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COMMENTARIES
ON
THE LAWS OF ENGLAND.

BY
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IN TWO VOLUMES.

VOL. I
WITH NOTES BY WILLIAM WAIT,
COUNSELLOR-AT-LAW.

ALBANY, N. Y.
JOHN D. PARSONS, JR., LAW BOOK PUBLISHER.
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PREFACE.

THESE Commentaries upon the Laws of England pursue the order adopted, and contain much of the matter to be found in Sir W. Blackstone's celebrated volumes^(a). They are meant to be such as he would himself, if now living, have reproduced, amending where amendments were needed, adding from the reports and statute book, and modifying his style in accordance with modern usage. This task, even to the great commentator, would have been difficult, and to those on whom it has fallen has necessarily been very formidable. Neither is the existing state of our law such as may facilitate the endeavour to exhibit it in a shape compendious and philosophical. In part dependent upon cases decided with reference to isolated facts, in part dependent upon statutes, too often enacted with reference to especial exigencies, each page of our legal volume unfolded by the hand of time adds to the perplexities of an author. And difficult as it may be to determine the state of our law at this or at that period, it is scarce possible accurately to exhibit it at the moment when a work, in the preparation of which years have been continuously occupied, emerges from the press. Admitting that the customary law of England is in the main certain; that though in some sort flexible, this flexibility is made conducive to the ends of justice; the statute law is undeniably shifting and unsettled, for that which is written to-day may be effaced to-morrow, or may be impliedly repealed, or altered and amended by phraseology so doubtful as to call for authoritative exposition. Thus is it, that the judgment of an appellate court may falsify a proposition correct when it was penned; that a statute consisting of some few brief clauses may shatter a fabric reared with persistent labour by the commentator. But these considerations should neither discourage the author nor deter the reader. The mishap adverted to is inseparable from our system of jurisprudence. And to abstain from the study of our law because it cannot in all

^(a) Of which the 21st Edition, containing many valuable notes, was placed at the entire disposal of the writers of this work.

respects be precisely and accurately set forth would be as senseless as to abstain from the study of pharmacy because its appliances cannot always cure.

These Commentaries treat of The Rights of Persons, The Rights of Things, Private Wrongs, and Public Wrongs^(b). Under the first of these heads are considered not merely the absolute rights of individuals, such as the right of liberty and that of property, but also the nature of those institutions, which, by the framers of our law, were deemed essential for assuring and maintaining them—the attributes of parliament, of the sovereign, and of minor magistrates are here passed under review—the states and conditions of the people are regarded—rights and liabilities incident to the ordinary relations of society are enumerated. Under the second of the above heads are included the classification and legal nature of real property, the tenures and titles of its occupants—the various species of estates—the modes of acquiring and transferring them. Personalty is likewise here noticed, the property in and title to it. The third division of this work is devoted to the redress of private wrongs—the courts which administer it—their jurisdiction and method of procedure; while the fourth division exclusively concerns itself with acts which are criminal in kind, with offences against the crown, the commonwealth, the community—the manner of repressing and of punishing them. An epitome follows of the Rise and Progress of the Laws of England.

Excessive care has been taken in the compilation of these Commentaries, and though a reader may little heed the precise apportionment of such labour as between those who have bestowed it, somewhat should perhaps be said upon the subject. For those portions of the work which are irrespective of the Law of Real Property and Equity, responsibility attaches to him whose name first appears below; he has, however, been most materially aided in preparing them by several learned and accomplished friends;—as regards some important chapters^(c) in Volume I, by Mr. GEARY of the Midland Circuit; as regards the account of an action at law in Volume III. ^(d), by Mr. JOSEPH PHILIPS of the Home Circuit; and as regards the account of the jurisdiction and practice of the Divorce and Matrimonial Court, the Probate Court, the Court of Admiralty, and the Ecclesiastical Courts, contained in the same volume^(e), by Mr. Inderwick, of the Home Circuit; to each of whom the sincerest acknowledgments are due.

^(b) The organic arrangement of Blackstone has thus been adhered to, and the sequence of chapters in some of these volumes is the same, or nearly so, as in his own.

^(c) Namely, part of chap. 8, and chaps. 9, 18—17.

^(d) Chap. 12.

^(e) Chaps. 14—17.

PREFACE.

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To him whose name is secondly undersigned attaches responsibility for the disquisition on our Law of Real Property(*f*), on the Redress of Private Wrongs by the operation of law (*g*), and on Courts of Equity, their Jurisdiction and Procedure(*h*).

In dealing with the above subjects historic changes have not been disregarded, but the especial aim has been to pourtray the living law.

May these Commentaries aid in spreading abroad a knowledge of our laws—in quickening the apprehension of such as would know them—in teaching to all the necessity of obeying them!

HERBERT BROOM.

EDWARD A. HADLEY.

LONDON, *October* 20, 1869.

(*f*) Vol. II.

(*g*) Vol. III., chap. 2.

(*h*) Vol. III., chaps. 4—6.

PREFACE TO AMERICAN EDITION.

EVERY student who enters upon the study of the law finds it necessary to begin with elementary works which give him an outline of the principles of the law, or a general view of the subject.

Among the works used for this purpose, Blackstone's Commentaries have long held a high place in the estimation of the student and of the legal profession. But, since that work was written, the laws have been so changed, even in England, that much of the text is now obsolete law. And it was found necessary to rewrite the entire work if it was to retain its place as a text-book. This task was assumed by Messrs. Broom & Hadley, and their labors are a monument to their industry and learning. They have omitted such matters as are not now regarded as law in England; and have added such new titles as have become useful by reason of changes in the laws.

The latest authorities are given, so that either the student or the practitioner may rely upon the text as sound law. The American editor has added such notes as seemed desirable by way of illustrating the text. Where the English law is in harmony with the American, the cases cited in the notes will show that fact; and, if there is a difference between the American and the English law, the notes will point out the prominent distinctions or differences. In reading this work the student may feel confident that the text gives him the English law of the present day; and in reading the notes he will find such American authorities and illustrations as were supposed to be useful to the student or valuable to the practitioner. In the hope that it may prove a convenient and reliable assistant in the study or the practice of the law it is submitted to the profession.

WILLIAM WAIT.

September 7th, 1875.

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COMMENTARIES

ON THE

LAW OF ENGLAND.

INTRODUCTION.

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THE STUDY OF THE LAW.

COMMENTARIES on the Laws of England may properly commence with some general exhortation to the study of our law, and some specific reasons why that study should be cultivated.

A law is an ordinance dictated by some power which can enforce obedience to its will. (a) A complete body of laws professes to be adapted, or to be capable of adaptation, to every case calling for the interposition of justice which can arise within the limits of the country where it obtains. Legal principles, therefore, do not change or vary in subservience to the fashion of the times, though they are flexible and accommodate themselves to new facts which could not have been within the contemplation of those who originated and propounded them. Likewise, to prevent needless litigation, the decrees of courts of justice are uniform in a much greater degree, at all events, than may [*2] popularly be supposed.

A mere statement of the foregoing propositions might suffice to show that law is the science which regulates our social system, which ensures its stability and cohesion, which affords to each member of the commonwealth a due protection. Law, in short, is the science which maintains an equilibrium between the different social forces, each of which being placed under subjection to the law, is made to act harmoniously with its fellows.

To demonstrate still further the utility of some acquaintance with our laws, to all classes of the community, the following reflections may be offered:

Importance of a knowledge of law to all classes: Political or civil liberty, rightly understood, consists in the power of doing whatsoever the laws permit; (b) it can only exist in virtue of a general conformity, by all orders and degrees, to those equitable

(a) Post, p. 81.

(b) *Libertas quidem est naturalis facultas ejus, quod cuique facere libet, nisi si quid vi aut jure prohibetur.* Inst. 1, 3, 1.

rules of action, by which the meanest individual is protected from the insults and oppression of the greatest.(1) As, therefore, every subject is interested in the preservation of the laws, it is incumbent upon every man to be acquainted with those, at least, with which he is immediately concerned; lest he incur the censure, as well as inconvenience, of living in society without knowing the obligations which it lays him under. And thus much may suffice for persons of inferior condition, who have neither time nor capacity to enlarge their views beyond that contracted sphere in which they are appointed to move. But those on whom nature and fortune have bestowed more abilities and greater leisure, cannot be so easily excused. These advantages are given them, for the benefit not of themselves only, but also of the public; and yet they cannot, in any scene of life, discharge properly their duty either to the public or to themselves, [*3] without some degree of knowledge of the laws.(2.) To evince this the more clearly, it may not be amiss to descend to a few particulars.

(1) The Declaration of Independence contains a clear statement of the great principles of civil and political liberty. "We hold these truths to be self-evident, that all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty and the pursuit of happiness; that to secure these rights governments are instituted among men, deriving their just powers from the consent of the governed; that whenever any form of government becomes destructive of these ends, it is the right of the people to alter or abolish it, and to institute a new government, laying its foundation on such principles, and organizing its powers in such forms, as to them shall seem most likely to effect their safety and happiness."

In the United States the political and civil liberties of the citizen are guaranteed by the constitution of the United States, as well as by the several State constitutions. These constitutions limit the powers of the legislatures, and of majorities, and stand as a barrier for the protection of the rights and liberties of the citizen, and of minorities. Civil liberty has several guaranties, some of which are the following: National and State independence. The national government is above all foreign interference. The State is independent of the national government, except in those instances in which the United States constitution restricts the power of the States. Subject to the limitations contained in that instrument, each State is an independent sovereignty; and both the national and the State governments within their proper sphere, enact such laws as they please, being limited only by the constitutions.

The protection of individual liberty, and the right to the writ of *habeas corpus* is a great feature in a system which is designed to secure freedom and civil rights. The right to a prompt, impartial trial by jury, in criminal cases, is an invaluable right. So of the liberty of conscience, in matters political or religious, as well as the right to remain or remove, or to engage in every lawful kind of business.

To secure the enforcement of the laws for the protection of civil liberty, the civil laws of the land are paramount to those of the military power, in times of peace. The right to bear arms is secured, as well as the right to vote, and by the ballot the individual expresses his will as to the laws to be enacted or the officers to be elected.

(2) In a country like ours, in which any citizen may be elected to the National or to a State legislature, it is important that there should be such a general knowledge of constitutional law, and of the general principles of the law as will qualify him to vote intelligently upon such questions as arise during the course of enacting laws. It is not to be expected, nor even to be desired, that every member of congress or of a State legislature should be an accomplished common-law lawyer. But if he is ignorant of the principles of the government under which he lives, and for whose citizens he would make laws, he is not likely to make a legislator worthy of the suffrages of an intelligent constituency. In relation to this matter, a learned English law writer (Warren) thus expresses himself: "One of the constitutions of our own king Alfred expressly required that his nobility

Let us, therefore, begin with persons of independent estate and fortune; whom even to suppose ignorant in this branch of learning is treated by Mr. Locke(c) as a strange absurdity. Landed property, with its long and voluminous train of descents and conveyances, settlements, entails, and incumbrances, forms the subject matter of a most intricate and extensive branch of legal knowledge; the thorough comprehension of this, with all its minute distinctions, is, perhaps, too laborious a task for any but a lawyer by profession; nevertheless, the understanding of a few legal principles, relating to estates and conveyancing, to the forms of leases and agreements may form some check and guard upon the inferior agents of a landed proprietor, and preserve him, at least, from very gross and notorious impositions.

Again, the policy of our law has made some forms necessary in the wording of wills, and in the manner of attesting them. An ignorance of these must always be of dangerous consequence to such as by choice or to testators; necessity compile their own testaments without any technical assistance. Those who attend our courts of justice witness the confusion and distress hereby occasioned in families; the difficulties which arise in discerning the true meaning of a testator, or sometimes in discovering any meaning at all in that which he has written; so that, in the end, his estate may be vested in a manner quite contrary to his enigmatical intentions, because, perhaps, he has omitted one or two formal words which are necessary to set forth his meaning with indisputable legal precision, or because he has executed his will in the presence of fewer witnesses than the law requires.

But to proceed from private concerns to those of a more *public consideration. A very large portion of the community are liable to be called upon to establish the rights, to estimate the injuries of their fellow subjects, to weigh the accusations against them, and sometimes to dispose of their lives, by serving upon juries. Persons in this responsible situation are frequently obliged to decide, upon their oaths, questions of nice importance, in the solution of which some legal skill is requisite; especially where law and fact, as often happens, are intimately blended together. And the incapacity to do this with propriety, tends to diminish the credit and authority of juries, and has, perhaps, thrown more power into the hands of the judges to direct, control and even reverse their verdicts, than by the constitution was intended.

(c) Education, s. 187.

should be instructed in the laws. Without this knowledge, indeed, a man will advance but vain and frivolous pretenses to exercise the functions of a statesman or a legislator. It is true he may be *eager* enough to meddle with such matters; he may, indeed, be "given to change;" he may become, perhaps, a showy declaimer, fluent in the use of common-places—that is, if either house of parliament will tolerate his puerile inanities, he may possibly acquire credit on occasions minor, of mere temporary or local interest and importance; but on the stirring, grand, national CONSTITUTIONAL questions which are often so suddenly started, he will be, he needs must be, an inglorious mute; his 'vote and influence' may be solicited by the contending parties, but nothing further will be expected, or, indeed, permitted. Such information as is required on *these* occasions, however great may be his zeal or talents, or intense his desire of distinction, he neither has nor can get. No *cram* will suffice; nothing but the careful, leisurely acquisition of early years, assiduously kept up—at once generating and justifying confidence and self-reliance—will enable a man to acquit himself on such occasions even creditably. And how often in these pregnant times do such occasions arise; what melancholy exhibitions are sometimes the consequence."

For one placed in the commission of the peace an ample field is open to exert his talents by maintaining good order in his neighbourhood; by punishing the dissolute and idle; by protecting the peaceable and industrious; and, above all, by healing petty differences, and preventing vexatious prosecutions. But, in order to attain these desirable ends, it is necessary that the magistrate should understand his business; and have not only the will, but the power also, by possessing the required knowledge, to administer justice. Else, when he has mistaken his authority, through passion, through ignorance, or carelessness, he will incur contempt from his inferiors, and censure from those to whom he is accountable for his conduct.

Yet further: many gentlemen of property, position, or ability, at some period or other of life, are desirous of representing their country in parliament; and those who are ambitious of receiving so high a trust, would do well to remember its nature and importance. They are not thus honourably distinguished from the rest of their fellow-subjects, merely that they may privilege their persons; that they may list under party banners; [*5] may grant or withhold supplies; may vote with or vote against a popular or unpopular administration; but, upon considerations far more interesting and important. They are the guardians of the English constitution; the makers, repealers, and, in some sense interpreters of the English laws; delegated to watch, to check, and to avert, every dangerous innovation, to propose, to adopt, and to cherish any solid and well-weighed improvement; bound by every tie of nature, of honour, and of religion, to transmit that constitution and those laws to their posterity, amended if possible, at least without any derogation. And how unbecoming must it appear in a member of the legislature to vote for a new law who is utterly ignorant of the old! what kind of interpretation can he be enabled to give, who is a stranger to the text upon which he comments!

Indeed, it is amazing that to the science of legislation, the noblest and most difficult of all sciences, no preliminary method of instruction is looked upon as requisite. Apprenticeships are held necessary to almost every art, commercial or mechanical; a long course of reading and study must form the divine, the physician, the practical professor of the laws: but many a man of superior fortune thinks himself born a legislator. The great Roman orator, (d) however, was of a different opinion: "It is necessary (says he) for a senator to be thoroughly acquainted with the constitution; and this (he declares) is a knowledge of the most extensive nature; a matter of science, of diligence, of reflection; without which no senator can possibly be fit for his office."

The mischiefs that have arisen to the public from inconsiderate alterations in our laws, are too obvious to be called in question: and how far they have been owing to the defective education of our senators, is a point well worthy [*6] of attention. The common law of England has *fared like other venerable edifices of antiquity, which rash and inexperienced workmen have ventured to new-dress and refine, with all the rage of modern improvement. Hence frequently its symmetry has been destroyed, its proportions distorted, and its majestic simplicity exchanged for specious embellishments and fantastic novelties. For, to say the truth, almost all the perplexed questions, almost

(d) *Est senatori necessarium nosse rempublicam; idque late patet:—genus hoc omne scientiæ, diligentia, memoria est: sine quo paratus esse senator nullo pacto potest. Cic. De Leg. 3. 18.*

all the niceties, intricacies, and delays (which have sometimes disgraced our courts of justice), owe their origin not so much to the common law itself, as to innovations that have been made in it by acts of parliament; "overladen (as Sir Edward Coke expresses it^(e)) with provisoes and additions, and many times on a sudden penned or corrected by men of none, or very little judgment in law." This great and well-experienced judge further declares (^f), that "the greatest questions arise not upon any of the rules of the common (*i.e.*, unwritten) law;" and warmly laments the confusion introduced by ill-judging and unlearned legislators. But "if," he subjoins, "acts of parliament were after the old fashion penned, by such only as perfectly knew what the common law was before the making of any act of parliament concerning that matter, as also how far forth former statutes had provided remedy for former mischiefs, and defects discovered by experience; then should very few questions in law arise, and the learned should not so often and so much perplex their heads to make atonement and peace, by construction of law, between insensible and disagreeing words, sentences, and provisoes, as they now do." And if this inconvenience was so heavily felt in the reign of Queen Elizabeth, how must the evil have increased in later times, when the statute-book is swelled to a vastly larger bulk; unless, indeed, it should be found, that the penners of our modern statutes have proportionably better informed themselves in the knowledge of the common law.

*What has been said of our commoners in general, and the propriety of [^{*7}] their applying themselves to the study of our laws, will hold equally, or still more strongly, with regard to the nobility of this realm, except only in the article of serving upon juries. But, in lieu of this, they have peculiar provinces of far greater consequence and concern; being by birth hereditary counsellors of the crown, and judges upon their honour as well of great political offenders as of their brother-peers. Onerous as this trust is, it can no where be so properly reposed, as in the noble hands where our excellent constitution has placed it; and assuredly it behooves the members of our Upper House, from the independence of fortune and dignity of station which they enjoy, to employ that leisure which is a consequence of both, in attaining a more extensive knowledge of the laws, than for persons of inferior rank may be essential.

The Roman pandects will furnish us with a piece of history not inapplicable to our present purpose. Servius Sulpicius, a gentleman of the patrician order, and a celebrated orator, had occasion to take the opinion of Quintus Mutius Scævola, the then oracle of the Roman law; but, for want of some knowledge in that science, could not so much as understand even the technical terms, which his friend was obliged to make use of. Whereupon, Mutius Scævola could not forbear to upbraid him with this memorable reproof(^g), "that it was a shame for a patrician, a nobleman, and an orator of causes, to be ignorant of that law in which he was so peculiarly concerned." This reproach made so deep an impression on Sulpicius, that he immediately applied himself to the study of the law; wherein he attained to such proficiency, that he left behind

(e) 2 Rep. pref.

(f) Id.

(g) *Turpe esse patricio, et nobili, et causas*

oranti, jure in quo versaretur ignorare. Dig. 2. 2. 48.

him about a hundred and fourscore volumes of his own compiling upon the subject; and became, in the *opinion of Cicero^(h), a much more complete lawyer than even Mutius Scævola himself.

I would not be thought to recommend to our English nobility and gentry, to become as great lawyers as Sulpicius; though he, together with this character, sustained likewise that of an excellent orator, a firm patriot, and a wise, indefatigable senator; but the inference which arises from the story is this, that ignorance of the laws of the land has ever been esteemed dishonourable in those, who are intrusted by their country to maintain, to administer, and to amend them.

Nor will some amount of legal knowledge be found in the least superfluous for professional persons though of inferior degree. The clergy, in particular, have abundant reason to be acquainted with many branches of the law, which are almost peculiar and appropriated to themselves alone. Such are the laws relating to advowsons, institutions, and inductions; to simony, and simoniacal contracts; to residence and pluralities; to church-rates; to tithes, and other ecclesiastical dues; to marriage, and to various religious observances which are consigned to the care of their order, yet attract in no slight degree the attention, and awaken the interest of the laity. To understand these aright, to discern what is warranted or enjoined, and what is forbidden by law, demands a sort of legal apprehension; which is no otherwise to be acquired, than by use, and by a familiar acquaintance with legal writers.

The science of medical jurisprudence has of late years attained to especial prominence and importance; inasmuch also as the evidence of skilled witnesses is justly deemed entitled to much weight; some general acquaintance with legal principles, and the nature of criminal offences, is suggested for those professing the faculty of physic as desirable and useful.

[*9] To officers of the army and navy who may be called *upon to aid in administering martial law, or to sit as members of a court-martial, some knowledge of the leading rules of evidence—such at all events as may be acquired without laborious study, or a minute examination of decided cases—is essential.

A word as to purely judicial officers will of course suffice. Should a judge in the most subordinate jurisdiction be deficient in knowledge of the law, it would reflect disgrace upon himself, as well as upon those who appointed him, and yet the consequence of his ignorance might be comparatively trifling: his judgment, moreover, might sometimes be examined, and his errors be rectified, by other courts. But, how much more serious and affecting would be the case of a superior judge, if without competent skill in the laws he should boldly venture to decide a question upon which the welfare and subsistence of whole families might depend! where the chance of his judging right or wrong, is barely equal; and where, if he chances to judge wrong, he does an injury of the most alarming nature, an injury perhaps without possibility of redress.

A judge ought, moreover, not only to decide correctly, but to give correct

(h) Brut. 41.

reasons for his decision, so that, the grounds on which it rested being understood, the judgment itself may afterwards be confidently applied.(i) (3)

*Admitting that a knowledge of our laws is, for most of our fellow-countrymen, desirable, and for some essential, a brief inquiry may be made [*10] proper why legal studies, now happily reviving, fell, during a long period, into disrepute and neglect amongst us.

Sir John Fortescue, in his panegyric on the laws of England(k) (written in the reign of Henry VI.), puts a very obvious question in the mouth of the young prince, whom he is exhorting to apply himself to that branch of learning:—"why the laws of England, being so good, so fruitful, and so commodious, are not taught in the universities, as the civil and canon laws are?" In answer to which he gives (l) what seems, with due deference be it spoken, a very jejune and unsatisfactory reason; being, in short, that "as the proceedings at common law were, in his time, carried on in three different tongues, the English, the Latin, and the French, that science must be necessarily taught in those three several languages; but that in the universities, all sciences were taught in the Latin tongue only;" and therefore he concludes that the laws of England "could not be conveniently taught or studied in our universities." But, without attempting to examine seriously the validity of this reason (the very shadow of which has been taken away), we perhaps may find out a better, or at least a more plausible explanation, why the study of the municipal laws was at one time banished from our seats of science, than that which the learned chancellor thought it prudent to give to his royal pupil.

That ancient collection of unwritten maxims and customs, which is called the common law, however compounded, or from whatever fountains derived(m), has subsisted immemorially in this kingdom; and, though somewhat altered and impaired by the violence of the times, it in great measure weathered the rude shock of *the Norman conquest. It became endeared to the people [*11] in general, as well because its decisions were universally known, as because it was found to be excellently adapted to the genius of the English nation(n). In the knowledge of this law consisted great part of the learning

(i) In *Wilkes's case*, 19 St. Tr. 1098, Lord Mansfield observed:—"It is not only a justice due to the Crown and the party in every criminal cause where doubts arise to weigh well the grounds and reasons of the judgment, but it is of great consequence to explain them with accuracy and precision in open court, especially if the questions be of a general tendency, and upon topics never before fully considered and settled—that the criminal law of the land may be certain and known."

It was indeed affirmed by no less considerable a judge than Lord Hardwicke that courts neither of equity nor of law are obliged to give reasons for their judgments

(Gregory v. Molesworth, 3 Atk. 627); but this idea, which was never much acted upon, has long since been exploded, and not a few recent judgments might confidently be appealed to as models of logical reasoning, of methodical arrangement, of learned and luminous exposition.

(k) C. 47.

(l) C. 48.

(m) As to which, *post*, p. 55.

(n) In *Barnardiston v. Soame*, 6 St. Tr. 1089, it was judicially remarked that "our common law complies with and conforms to the general opinion and genius of the kingdom. It values what they esteem and value, and disesteems what they value not."

(3) It is always desirable that a judge should declare the true grounds, as well as to assign sufficient reasons for the judgment which he pronounces. And yet, if his decision is correct, and in accordance with the law, it will be sustained, although the reasons he assigns for it are entirely erroneous and insufficient. *Gillespie v. Torrance*, 7 Abb. 462; *Munro v. Potter*, 34 Barb. 358; *Deland v. Richardson*, 4 Denio, 95; *Hanford v. Archer*, 4 Hill, 273; *Holtzinger v. National Corn Exchange Bank*, 6 Abb. N. S. 292; 37 How. 203; 1 Sweeny, 64; *Beckwith v. Whalen*, 5 Lans. 376; *Ohio and Mississippi R. R. Co. v. Shultz*, 81 Ind. 150.

of the dark ages; it was taught, says Mr. Selden(*o*), in the monasteries, in the universities, and in the families of the principal nobility. The clergy, in particular, as they then engrossed almost every other branch of learning, so (like their predecessors the British Druids (*p*)) were they peculiarly remarkable for their proficiency in the study of the law. *Nullus clericus nisi causidicus*, is the character given of them soon after the conquest by William of Malmesbury(*q*). The judges, therefore, were usually created out of the sacred order(*r*), as was likewise the case among the Normans(*s*); and all the inferior legal offices were filled by the lower clergy, which has occasioned their successors to be denominated "clerks" to this day.

The common law of England, however, being not committed to writing(*t*), but handed down by tradition, use, and experience, was not so heartily relished by the foreign clergy, who came over hither in shoals during the reign of the Conqueror and his two sons, and were utter strangers to our constitution as well as to our language. About the middle of the twelfth century, moreover, the study of the civil law revived throughout the west of Europe, where before it had been laid aside(*u*) though some traces of [*12] its authority remained in Italy(*x*) and the eastern provinces of the empire(*y*). It now became in a particular manner the favourite of the popish clergy, who borrowed the method and many of the maxims of the canon law from this original. The study of it was introduced into several universities abroad, particularly that of Bologna, where exercises were performed, lectures read, and degrees conferred in this faculty, as in other branches of science; and many nations on the continent, just then beginning to recover from the convulsions consequent upon the overthrow of the Roman empire, and settling by degrees into peaceable forms of government, adopted the civil law (being the best written system then extant), as the basis of their several constitutions; blending and interweaving it among their own feudal customs, with, in some places, a more extensive, in others a more confined authority(*z*).

Nor was it long before the prevailing mode of the times reached England. For Theobald, a Norman abbot, being elected to the see of Canterbury(*a*), and extremely addicted to this new study, brought over with him in his retinue many learned proficients therein; and among the rest Roger surnamed Vacarius, whom he placed in the university of Oxford(*b*), to teach it to the people of this country. But it did not meet with the same easy reception in England, where a comparatively mild and rational system of laws had been long established, as it did upon the continent; and though the monkish clergy (devoted to the will of a foreign primate) received it with eagerness and zeal, yet the laity, who were more interested to preserve the old constitution, and had already severely felt the effect of many Norman innovations,

(*o*) In Fletam, 7. 7.

(*p*) Cæsar de bello Gal. 6. 13.

(*q*) De gest. reg. 1. 4.

(*r*) Dugdale Orig. jurid. c. 8.

(*s*) *Les juges sont sages personnes et autentiques—siccome les archevesques, evesques, les chanoines des eglises cathedraulx, et les autres personnes qui ont dignites in sainctes eglises; les abbez, les prieurs conventaulx, et les gouverneurs des eglises, &c.* Grand Coustumier, ch. 9.

(*t*) Post, p. 54.

(*u*) LL. Wisigoth. 2. 1. 9.

(*x*) Capitular. Hludov. Pil. 4. 103.

(*y*) Selden in Fletam. 5. 5.

(*z*) Domat. Treatise of Laws, c. 13, s. 9. Epistol. Innocent IV. in M. Paris ad A. D. 1254.

(*a*) A. D. 1188.

(*b*) Gervas. Dorobern. Act. Pontiff. Cantuar. col. 1665.

continued wedded to the use of the common law. King Stephen, shortly [*13] after the establishment of Vacarius as a professor, published a proclamation(c), forbidding the study of the laws then newly imported from Italy, which was treated by the monks(d) as a piece of impiety, and though it might prevent the introduction of the civil law process into our courts of justice, yet did not hinder the clergy from reading and teaching it in their own schools and monasteries.

From this time the nation seems to have been divided into two parties; the bishops and clergy, many of them foreigners, who applied themselves wholly and endeavored to introduce it into this country. to the study of the civil and canon laws, which now came to be inseparably interwoven with each other; and the nobility and laity, who adhered with equal pertinacity to the old common law; both of them reciprocally jealous of what they were unacquainted with, and neither of them, perhaps, allowing the opposite system that real merit which is abundantly to be found in each. This may appear, on the one hand, from the spleen with which the monastic writers(e) speak of our municipal laws, and, on the other, from the firm temper which the nobility showed at the famous parliament of Merton, when the prelates endeavoured to procure an act, to declare all bastards legitimate in case the parents intermarried, alleging this only reason, because holy church (that is, the canon law) declared such children legitimate; but "all the earls and barons (says the parliament roll(f)), with one voice answered, that they would not change the laws of England which had hitherto been used and approved." And we find the same jealousy prevailing above a century afterwards(g), when the nobility declared, with a kind of prophetic spirit, "that the *realm of England hath never been [*14] unto this hour, neither by the consent of our lord the king, and the lords of parliament, shall it ever be, ruled or governed by the civil law"(h). And of this temper between the clergy and laity many more instances might be given(i).

While things were in this situation, the clergy, finding it impossible to root out the municipal law, began to withdraw themselves by degrees from the temporal courts; and to that end, very early in the reign of king Henry III., episcopal constitutions were published(k), forbidding ecclesiastics to appear as advocates *in foro seculari*; nor did they long continue to act as judges there, not caring to take the oath of office which was then found necessary to be administered, that they should in all things determine according to the law and custom of this realm(l); though they still kept possession of the high office of chancellor; an office then of little juridical power; and afterwards, as its business increased by degrees, they modelled the process of his court at their own discretion.

But wherever they retired, and wherever their authority extended, they carried with them the same zeal to introduce the rules of the civil, in exclusion

(c) Rog. Bacon, citat. per Selden in Fletam. 7. 6. & in Fortesc. c. 88; 8 Rep. Prof.

(d) Joan. Sarisburiens. Polycrat. 8. 23.

(e) Joan. Sarisburiens. Polycrat. 5. 16. Polydor. Virg. Hist. 1. 9.

(f) *Et omnes comites et barones una voce responderunt, quod nolunt leges Anglie mutare, quas hucusque usitata sunt et approbata.* Stat. Merton. 20 Hen. III. c. 9.

(g) 11 Ric. II.

(h) Selden. Jan. Anglor. 1. 2. s. 48; in Fortesc. c. 88.

(i) As to the authority of the civil and canon law in this country, see *post*, pp. 78, 82.

(k) Spelman. Concil. A. D. 1217. Wilkins, vol. 1. 574, 599.

(l) Selden in Fletam. 9. 3.

of the municipal law. This appears in a particular manner from the spiritual courts of all denominations, from the chancellor's court at the university of

Cambridge, and from the court of chancery before mentioned;
The common law despised by the clergy.

in all of which the proceedings are to this day in a course much conformed to the civil law: for which no tolerable reason can be assigned, unless that these courts were all under the immediate direction of the popish ecclesiastics, among whom it was a point of religion to exclude the municipal law; Pope Innocent IV. having forbidden^(m) the very reading of it [*15] by the *clergy, because its decisions were not founded on the imperial constitutions, but merely on the customs of the laity. And remembering that our universities continued to be, till the time of the Reformation, entirely under the influence of the popish clergy, we shall perceive the reason why the study of the Roman laws was in those days of bigotry pursued with such alacrity in these seats of learning; and why the common law was entirely despised, and esteemed little better than heretical.

And, after the Reformation, many causes conspired to prevent our municipal law from becoming a part of academical education. As, first, long usage and established custom; which, as in everything else, so especially in
and not encouraged in the universities. the forms of scholastic exercise, have justly great weight and authority. Secondly, the real intrinsic merit of the civil law, considered upon the footing of reason and not of obligation, which was well known to the instructors of our youth; and their total ignorance of the merit of the common law, though its equal at least, and perhaps an improvement on the other. Thirdly and principally, because the study of the common law, having been banished from our universities in the times of popery, fell into a quite different channel, and was wholly cultivated in another place. For being then entirely abandoned by the clergy, a few stragglers excepted, the study and practice of it devolved of course into the hands of laymen: who entertained upon their parts a most hearty aversion to the civil law⁽ⁿ⁾, and made no [*16] scruple to profess their contempt for, nay even their ignorance^(o) of *it, in the most public manner. After the withdrawal, indeed, of the clergy from practice in the temporal courts, the common lawyers made a firm and successful opposition to the efforts of the Anglican hierarchy to free themselves from the control of the law. This is shown at various epochs of our history.

Before the Reformation the papal clergy had two principal objects in view, the withdrawal of spiritual persons from lay jurisdiction; and the acquisition of an exclusive jurisdiction for the spiritual courts over "divine matters." Their struggles for the former were nipped in the bud by the Constitutions of

(m) M. Paris ad A. D. 1254.

(n) Fortesc. de laud. Leg. c. 23.

(o) This remarkably appeared in the case of the abbot of Torun, M. 22 Edw. III. 24, who had caused a certain prior to be summoned to answer at Avignon for erecting an oratory *contra inhibitionem novi operis*; by which words Mr. Selden (in Flet. 8. 5) very justly understands to be meant the title *de novi operis nuntiatione* both in the civil and canon laws (Dig. 89. 1; C. 8. 11; Decretal. not Extrav. 5. 32), whereby the erection of any new buildings in prejudice of more an-

cient ones was prohibited. But Skipwith, the king's serjeant, and afterwards Chief Baron of the Exchequer, declares them to be flat nonsense: "*in ceuz parolz, contra inhibitionem novi operis, ny ad pas entendment*:" and Justice Schardelow mends the matter but little by informing him that they signify a restitution in their law; for which reason he very sagely resolves to pay no sort of regard to them, "*Ceo n'est que un restitution en leur ley, pur que a ceo n'avo- mus regard, &c.*"

Clarendon, whilst the writ of prohibition checked every successive attempt to seize upon the latter. In order to free himself from the control of this writ, Archbishop Boniface struggled vehemently in the reign of Henry III., fairly trying his strength against that of the courts of common law, by threatening the judges of those courts with excommunication if they should dare to issue prohibitions on the matters specified in his *articuli cleri*. Yet, says Lord Coke (*p*), notwithstanding the greatness of the archbishop, and that divers of the judges and all the great officers of state were clergy, the judges proceeded according to the laws of the realm, and still kept, though with great difficulty, the ecclesiastical courts within their just and proper limits. At the Reformation the contending parties came to issue in the parliament held in the 21st year of Henry VIII., on the abuses of the church. In that parliament three bills were sent up to the lords from the commons, one against unreasonable exactions of fees for the probate of wills, *another against mortuaries, [*17] and the third to restrain pluralities and non-residence, to forbid the clergy taking farms, &c., and to confine them to a due discharge of their functions. These bills having eventually been passed(*q*), were, after a long interval, followed up by enactments against appeals to Rome(*r*), for the submission of the clergy(*s*), against payment of first fruits to the pope, and for the election of bishops(*t*), against Peter's pence and dispensations(*u*), for the king's supremacy(*x*), for the suppression of the lesser monasteries(*y*), for extinguishing the authority of the pope(*z*), and for the total suppression of the monasteries(*a*).

Even during the reign of Elizabeth, the animosity between the lawyers and the clergy was not entirely dormant(*b*), and no sooner had James I. ascended the throne, than we find the prelates renewing their claims to a jurisdiction beyond the control of the courts of common law, and making especial remonstrance against the use of the writ of prohibition. The exact nature of these ecclesiastical demands will be learned from a survey of the canons of 1603(*c*), and the *articuli cleri* of Archbishop Bancroft(*d*) in the same year. The successful opposition made by the judges to the pretensions of Bancroft only served to exasperate both parties, and to aggravate that jealousy of the ecclesiastical courts, which the common lawyers had long entertained(*e*). But the supremacy of the legal over the ecclesiastical power was shortly after this period finally established.

*In the thirteenth century an incident had occurred which greatly [*18] tended to the support of our common law. This incident was the fixing

the court of common pleas, the grand tribunal for disputes concerning property, in one certain spot; that the seat of ordinary justice might be permanent and notorious to all the nation. This court had previously been held before the king's chief justiciary of Eng-

(*p*) 2 Inst. 599; *et vide* Glanvil. lib. 4. c. 13; lib. 12. c. 21. 23; Bracton Bk. 5.

(*q*) 21 Hen. 8, cc. 5, 6, & 13.

(*r*) 24 Hen. 8, c. 12.

(*s*) 25 Hen. 8, c. 19.

(*t*) Id. c. 20.

(*u*) Id. c. 21.

(*x*) 26 Hen. 8, c. 1.

(*y*) 27 Hen. 8, c. 28.

(*z*) 28 Hen. 8, c. 10.

(*a*) 30 Hen. 8, c. 13.

(*b*) See the account of the debate in the House of Commons on the Ex-officio Oaths Bill, A. D. 1592.

(*c*) *Post*, p. 85.

(*d*) 2 Inst. 601.

(*e*) In 1611 we find Bancroft complaining of the power and popularity of the common lawyers, in answer to a petition from the doctors of the Arches, expressly requesting his grace to favour them against the common lawyers: Strype's Whitgift, App. p. 227.

land, in the *aula regis*, or such of his palaces wherein his royal person resided; and had removed with his household from one end of the kingdom to the other. This was found to occasion great inconvenience to the suitors; to remedy which it was made an article of the great charter of liberties, both that of king John and that of king Henry III. (*f*), that "common pleas should no longer follow the king's court, but be held in some certain place:" in consequence of which they have ever since been held (a few necessary removals in times of sickness excepted) in the palace of Westminster only. This brought together the professors of the municipal law, who before were dispersed about the kingdom. and formed them into an aggregate body; whereby a society was established of persons, who (as Spelman(*g*) observes), addicting themselves wholly to the study of the laws of the land, and no longer considering it as a mere subordinate science, for the amusement of leisure hours, raised those laws to the pitch of perfection which was attained by them under the auspices of our English Justinian, king Edward I.

The professors and practitioners of our law thus naturally fell into a kind of collegiate order; and, being excluded from Oxford and Cambridge, found

it necessary to establish a new university of their own. For this purpose they acquired at various times certain houses(*h*),

*the inns of court and of chancery(*i*), between the city of Westminster, the place of holding the king's courts, and the city of London, for advantage of ready access to the one, and plenty of provisions in

the other(*k*). Here exercises were performed, lectures read, and degrees were at length conferred in the common, as at other universities in the canon and civil law. The degrees were those of barristers (first styled apprentices(*l*) from *apprendre*, to learn) who answered to the bachelors of our universities: as the state and degree of a serjeant(*m*), *serviens ad legem*, corresponded to that of doctor.

The crown seems to have soon taken under its protection this infant seminary of common law; and the more effectually to foster and cherish it, king Henry III., in the nineteenth year of his reign, issued an order directed to the mayor and sheriffs of London, commanding that no regent of any law school within that city should for the future teach law therein(*n*). The word law, or *leges*, being a general term, may create some doubt at this distance of time, whether the teaching of the civil law, or the common, or both, is hereby restrained.

(*f*) C. 20, of the former, and c. 11, of the latter.

(*g*) Glossar. 834.

(*h*) The Inner Temple, Middle Temple, Lincoln's Inn, and Gray's Inn. As to the origin and constitution of these learned societies, the reader is referred to the Report presented to Parliament, A. D. 1855, by the commissioners appointed to inquire into "the arrangements in the Inns of Court and Inns of Chancery for promoting the study of the law and jurisprudence."

(*i*) Gray's Inn, Lincoln's Inn, the Inner Temple, and Middle Temple, are the only societies the members whereof are called to the bar. The Inns of Chancery are Barnard's Inn, Staple's Inn, Thavies's Inn, Clement's Inn, Clifford's Inn, Lyon's Inn, and New Inn.

The first two belong to Gray's Inn, the next to Lincoln's Inn, the next three to the Inner Temple, and the last to the Middle Temple. Furnival's Inn, which belongs to Lincoln's Inn, and the Strand Inn, which formerly belonged to the Middle Temple, have long ceased to exist as law societies.

(*k*) Fortesc. c. 48.

(*l*) Apprentices or barristers seem to have been first appointed by an ordinance of king Edward I. in Parliament, in the 20th year of his reign; Spelm. Gloss. 37; Dugdale, Orig. Jurid. 55.

(*m*) Serjeants' Inn is appropriated to serjeants-at-law.

(*n*) *Ne aliquis scholas regens de legibus in eadem civitate de cetero ibidem leges doceat.*

But in either case it tends to the same end. If the civil law only is prohibited (which is Mr. Selden's(o) opinion), it is then a retaliation upon the clergy, who had executed the common law from their seats of learning. If the municipal law be also included in the restriction (as sir Edward Coke(p) understands it, and which the words seem to import), then the intention is evidently this; by prohibiting private teachers within the walls of the city, to collect all the common lawyers into the one public university, which was newly instituted in the suburbs.

In this juridical university (for such it is insisted to have been by Fortescue(g) and sir Edward Coke (r)) there were two sorts of collegiate houses; one called inns of chancery, in which the younger students of the law were usually placed, "learning and studying," says Fortescue(s), "the originals, and as it were the elements of the law; who, profiting therein, as they grew to ripeness, so were they admitted into the greater inns of the same study, called the inns of court." And in these inns of both kinds, he goes on to tell us, the knights and barons, with other grantees and noblemen of the realm, did use to place their children, though they did not desire to have them thoroughly learned in the law, or to get their living by its practice: so that in his time there were about two thousand students at the several inns, all of whom he informs us were *fili nobilium*, or gentlemen born.

Hence it is evident, that though under the influence of the monks our universities neglected this study, yet in the time of Henry VI. it was thought highly necessary, and was the universal practice, for the young nobility and gentry to be instructed in the elements of our laws. By degrees, however, this custom unfortunately fell into disuse; so that in the reign of queen Elizabeth sir Edward Coke(t) does not reckon above a thousand students for the bar, and the number at present is very considerably less. Yet although many of such as are admitted to the degree of barrister neither intend to practise nor have qualified themselves to do so, the requirements of the public in regard to this learned profession have doubtless during recent years been more than adequately supplied.

The privilege of calling to the bar is (subject to limitations below indicated(u)) vested in the benchers or governing body of each of the four inns of court; and by these societies has recently been framed and brought into operation a curriculum of legal education, the outlines whereof are sufficiently set

(o) In Flet. 8, 2.

(p) 2 Inst. proem.

(q) C. 49.

(r) 3 Rep. pref.

(s) C. 49.

(t) 3 Rep. pref.

(u) Should the decision of the Benchers be adverse, the applicant may appeal to the Judges, who will determine whether the grounds of rejection assigned are or are not sufficient.

In *The King v. The Benchers of Lincoln's Inn*, 4 B. & C. 855, the Court of Queen's Bench refused a mandamus, and the judges also refused to interfere, as visitors, to compel the admission of a student; but with

respect to the call to the bar, Mr. Justice Littledale said that "a member who has been suffered to incur expense with a view to being called to the bar, thereby acquires an inchoate right to be called, and if the benchers refuse to call him, they ought to assign a reason for so doing; and if there be no reason, or an insufficient one, then the member, who has acquired such inchoate right, is entitled to have that right perfected."

The benchers claim, and have occasionally exercised, the power to disbar members after they have been called to the degree of barrister-at-law.

forth in the note below(x). (4)* From the introduction and establishment of this system solid advantages have flowed, and it is satisfactory to add, that legal studies are now, through the wisdom of collegiate preceptors and the benefi-

(a) No. I.

(4) In the United States the rule as to admission to practice is very liberal. And in all of the States the subject is regulated by statute or by the rules and practice of the court, or by both of them.

It is quite common to set forth in a note some general rules relating to the study of the law. But no such note can do more than to state in the most general terms a few suggestions, which, from the nature of the case, must be very imperfect.

If the student desires useful information at a small expense he will find it in Warren's *Practical Introduction to Law Studies*; a new American edition of which has recently been published. The American editor of that work, ISAAC GRANT THOMPSON, Esq., has discharged his duty with learning and elegance, and there is no book which the editor can more cheerfully recommend to the student than this edition of the work. The publisher is JOHN D. PARSONS, Jr., of Albany, N. Y.

* THE CURRICULUM OF LEGAL EDUCATION AT THE INNS OF COURT.

The entire system of education at the Inns of Court may be said to include the following subjects—I. The admission of students; II. The mode of keeping terms; III. The calling of students to the bar; IV. The granting of certificates to practice under the bar; and V. The lectures and examinations. The system is based upon certain regulations approved of by the Four Societies jointly, of which the substance is as under:—

I. *As to the Admission of Students.*—Every person,¹ not otherwise disqualified, who has passed a public examination at any of the universities within the British dominions, may be admitted as a student at any Inn of Court, for the purpose of being called to the bar, or of practicing under the bar, without passing any preliminary examination. But every other person so applying to be admitted is required before admission to pass an examination² in the following subjects, viz.:¹—The English Language;² The Latin Language; and³ English History. The Benchers of any Inn have power, however, to relax or dispense with this regulation, in whole or in part, in any case in which they may think that special circumstances justify a departure from it.

II. *As to keeping terms.*—Students of the Inns of Court, being at the same time members of any of the universities of Oxford, Cambridge, Dublin, London, Durham, the Queen's University in Ireland, St. Andrew's, Aberdeen, Glasgow, or Edinburgh, can keep terms by dining in the halls of their respective societies any three days in each term; and students, who are not at the same time members of any of the said universities, may do so by dining in the halls of their respective societies any six days in each term.⁴

III. *As to calling to the Bar.*—Every student must have attained the age of twenty-one years before being called to the bar, and must have kept twelve terms before being so called, unless any term or terms shall have been dispensed with as hereinafter mentioned.⁴

1 No attorney at law, solicitor, writer to the signet, or writer of the Scotch courts, proctor, notary public, clerk in chancery, parliamentary agent, or agent in any court original or appellate, clerk to any justice of the peace, or person acting in any of these capacities, and no clerk of or to any barrister, conveyancer, special pleader, equity draftsman, attorney, solicitor, writer to the signet, or writer of the Scotch courts, proctor, notary public, parliamentary agent, or agent in any court original or appellate, clerk in Chancery, clerk of the peace, clerk to any justice of the peace, or of or to any officer in any court of law or equity, or person acting in the capacity of any such clerk, is admissible as a student at any Inn of Court for the purpose of being called to the bar, or of practicing under the bar, until such person shall have entirely and *bona fide* ceased to act or practice in any of the capacities above-named or described; and if on the rolls of any court, shall have taken his name off the rolls thereof.

2 Which is conducted by a joint board appointed by the Inns of Court.

3 But no day's attendance in hall will be available for the purpose of keeping term, unless the student attending shall have been present at the grace before dinner, during the whole of dinner, and until the concluding grace shall have been said.

4 A rule has also very recently been promulgated to this effect:—That not more than four terms under any circumstances be dispensed with in favor of students coming from India or the colonies with a view to return to residence there, and that it is not expedient to dispense with any terms for

cence of private benefactors, gradually receiving in our great universities attention and encouragement in some degree commensurate with their value. Without at all insisting upon academical education as an indispensable preliminary

Further, no student is eligible to be called to the bar who has not attended during one whole year the lectures and private classes of two of the readers, unless he has been a pupil during one whole year, or periods equal to one whole year, in the chambers of some barrister, certified special pleader, conveyancer, or draftsman in equity, or two or more of such persons, or has satisfactorily passed a general examination.¹

Calls to the Bar take place during term and on the same day by the several societies, namely, on the sixteenth day of each term, unless such day happen to be Sunday, and in such case on the Monday after.

IV. *As to certificates to practice under the Bar.*—No student of any Inn of Court is allowed to apply for or take out any certificate to practice, either directly or indirectly, as a special pleader, or conveyancer, or draftsman in equity, without the special permission of the benchers of the society of which he is a student, and no such permission will be granted until the student applying has kept twelve terms. Such permission is granted for one year only from the date thereof, but may be renewed annually.

No student can obtain any such certificate unless he shall have attended such lectures and classes, or passed such an examination, or been such pupil, as would be necessary to entitle him to be called to the Bar.²

V. *As to the Lectures and Examinations.*—These are under the special superintendence of "The Council of Legal Education," consisting of eight Benchers, of whom two are nominated by each of the Inns of Court, and of whom four are a quorum.

The Council has power to grant dispensations to students, who may have been prevented by any reasonable cause from complying with the regulations as to attendance at lectures and classes, and all arrangements touching the number of public lectures to be delivered by the readers, and the hours and extent of private classes, are with the Council.

For the purposes of education the legal year is considered as divided into three terms, one commencing on the 1st of November and ending on the 22nd of December, the second commencing on the 11th of January and ending on the 30th of March, and the third commencing on the 15th of April and ending on the 31st of July, subject to a deduction of the days intervening between the end of Easter and the beginning of Trinity Term.

For the purpose of affording to the students, the means of obtaining instruction and guidance in their legal studies, six readers are appointed, viz.:—(1) a reader on jurisprudence and civil and international law; (2) a reader on the law of real property; (3) a reader on the common law;³ (4) a reader on equity; (5) a reader on constitutional law and legal history; and (6) a reader on Hindu and Mahomedan law, and on the laws in force in British India.

The duties of these readers principally consist in the delivery of lectures in each educational term;⁴ of the formation of classes of students, for the purpose of giving instruction

such students except on the following conditions, viz.: (1) That students from India do satisfactorily pass an examination in Hindu and Mahomedan law, the Indian penal code, the code of civil procedure, the Intestate and Testamentary Act, and in such other codes or acts as may from time to time become law in British India; and in addition to such examination do pass such examinations and abide by all such rules and regulations as are now in force for students seeking a pass certificate by examination for call to the bar. (2) That students from the colonies do pass such an examination as is required, and do abide by all such rules and regulations as are now in force in order to obtain a certificate of honor. (3) Provided that each Inn of Court may under very special circumstances dispense with the above conditions.

¹ Students admitted before the first day of Hilary Term, 1864, have the option of qualifying themselves to be called to the bar, either under the previous rules of the Inns of Court of Hilary Term, 1852, or under the present regulations.

² Students admitted before the first day of Hilary Term, 1864, have the option of qualifying themselves to obtain such certificates, either under the rules of the Inns of Court of Hilary Term, 1852, or under existing regulations.

³ It is part of the duty of the reader on the common law to give instruction in his lectures on the subject of the office and duties of magistrates.

⁴ Two courses of lectures are delivered by the reader on common law, the reader on equity, and the reader on real property, in each educational term, of which one is on the elementary, and the other on the more advanced portion of the subject to which his lectures apply.

to entering the profession of the law, or even upon making the rudiments of law a necessary part of academical education, we need not scruple to affirm [*22] that sciences are *of a sociable disposition, and flourish best in the neighbourhood of each other: that there is no branch of learning but may be helped and improved by assistance drawn from other arts. If, therefore, the student of our laws has polished and matured his style, by perusal and imitation of the purest classical writers, among whom the historians and orators will best deserve his regard; if he can reason with precision, and separate argument from fallacy, by the clear simple rules of unsophisticated logic; if, disciplined by abstract mathematical demonstrations, he can fix his attention and steadily

in a more detailed and personal form than can be supplied by general lectures; and of affording to students, generally, advice and directions for the conduct of their professional studies.

The readers also assist in conducting the general examinations held twice a year,¹ for the examination of all such students as may be desirous of being examined previously to being called to the bar.

As an inducement to students to prepare themselves for such examination, studentships and exhibitions have been founded of fifty guineas per annum each, and twenty-five guineas per annum each respectively, to continue for a period of three years. One such studentship is conferred on the most distinguished student at each general examination, and one such exhibition is conferred on the student who obtains the second position; and further the examiners select and certify the names of three other students who have passed the next best examinations, and the Inns of Court to which such students as aforesaid belong, may, if desired, dispense with any Terms, not exceeding two, that may remain to be kept by such students previously to their being called to the bar. Pass certificates for a call to the bar are also awarded at these examinations; the examiners, however, are not obliged to confer or grant any studentship, exhibition, or certificate, unless they are of opinion that the examination of the students has been such as entitles them thereto.

At every call to the bar those students who have passed a general examination, and either obtained at such examination a studentship, an exhibition, or a certificate of honor, take rank in seniority over all other students who may be called on the same day.

The examination is by printed and oral questions on books and subjects specified in a programme previously issued.

Besides the above general examinations there are, in the month of July, in each year, voluntary examinations of the students upon the subjects of the several courses of lectures, but no student is entitled to go in for examination on any of such subjects, unless he has obtained a certificate from the reader that he has duly attended his lectures and classes upon the subject on which he offers himself for examination.² These voluntary examinations are conducted by barristers (not being readers) nominated for that purpose by the Council of Legal Education.

As an inducement to students to attend and make themselves proficient in the subjects of the lectures, exhibitions of the respective values below mentioned,³ have been founded and are conferred on the most distinguished students at the voluntary examinations.

¹ These examinations are held in or shortly before Michaelmas Term, and in or shortly before Trinity Term.

² It is ordered that no student who shall be entitled to a certificate of having attended the advanced course of lectures of the reader on common law, on equity, or on the law of real property, shall be at liberty to go in for examination upon the subject of the elementary course of lectures on the same head; and that no student shall be admitted for examination on the subject of the elementary course of lectures, on any of the above-mentioned heads, after he shall have kept more than eight terms, or for examination on any of the subjects after he shall have kept all his terms, unless in either case the Council of Legal Education for special reasons think fit to allow the same.

³ Five of such exhibitions are given to members of the advanced classes in the common law, in the law of real property, and in equity, and the most proficient among the students in jurisprudence, the civil law, and international law, and the students in constitutional law and legal history, every year; they are of the value of thirty guineas a year each, and endure for two years. Three of such exhibitions are given to members of the elementary classes in the common law, in the law of real property, and in equity, and are twenty guineas a year each, and endure for two years, but merge on the acquisition of a superior studentship.

pursue truth through any the most intricate deduction ; if he has enlarged his conceptions of nature and art, by a view of the several branches of genuine experimental philosophy ; if he has impressed on his mind the sound maxims of the law of nature, the best and most authentic foundation of human laws ; if, lastly, he has contemplated those maxims reduced to a practical system in the laws of imperial Rome ; if he has done this, or any material part of it, a student thus qualified may enter upon the study of the law with incredible advantage and reputation. If, indeed, during the acquisition of these accomplishments, he can afford himself leisure at the university, to lay the foundation of his future labours in a solid scientific method, without thirsting too early to attend that practice which it would be impossible he should rightly comprehend, he will afterwards proceed with the greater ease, and will unfold the most intricate points with an intuitive sagacity and clearness.

Hints for the study of the law. With reference to the mode of pursuing legal studies, a few remarks — 1st, general, 2ndly, practical, in their nature, are subjoined.

First may be urged upon the student the supreme importance of method (*y*) in studying our law. Before him * should be stretched, as it were, a [*23] map indicating the shape of the country to be explored, its connexions and boundaries, its greater divisions and principal cities ; it is not indeed for the student to describe minutely its subordinate limits, or to fix the longitude and latitude of every inconsiderable hamlet in it. His attention should be engaged, like that of the students mentioned by Fortescue (*z*) “ in tracing out the originals, and, as it were, the elements of the law.” For if, as Justinian (*a*) has observed, the tender understanding of the student be loaded at the first with a multitude and variety of matter, it will either occasion him to desert his studies, or will carry him heavily through them, with much labour, delay, and despondence. These originals should be traced to their fountains, as well as our distance will permit ; to the customs of the Britons and Germans, as recorded by Cæsar and Tacitus ; to the codes of the northern continental nations, or to those of our own Saxon princes ; to the rules of the Roman law, either left here in the days of Papinian, or imported by Vacarius and his followers : but above all to that *inexhaustible reservoir of legal antiquities and learning, the feudal law, [*24] or, as Spelman (*b*) has entitled it, the law of nations in our western orb. These primary rules and fundamental principles should be weighed and compared with the precepts of the law of nature and of nations, and when possible

(*y*) In the introduction to the Encyclopædia Metropolitana, by Mr. Coleridge, that philosophical writer inquires what amongst educated men at once distinguishes him of superior mind ? Not always the weight or novelty of his remarks ; not always the interest of the facts which he communicates, or the peculiarity of his words and phrases ; but “ the true cause of the impression made upon us is that his mind is methodical.” Throughout what he says is manifest some leading and definite idea, is manifest distinctness of mental vision, a power of foreseeing at the beginning of every sentence how it is to end, and how all its parts may be brought out in the best and most orderly succession. These are suggestive words, which should impress themselves on the mind of every

one who would aspire to excellence as an advocate, or who would aim at achieving reputation on the bench or in our national council-chamber.

(*z*) *Ante*, p. 20.

(*a*) *Incipientibus nobis exponere jura populi Romani, ita videntur tradi posse commodissime, si primo levi ac simplici viâ singula tradantur; alioqui, si statim ab initio rudem adhuc et infirmum animum studiosi multitudinis ac varietate rerum oneravimus, duorum alterum, aut desertorem studiorum efficiemus, aut cum magno labore, sæpe etiam cum diffidentia (quæ plerumque juvenes avertit), serius ad id perducemus, ad quod, leviori viâ ductus, sine magno labore, et sine ullâ diffidentia maturius perducî potuisset.* Inst. l. 1. 2.

(*b*) Of parliaments, 57.

with the practice of other countries; should be explained by reasons, illustrated by examples, and confirmed by undoubted authorities; their history should be deduced, their changes and revolutions observed; and it should be shewn how far they are connected with, or have at any time been affected by, the civil transactions of the kingdom.

To one who thus addresses himself to legal studies, who searches for correct and wholesome law at the sources whence it may be drawn, certain difficulties calculated much to retard, if not wholly to arrest his progress, may present themselves. Law is a technical science, so that in developing and applying it, technical words and phrases are employed, with the full significance of which familiarity must gradually be acquired by reading law treatises and reported cases, by the study of pleading, and by observing the practice of our courts(c). The desirableness of studying decided cases will appear from a remark of Best, C. J. (d), that "the judgments of the Courts of Westminster Hall are the only authority that we have for by far the greatest part of the law of England," *i. e.*, of the customary or unwritten law. The decision of a court must be regarded as the answer solemnly given by it to a question raised between parties, either [*25] on the pleadings, or in such manner, and by such *peculiar process as may be allowed, and it may consequently well be that the prodigious series of decisions noted up by the reporters really does constitute or authenticate by far the greater portion of our unwritten law. These cases range over and apply themselves to an almost infinite variety of subjects, and it is interesting to notice how from time to time the drift of decisions has changed in accordance with the change of system, with the advance of civilisation — with social progress. The earlier volumes of our reports, including the series of Year Books (e), contain for the most part decisions throwing light upon the feudal tenures — upon real actions — upon direct torts to land, to chattels, to the person. In these volumes are also to be met with some curious cases upon pleading. To the Year Books and earlier reports, however, we might vainly look for authorities concerning mercantile transactions, or (save only where torts simple in their nature are involved) concerning chattel property. For some centuries, indeed, after the Conquest, personalty was little cared for, and those engaged in mercantile pursuits were little regarded or protected by the law; it was not, as observed by a learned writer (f), till the reign of Henry VII. that the advantages arising from our insular position and internal resources began to be developed or brought into active operation. In Magna Carta, doubtless, as ratified by Henry III., are contained divers provisions, having direct reference to the law merchant, and evidently designed to benefit and encourage trade; provisions for insuring uniformity in the measures used for the sale of various commodities throughout the realm, and for guaranteeing to foreign merchants safe conduct in this country. Nevertheless we might vainly search our earliest legal chronicles for precedents respecting mercantile transactions. Toward [*26] the close, however, of the 15th century, personal property was gradually

(c) From the conquest till the reign of Edward III. oral forensic pleadings were conducted in Norman-French; and the practice obtained until a very much later period (*temp.* George II., A. D. 1730) of enrolling the proceedings of our courts in Latin. From

the French and Latin languages, accordingly, many technical law terms and legal phrases have been derived.

(d) *Fletcher v. Lord Sondes*, 3 Bing. 588.

(e) *Temp.* Edward II. — Henry VIII.

(f) *Encyc. Britan.*, title "Commerce."

manufactures, was becoming more and more a subject of discussion in our courts, so that lawyers were compelled to bestow upon it some share of their attention, which seems before to have been wholly engrossed by the learning of real property (*g*). From A. D. 1500, until the time when Lord Mansfield presided over the King's Bench (*h*), many and not unimportant reported cases are to be found touching the law of contracts. It is, however, to the great judge just named that we must look for an exposition of the doctrines of our law merchant, and assuredly without definite rules governing this department of our law, the law of contracts itself could not be said to have far advanced towards its maturity. During Lord Mansfield's long judicial career, our reports evidence the rapidly increasing estimation in which commerce and commercial dealings were held amongst us. There are to be found enunciated principles, often founded on considerations of mercantile convenience, which have since been repeatedly recognised as sound. And although the body of our *Lex Mercatoria* has been immensely added to since Lord Mansfield's time, as well by legislative enactments as by the recorded judgments of our courts, the hand which laid the foundations of this vast structure was his alone, and his the genius which designed and amplified its outlines. It would be easy to show that during the last three-quarters of a century the character of our reported cases has materially changed, that their character is still changing. And hence the branch of study recommended is to a great degree relieved of monotony, and, if carried out on a judicious and comprehensive plan, will give no little insight into the manners and customs of our ancestors, as well as into the history of our country, for some of the remarkable features of that history are to be found depicted in the reports as they are depicted in the Statute Book.

*2ndly. The plan of these commentaries forbids an elaborate enquiry [*27] respecting the course of study proper for a practitioner of law(*i*); a few remarks, however, as to the reading of reported cases may not be deemed superfluous. Obviously the difference is great between so reading cases as to apprehend merely the isolated points decided in them, and so reading cases as to extract out of them principles, and to acquire that peculiar power of analysing facts, and that peculiar mode of thought which to the accomplished lawyer are habitual. The faculty of generalising is indeed of difficult attainment. To generalise from decided cases we must understand correctly the ground of each of the decisions before us, and we must ever keep in mind this golden dictum(*k*):—"The reason and spirit of cases make law—not the letter of particular precedents"—so that a knowledge of principles and cases may, and ought to be, simultaneously acquired. Principles are evidenced and illustrated by cases. Cases which may at first sight appear discordant, become harmonious and reconcilable with one another by reference to established principles(*l*).

(*g*) Reeves. Hist. Eng. L. III. 369.

(*h*) A. D. 1757—1788.

(*i*) An entire course of reading and training for the bar has been admirably set forth by Mr. Warren, Q. C., in his introduction to Law Studies.

(*k*) Per Lord Mansfield, *Fisher v. Prince*, 3 Burr. 1364.

(*l*) In *Jones v. Randall*, Cowp. 39, the question raised being whether a particular contract was against law and void upon the face of it, Lord Mansfield remarked as follows:—"It is admitted that the contract is

against no positive law; it is admitted that there is no case to be found which says it is illegal; but it is argued, and rightly, that, notwithstanding it is not prohibited by any positive law, nor adjudged illegal by any precedents, yet it may be decided to be so upon principles; and the law of England would be a strange science indeed if it were decided upon precedents only. Precedents serve to illustrate principles, and to give them a fixed certainty. But the law of England, which is exclusive of positive law enacted by statute, depends upon principles."

Two plans have been suggested—the one by the illustrious Lord Bacon—the other by an eminent modern author(*m*)—whereby familiarity with decided cases [*28] may *without much difficulty be got. In Lord Bacon's mind the idea of associating cases with principles predominated, and in his Treatise on the Maxims of our Law, a mode of effecting this association is developed. In the preface to that treatise, he tells us that “there be two contrary faults and extremities in the debating and sifting out of the law, which may be best noted in two several manner of arguments. Some argue upon general grounds, and come not near the point in question; others without laying any foundation of a ground or difference do loosely put cases—which, though they go near the point yet, being put so scattered, prove not, but rather serve to make the law appear more doubtful than to make it more plain.” That is to say—principles without cases are too vague and general to serve unerringly as guides, and cases without principles lead but to perplexity and doubt.

A different plan adopted by modern writers has been this: to select out of the reports leading cases which bear upon some branch or department of the law, and of which each involves, and is usually cited to establish, a point or principle of real practical importance. And in order that the consequences flowing from each decision may be understood, and its authority may most easily be estimated, notes are appended to the principal cases, containing references to subsequent decisions, and elucidating difficulties. Thus, whilst mainly and primarily directing attention to cases, the writers alluded to take such opportunities as offer of expounding principles, whereas Lord Bacon presents first the principle, and then illustrates and qualifies it by apt examples.

By either method above suggested, much facility is afforded for acquiring familiarity with the landmarks of our law—for acquiring, not merely a knowledge of cases, but knowledge likewise in regard to their comparative weight, authenticity, and importance.

It is satisfactory to reflect that when once the foundation of such knowledge [*29] has properly been laid, its *superstructure may with increasing facility be reared. Nor can time spent in learning the rudiments of law be said to have been idly and unprofitably spent. For, even should the idea of practising in our law courts afterwards be relinquished, an admirable mental training will thus have been gone through—conducting to a logical precision of thought—to accuracy of language, and to vigour of the reasoning faculty. And besides these indirect advantages which flow from legal studies, a knowledge of law is for itself, on grounds already stated(*n*), to be desired. “There is no jewel,” says sir E. Coke(*o*), “in the world comparable to learning; no learning so excellent, both for prince and subject, as knowledge of laws; and no knowledge of any laws (I speak of human) so necessary for all estates, and for all causes concerning goods, lands, or life, as the common laws of England.”

(*m*) The late Mr. J. W. Smith.

(*o*) 2 Rep. pref.

(*n*) *Ante*, pp. 2—9.

*SECTION II

[*30]

THE NATURE OF LAWS IN GENERAL.

LAW, in its most general and comprehensive sense, signifies a rule of action ; and is applied indiscriminately to all kinds of action, whether animate or inanimate, rational or irrational(a). Thus we say, the laws of motion, of gravitation, of optics, or mechanics, as well as the laws of nature and of nations. Law is a rule of action which is prescribed by some superior, and which the inferior is bound to obey.

Thus, when the Supreme Being formed the universe, and created matter out of nothing, he impressed certain principles upon that matter, from which it can never depart, and without which it would cease to be. When he put that matter into motion, he established certain laws of motion, to which all moveable bodies must conform. And, to descend from the greatest operations to the smallest, when a workman forms a clock, or other piece of mechanism, he establishes, at his own pleasure, certain arbitrary laws for its direction ; as that the hand shall describe a given space in a given time ; to which law as long as the work conforms, so long it continues in perfection, and answers the end of its formation.

If we farther advance, from mere inactive matter to vegetable and animal life, we shall find them still governed by laws ; more numerous indeed, but equally *fixed and invariable. The whole progress of plants, from the seed to the root, and from thence to the seed again ;—the method of animal nutrition, digestion, secretion, and all other branches of vital economy ;—are not left to chance, or the will of the creature itself, but are performed in a wondrous involuntary manner, and guided by unerring rules laid down by the great Creator.

This then is the general signification of law, a rule of action dictated by some superior being ; and in those creatures that have neither the power to think nor to will, such laws must be invariably obeyed, so long as the creature itself subsists, for its existence depends on that obedience. But laws, in their more confined sense (in which it is our present business to consider them), denote the rules, not of action in general, but of human action or conduct ; that is, the precepts by which man, the noblest of all sublunary beings, a creature endowed with both reason and free-will, is commanded to make use of those faculties in the general regulation of his behaviour.(5)

(a) The word "law" may apply to "any thing laid down or imposed, either by God or by a prince governing a people." Richard-son Dict. *ad verb.*
nature, by a people binding themselves, or

(5) "This, perhaps, is the only sense in which the word *law* can be strictly used ; for, in all cases where it is not applied to human conduct, it may be considered as a metaphor, and in every instance a more appropriate term may be found. When it is used to express the operations of the Deity or Creator, it comprehends ideas very different from those which are included in its signification when it is applied to man, or his other creatures. The volitions of the Almighty are his laws ; he had only to will, *φωσ γενεσθαι καὶ γενεσθαι*.

When we apply the word *law* to motion, matter, or the works of nature or of art, we shall find, in every case, that, with equal propriety and perspicuity, we might have used the words *quality*, *property*, or *peculiarity*. We say that it is a law of motion that a body put in motion *in vacuo* must forever go forward, in a straight line, with the same velocity ; that

Man, considered as a creature, must necessarily be subject to the laws of his Creator, for he is entirely a dependent being. A being, independent of any other, has no rule to pursue, but such as he prescribes to himself; but a state of dependence will inevitably oblige the inferior to take the will of him, on whom he depends, as the rule of his conduct; not, indeed, in every particular, but in all those points wherein his dependence consists. This principle has more or less extent and effect, in proportion as the superiority of the one and the dependence of the other is greater or less, absolute or limited. And as man depends absolutely upon his Maker for everything, it is necessary that he should in all points conform to his Maker's will.

This will of his Maker is called the law of nature.⁽⁶⁾ For as God, when he created matter, and endued it with a principle of mobility, established certain rules for the perpetual direction of that motion; so, when he created *man, and endued him with free-will, he laid down certain immutable laws of human nature, whereby that free-will is in some degree regulated and restrained, and gave him also the faculty of reason to discover the purport of those laws.

Considering the Creator only as a being of infinite power, he was able unquestionably to have prescribed whatever laws he pleased to his creature, man, however unjust or severe. But as he is also a being of infinite wisdom, he has

it is a law of nature that particles of matter shall attract each other with a force that varies inversely as the square of the distance from each other; and mathematicians say that a series of numbers observes a certain law when each subsequent term bears a certain relation or proportion to the preceding term; but, in all these instances, we might as well have used the word *property* or *quality*, it being as much the property of all matter to move in a straight line, or to gravitate, as it is to be solid or extended; and when we say that it is the law of a series that each term is the square or square root of the preceding term, we mean nothing more than that such is its property or peculiarity. And the word *law* is used in this sense in those cases only which are sanctioned by usage; as it would be thought a harsh expression to say that it is a law that snow should be white, or that fire should burn. When a mechanic forms a clock, he establishes a model of it either in fact or in his mind, according to his pleasure; but if he should resolve that the wheels of his clock should move contrary to the usual rotation of similar pieces of mechanism, we could hardly with any propriety established by usage apply the term *law* to his scheme. Where *law* is applied to any other object than man, it ceases to contain two of its essential ingredient ideas, viz.: disobedience and punishment.

Hooker, in the beginning of his Ecclesiastical Polity, like the learned judge, has with incomparable eloquence interpreted *law* in its most general and comprehensive sense. And most writers who treat *law* as a science begin with such an explanation. But the editor, though it may seem presumptuous to question such authority, has thought it his duty to suggest these few observations upon the signification of the word *law*."—CHRISTIAN.

(6) "The 'Law of Nature' is a supreme, invariable and uncontrollable rule of conduct to all men; and it is so called because its general precepts are essentially adapted to promote the happiness of man, as long as he remains a being of the same nature with which he is at present endowed, or, in other words, as long as he continues to be man, in all the variety of times, places and circumstances in which he has been known, or can be imagined to exist; because it is discoverable by natural reason, and suitable to our own natural constitutions, because its fitness and wisdom are founded on the general nature of human beings, and not on any of those temporary and accidental situations in which they may be placed; and, lastly, because its violation is avenged by natural punishments which necessarily flow from the constitution of things, and are as fixed and inevitable as the order of nature, as by shame, remorse, infamy and misery, and still further enforced by reasonable expectation of still more awful penalties in a future and more permanent state of existence."—MACKINTOSH.

laid down only such laws as were founded in abstract justice. These are the eternal, immutable laws of good and evil, to which the Creator himself in all his dispensations conforms; and which he has enabled human reason to discover, so far as they are necessary for the conduct of human actions. Such among others are these principles: that we should live honestly, should hurt nobody, and should render to every one his due; on which three general precepts Justinian has grounded the whole doctrine of law^(b).

But if the discovery of these first principles of the law of nature depended only upon the due exertion of right reason, and could not otherwise be obtained than by a chain of metaphysical disquisitions, mankind would have wanted some inducement to have quickened their inquiries, and the greater part of the world would have rested content in mental indolence, and ignorance, its inseparable companion. As therefore the Creator is a being, not only of infinite power and wisdom, but also of infinite goodness, he has been pleased so to contrive the constitution and frame of humanity, that we should want no other prompter to inquire after and pursue the rule of right, but only our own self-love, that universal principle of action. For he has so intimately connected, so *inseparably interwoven the laws of eternal justice with the happiness of each individual, that the latter cannot be attained but by observing the former; and, if the former be punctually obeyed, it cannot but induce the latter. In consequence of which mutual connexion of justice and human felicity, he has not perplexed the law of nature with a multitude of abstract rules and precepts referring merely to the fitness or unfitness of things; but has graciously reduced the rule of obedience to this one paternal precept—that man should pursue his own true and substantial happiness. This is the foundation of what we call ethics, or natural law; the primary object of which is to demonstrate, on the one hand, that this or that action tends to man's real happiness, and therefore that the performance of it is a part of the law of nature; on the other hand, that this or that action is destructive of man's real happiness, and therefore that the law of nature forbids it.

This law of nature being coeval with mankind, and dictated by God himself, is of course superior in obligation to any other. It is binding over all the globe, in all countries, and at all times: no human laws are of any validity, if contrary to this; and many of them derive their force and principal authority from this original.

But in order to apply the law of nature to the particular exigencies of each individual, it is still necessary to have recourse to reason: whose office it is to discover, as was before observed, what the law directs in every circumstance of life; by considering what method will tend the most effectually to our own substantial happiness. And if our reason were always clear and perfect, unruffled by passions, unclouded by prejudice, unimpaired by disease or intemperance, the task would be pleasant and easy; we should need no other guide than this. But every man now finds the contrary in his own experience; that his reason is corrupt, and his understanding full of ignorance and error.

* This has given manifold occasion for the benign interposition of [*34] Divine Providence; which, in compassion to the frailty, the imperfection, and

(b) *Juris praecepta sunt haec, honeste vivere, rules of law, but short statements of the alterum non laedere, suum cuique tribuere.* chief moral obligations on which rules of law
Inst. I. 1. 3. "These *juris praecepta* are not are based." Sandars, Inst. Just. p. 87.

the blindness of human reason, has been pleased, at sundry times and in divers manners, to discover and enforce its laws by an immediate and direct revelation. The doctrines thus delivered we call the revealed or divine law, and they are to be found only in the Holy Scriptures. These precepts tend, as does the original law of nature, in all their consequences, to man's felicity. But we are not from thence to conclude that the knowledge of these truths was attainable by reason, in its present vitiated state; since we find that, until they were revealed, they were hid from the wisdom of ages. As then the moral precepts of this law are indeed of the same origin with those of the law of nature, so their intrinsic obligation is of equal strength and perpetuity. Though undoubtedly the revealed law is of infinitely more authenticity than that moral system which is framed by ethical writers, and denominated the natural law. Because one is the law of nature expressly declared so to be by God himself; the other is only what, by the assistance of human reason, we imagine to be that law. If we could be as certain of the latter as we are of the former, both would have an equal authority: but, till then, they can never be put in any competition together.

Upon these two foundations, the law of nature and the law of revelation, depend, mediately or immediately, all human laws; no human laws should be suffered to contradict these. There are, it is true, many matters *per se* indifferent, as to which nevertheless legislation is needed for the public good, and *in foro conscientiae* obedience is due to laws enacted by the constituted government for the benefit of society. With regard to such points as are not indifferent, human laws must be deemed declaratory of and to derive efficacy from the divine ordinances; yet in the moral guilt of violating a law thus promulgated, [*35] is involved the ingredient of a disobedience to a *de facto* social * institution. To instance in the case of murder: this is expressly forbidden by the divine and demonstrably by the natural law; and from these prohibitions arises mainly the turpitude of this crime. Those human laws which annex a punishment to it, do however superadd fresh obligation on each member of the community to abstain from its perpetration. If indeed any human law should allow or enjoin us to commit it, we should be bound to transgress that human law, or else we should offend against both the natural law and the divine (c). But with regard to matters in themselves indifferent, neither commanded nor forbidden by divine laws; such, for instance, as the exporting of wool or other produce into foreign countries; here the inferior legislature has scope and opportunity to interpose, and to make that action unlawful which before was not so.

If man were to live in a state of nature, there would be no occasion for any other laws, than the law of nature, and the law of God. Neither could any

(c) Members even of the legislative body have ere now avowed an intention to transgress a projected law, if made. Thus, in the debate on the Church Discipline Bill (July 26 1838), the Bishop of Exeter said:— I speak advisedly, but I speak not in a spirit of defiance, when I say, that should this bill pass, I shall not feel myself at liberty to obey its main instructions or directions. To other laws I will cheerfully conform, but this will be a law that will strike

at the very root of the essential discipline of our Christian church. I plainly and openly then declare that, should this bill pass, if a clergyman in my diocese conducts himself criminally, I shall call on that clergyman to answer to me for his actions, and if he will not obey my remonstrance I shall proceed to that sentence which this bill tells me I shall not pass—I shall proceed to excommunicate him. (Mir. of Parl.)

other law possibly exist: for a law always supposes some superior who is to make it; and in a state of nature we are all equal, without any superior but

Him who is the author of our being. But man was formed for society; and neither is capable of living alone, nor indeed has the courage to do it (*d*). However, as it is impossible for the whole race of *mankind to be united in one great society, they must necessarily [*36] form separate states, commonwealths, and nations, entirely independent of each other, and yet liable to a mutual intercourse. Hence arises a third kind of law to regulate this mutual intercourse, called "the law of nations." (*e*): which, as none of these states will acknowledge a superiority in the other, cannot be dictated by any; but depends entirely upon the rules of natural law, or upon international comity (*f*), or upon mutual compacts, treaties, leagues, and agreements between these several communities: in the construction also of which compacts, we have no other rule to resort to, but the law of nature; being the only one to which all the communities are equally subject, and therefore in the civil law (*g*) — *quod naturalis ratio inter omnes homines constituit, vocatur jus gentium* (*h*).

Such and so broad as this being the foundation on which international law reposes, we yet learn from our reports that it cannot be allowed to prevail in any case where it runs counter to elementary principles of justice, to the law of nature, or the law of God. Thus, in virtue of international comity, the judgment, decree, or sentence of a foreign court is here held conclusive *quoad* that which it professes to decide, and yet this rule must be limited by provisos that the foreign court has jurisdiction *over the subject-matter, that the judgment was not obtained by fraud practised on the court for the [*37] purpose of procuring it, nor by collusion, nor by the malversation of the court itself (*i*).

(*d*) Puffendorff, 1. 7. c. 1, compared with Barbeyrac's commentary.

(*e*) "The true foundation on which the administration of international law must rest, is that the rules which ought to govern are those which arise from mutual interest and utility, from a sense of the inconveniences which would result from a contrary doctrine, and from a sort of moral necessity to do justice in order that justice may be done to us in return." Story, Conf. Laws, 3rd ed. 45.

(*f*) "International comity" is "the obligation of nations to give effect to foreign laws, when they are not prejudicial to their own rights and interests." Story, Conf. Laws, 3rd ed. 43.

(*g*) Dig. 1. 1. 9.

(*h*) The *jus gentium* included "the rules of right which govern the transactions of social life and nations in their dealings with each other." What we term international law is expressed more correctly by the term *jus inter gentes*. Sanders, Inst. Just. 87. 89.

(*i*) *Cammell v. Sewell*, 5 H. & N. 728; 3 Id. 617, 648.

In *Ferguson v. Mahon*, 11 Ad. & E. 179, an action of debt was brought upon a judgment of the Court of Common Pleas in Ireland. Plea, that though the judgment was in fact obtained by plaintiff against de-

fendant, yet "defendant was not at any time arrested upon or served with any process issuing out of the said court for the cause of action upon which judgment was obtained, nor had he at any time notice of such process, nor did he appear to the action." The question was whether this plea, assuming the facts alleged in it to be proved, afforded any answer to the suit? It was held to do so; Lord Denman observing that the grounds of a foreign judgment may be inquired into where the proceedings which resulted in such judgment were plainly contrary to natural justice. An Irish judgment, he admits, is a record for certain purposes so as to bar any inquiry into the merits of the case or the propriety of the decision, though not to preclude inquiry whether the judgment passed under such circumstances as showed that the court had properly jurisdiction over the litigants; or whether the defendant had had notice of the proceedings, or had been before the court. In this case the defence relied on the particular issue availed the defendant, who had judgment.

Upon the subject of international comity, general principles such as stated in the text may be deduced from *Fenton v. Livingstone*, 8 Macq.; Scotch App. Cas. 497.

Having premised thus much concerning the law of nature, the revealed law, and the law of nations, I proceed to treat more fully the principal subject of this section, municipal or civil law; that is, the rule by which particular districts, communities, or nations are governed; defined by Justinian to be (k) *quod quisque populus ipse sibi jus constituit*. I call it "municipal" law, in compliance with common speech; for though, strictly, that expression denotes the particular customs of one single *municipium* or free town, yet it may with sufficient propriety be applied to any one state or nation, which is governed by the same laws and customs.

[*38] Municipal law, thus understood, may properly be defined to be "a rule of civil conduct prescribed by the supreme power in a state, commanding what is right, prohibiting what is wrong, and regulating matters in themselves indifferent." (7) Let us endeavour to explain its several properties, as they arise out of this definition.

And, first, it is "a rule": not a transient sudden order from a superior, to or concerning a particular person; but something permanent, uniform, and universal. Therefore a particular act of the legislature to confiscate the goods of Titius, or to attain him of high treason, does not enter into the idea of a municipal law: for the operation of this act is spent upon Titius only, and has no relation to the community in general; it is rather a sentence than a law. But an act to declare that the crime of which Titius is accused shall be deemed high treason; this has permanency, uniformity, and universality, and therefore is properly a rule. It is also called a rule, to distinguish it from advice or counsel, which we are at liberty to follow or not, as we see proper, and to judge upon the reasonableness or unreasonableness of the thing advised; whereas our obedience to the law depends not upon our approbation, but upon the maker's will. Counsel is only matter of persuasion, law is matter of injunction; counsel acts only upon the willing, law upon the unwilling also.

It is also called a "rule," to distinguish it from a compact or agreement, for a compact is a promise proceeding from us, law is a command directed to us. The language of a compact is, "I will, or will not, do this;" that of the law is, "thou shalt, or shalt not, do it." It is true there is an obligation which a compact carries with it, equal in point of conscience to that of a law; but then the origin of the obligation is different. In compacts, we ourselves determine and promise what shall be done, before we are obliged to do it; in laws, we are obliged to act without ourselves determining or promising anything at all.

Upon these accounts law is defined to be "a rule."

[*39] Municipal law is also a rule "of civil conduct." This * distinguishes

(k) Inst. 1. 2. 1.

(7) "The design and object of the laws is to ascertain what is just, honorable and expedient; and, when that is discovered, it is proclaimed as a general ordinance, equal and impartial to all. This is the origin of law, which, for various reasons, all are under an obligation to obey; but especially because all law is the invention and gift of heaven, the sentiment of wise men, the correction of every offense, and the general compact of the State; to live in conformity with which is the duty of every individual in society." Demosthenes Orat. 1. Cont. Aristogit.

"Municipal law is a rule of civil conduct, prescribed by the supreme power in a State, commanding what is to be done, and forbidding the contrary." — SHARSWOOD.

municipal law from the natural or revealed; the former of which is the rule of moral conduct, and the latter not only the rule of moral conduct, but also the rule of faith. These regard man as a creature, and point out his duty to God, to himself, and to his neighbour, considered in the light of an individual. But municipal or civil law regards him also as a citizen, and bound to other duties towards his neighbour than those of mere nature and religion: duties, which he has engaged in by enjoying the benefits of the common union; and which amount to no more, than that he do contribute, on his part, to the subsistence and peace of the society.

It is likewise a rule "prescribed." Because a bare resolution, confined in the breast of the legislator, without manifesting itself by some external sign, can never be properly a law. It is requisite that this resolution be notified to the people who are to obey it. But the manner in which this notification is to be made, is matter of very great indifference. It may be notified by universal tradition and long practice, as is the customary law of England. It may be notified, *vidé voce*, by officers appointed for that purpose, as is done with regard to proclamations, and such acts of parliament as are appointed to be publicly read in churches and other assemblies(7). It may be notified by printing, or the like; which is the general course taken with our acts of parliament. Yet, whatever method is made use of, it is incumbent on the promulgators of a law to notify it in the most public [*40] and perspicuous manner; not like Caligula, who (according to Dio [Cassius] wrote his laws in a very small character, and hung them up upon high pillars, the more effectually to ensnare the people. There is still a more unreasonable method than this, which is called making of laws *ex post facto*; when, after an action (indifferent in itself) is committed, the legislature then for the first time declares it to have been a crime, and inflicts a punishment upon the person who has committed it.(8)

(7) Thus the *Confirmatio Cartarum* (25 Ed. 1) enacted (cap. 3) that the Great Charter of Henry III., and the Charter of the Forest, should be read in the cathedral churches throughout the realm, before the people, twice in every year. A few years afterwards (34 Ed. 1) still more careful provision was made for the promulgation of the statute, *de tallagio non concedendo*; by cap. 6 of which it was provided that "all archbishops

and bishops for ever shall read this present charter in the cathedral churches twice in the year; and upon the reading thereof shall openly denounce accursed all that willingly do, or procure to be done, anything contrary to the tenor, force, and effect thereof, in any point or article whatever." Other similar instances will occur to the reader of our statute-book.

(8) The constitution of the United States prohibits Congress from passing *ex post facto* laws (Const. art. 1, sec. 9); and it also prohibits every state from passing such laws. (Const. art. 1, sec. 10.)

The term *ex post facto* is construed to relate exclusively to criminal matters or offenses. "A law that punishes a citizen for an innocent action, or in other words, for an act which when done, was in violation of no existing law; a law that destroys, or impairs, the lawful private contracts of citizens; a law that makes a man a judge in his own cause; or a law that takes property from A and gives it to B. * * * The legislature may enjoin, permit, forbid, and punish; they may declare new crimes, and establish rules of conduct for all its citizens in future cases; they may commend what is right, and prohibit what is wrong; but they cannot change innocence into guilt, or punish innocence as a crime; or violate the right of an antecedent lawful private contract, or the right of private property." *Calder v. Bull*, 8 Dallas, 388.

An *ex post facto* law is thus defined: "1. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal, and punishes such action. 2. Every law that aggravates a crime, or makes it greater than it was when com-

Here it is impossible that the party could foresee that an action, innocent when it was done, should be afterwards converted to guilt by a subsequent law; he had therefore no cause to abstain from it; and all punishment for not

mitted. 3. Every law that changes the punishment, and inflicts a greater punishment than the law annexed to the crime when committed. 4. Every law that alters the legal rules of evidence, and receives less or different testimony than the law required at the time of the commission of the offense, in order to convict the offender." *Ib.* 890.

An act of Congress is unconstitutional if it requires an applicant for admission to practice in the Federal courts, to swear as a condition precedent to such admission that he has never voluntarily borne arms against the United States since he has been a citizen thereof; that he has voluntarily given no aid, counsel, or encouragement to persons engaged in armed hostility thereto; that he has neither sought nor accepted, nor attempted to exercise the functions of any office whatever, under any authority or pretended authority in hostility to the United States. *Garland, Ex parte*, 4 Wall. (U. S.) 333, 376, 377; *Green v. Shumway*, 89 N. Y. (12 Tiff.) 418; 86 How. Pr. 5; 7 Trans. App. 282. Such an act imposes a punishment for some of the acts which were not punishable at the time they were committed, and for other acts it adds a new punishment to that before prescribed, and it is, therefore, within the inhibition of the constitution against the passage of an *ex post facto* law. *Ib.* Exclusion from the practice of the law in the Federal courts, or from any of the ordinary avocations of life for *past conduct*, is punishment for such conduct. *Ib.* The exaction of the oath is the mode provided for ascertaining the parties upon whom the act is intended to operate. *Ib.* No state under the form or pretense of creating a qualification, or attaching a condition, to the exercise of any office, right or duty, can, in effect, inflict a punishment for a past act which was not punishable at the time it was committed. *Cummings v. State of Missouri*, 4 Wall. (U. S.) 277. To deprive or suspend any person from the exercise of any civil right for past conduct, is punishment for such conduct. *Ib.*

A clause in a state constitution which requires priests or clergymen, as a condition to their right to teach and preach, to take and subscribe an oath that they have not done certain specified acts which, at the time they were committed, were innocent in themselves, constitutes a bill of attainder within the meaning of the constitution of the United States, and it is therefore void. *Ib.*

A law of a state changing the place of trial from one county to another county in the same district, or even to a different district from that in which the offense was committed, or the indictment found, is not an *ex post facto* law, though passed subsequently to the commission of the offense, or the finding of an indictment. *Gut v. State*, 9 Wall. (U. S.) 35. An *ex post facto* law does not involve, in any of its definitions, a change of the place of trial of an alleged offense after its commission. *Ib.*

This constitutional provision was enacted for the protection and security of accused parties against arbitrary and oppressive legislative action, and, therefore, any change in the law which goes in mitigation of the punishment is not an *ex post facto* law. *Strong v. State*, 1 Blackf. 193; *Keene v. State*, 3 Chand. 109; *Boston v. Cummins*, 16 Geo. 102; *Woart v. Winnick*, 3 N. H. 473; *State v. Arlin*, 39 N. H. 180; *Clarke v. State*, 28 Miss. 261; *Maul v. State*, 25 Texas, 166.

In New York the rule is, that a law changing the punishment for offenses committed before its passage is *ex post facto* and void, under the constitution, unless the change consists in the remission of some separable part of the punishment before prescribed, or is referable to prison discipline or penal administration as its primary object. *Hartung v. People*, 22 N. Y. (8 Smith) 105; *Shepherd v. People*, 25 N. Y. (11 Smith) 406; 24 How. 388; *Ratsky v. People*, 29 N. Y. (2 Tiff.) 124; 28 How. 112; *Kuckler v. People*, 5 Park. 212.

It is not always easy to determine what changes in the law are to be regarded as in mitigation thereof. Changes in the modes of procedure or in the criminal practice are not considered *ex post facto* in their nature. And changes have been held to be constitutional in cases like the following: a change which precludes a defendant from taking advantage of variances on trial for an offense alleged to have been committed prior to such change, if such variances do not prejudice him. *Commonwealth v. Hall*, 97 Mass. 570.

So of a change which authorizes an amendment of indictments. *State v. Corson*, 59 Maine, 137; *Lasure v. State*, 19 Ohio, N. S. 43; *State v. Manning*, 14 Texas, 402; or one which

abstaining must of consequence be cruel and unjust. Laws should therefore in general be made to commence *in futuro*, and be notified before their commencement; which is implied in the term "prescribed." But when this rule is in the usual manner notified, or prescribed, it is then the subject's business to be thoroughly acquainted therewith; for if ignorance, of what he might know, were admitted as a legitimate excuse, for a breach of law, the laws would be of no effect, but might be eluded with impunity.(9)

gives the State additional challenges. *Walston v. Commonwealth*, 16 B. Monr. 15; *State v. Ryan*, 13 Minn. 370; *State v. Wilson*, 48 N. H. 398; *Commonwealth v. Dorsey*, 103 Mass. 412; *Waterford and Whitehall Turnpike Co. v. People*, 9 Barb. 161. But no change can be made which deprives the accused person of any substantial protection which was established for the purpose of securing a fair trial. *Hart v. State*, 40 Ala. 21.

(9) By the English law, a statute related to the first day of the session of parliament at which it was made, unless the act specified a different time for its commencement. *Panter v. Atty.-Gen.* 6 Bro. P. C. 486; *Latless v. Holmes*, 4 Term R. 660. This rule was changed by 33 Geo. III, ch. 18, which fixes the time to be when the act receives the royal assent, if no other time shall be provided in the act.

In New York, every law, unless a different time shall be prescribed therein, shall commence and take effect on and not before the twentieth day after the day of its final passage. 1 R. S. 157, § 12.

The English rule of construction does not give a retrospective effect unless the statute by precise words clearly shows that such was the intention of the legislature. *Thompson v. Lock*, 8 C. B. 540; 16 L. J. C. P. 75; *Evans v. Williams*, 2 Drew. & Sm. 324; *Marsh v. Higgins*, 9 C. B. 551; 1 L. M. & P. 253; 18 L. J. C. P. 297.

In the United States no rule is better settled than that which declares that every statute is to apply to none but future cases, unless the statute itself clearly and unequivocally declares a different intention. *Dash v. Van Kleeck*, 7 Johns. 477; *Sandford v. Bennett*, 24 N. Y. (10 Smith) 20, 23; *People ex rel. Peake v. Supervisors of Columbia Co.*, 48 N. Y. (4 Hand) 180, 185; *Plumb v. Sawyer*, 31 Conn. 851; *Briggs v. Hubbard*, 19 Vt. 86; *Atkinson v. Dunslop*, 50 Me. 111; *Hastings v. Lane*, 8 Shep. 134; *Thompson v. Alexander*, 11 Ill. 54; *State v. Barbee*, 3 Ind. 258; *Albyer v. State*, 10 Ohio St. 588; *State v. Atwood*, 11 Wis. 422; *Bartruff v. Remy*, 15 Iowa, 257; *Tyson v. School Directors*, 51 Penn. St. 9; *Graham, Ex parte*, 13 Rich. 277; *Clark v. Baltimore*, 29 Md. 277; *State v. The Auditor*, 41 Mo. 25.

Statutes may be retroactive in their character, and yet be valid, as in the case of a statute enacted to cure defects in legal proceedings, which are mere irregularities, and do not relate to matters of jurisdiction, if there is no express constitutional prohibition.

Such statutes have sometimes been enacted to cure irregularities in the assessment of property for taxation and the levy of taxes upon it. *Butler v. Toledo*, 5 Ohio St. 225; *Boardman v. Beckwith*, 18 Iowa, 292. So of irregularities in the organization or elections of corporations. *Syracuse Bank v. Davis*, 16 Barb. 188; *Mitchell v. Deeds*, 49 Ill. 416. So in relation to sales of land made by order of a surrogate. *Forbes v. Halsey*, 26 N. Y. (12 Smith) 53, 63; *Chandler v. Northrop*, 24 Barb. 129; *Wood v. Mo Chesney*, 40 id. 417, 422. So of a sale of real estate of infants when made in a partition suit, a defect in the proceedings may be cured by a subsequent statute. *Kearney v. Taylor*, 15 How. (U. S.) 498, 517.

Laws which impair the validity of existing valid contracts, partake of the nature of *ex post facto* laws, and are prohibited by the constitution. U. S. Const., art. 1, § 10. Contracts between States are as binding as those between individuals. *Fletcher v. Peck*, 6 Cranch, 133.

An office created by law may be repealed by law, without regard to the term or future salary of the officer intrusted with its exercise. *Conner v. Mayor, etc., of N. Y.*, 2 Sandf. 355, 369; 5 N. Y. (1 Seld.) 285; *Smith v. Mayor, etc., of N. Y.*, 37 N. Y. (10 Tiff.) 518, 520; 5 Trans. App. 228; *Warner v. People*, 2 Denio, 272; *Commonwealth v. Bacon*, 6 S. & R. 322; *Commonwealth v. Mann*, 5 W. & S. 418.

If the office itself be secured by the constitution, and the compensation be left to the legislature, it may be increased or diminished, so as to affect the incumbent, whether the compensation be by fees or by salary, as the public good may require. *Ib.*

But, farther: municipal law is a rule of civil conduct prescribed "by the supreme power in a State." For legislature, as was before observed, is the "by the supreme greatest act of superiority that can be exercised by one being power." over another. Wherefore it is requisite to the very essence of a law, that it be made by the supreme power. Sovereignty and a power to legis-

Although an office be created by the constitution, the people may by a new constitution terminate the office. *Ib.* But where the term of office is fixed by the constitution, the legislature cannot remove the officer, except in the mode allowed by that instrument, nor can it remove him directly, or indirectly by abolishing the office. *People v. Dubois*, 23 Ill. 547; *State v. Messmore*, 14 Wis. 163; *Commonwealth v. Gamble*, 62 Penn. St. 343; *State v. Brunst*, 26 Wis. 412; 7 Am. R. 84.

Charters of incorporation which are granted for the private benefit or purposes of the corporators, are contracts between the legislature and the corporators, and the grant cannot be resumed nor its benefits diminished or impaired without the consent of the grantees, unless the right to do so is reserved in the charter. *Dartmouth College v. Woodward*, 4 Wheat. 519; *Binghamton Bridge Case*, 3 Wall. 51; *Morris v. Trustees of Abingdon Academy*, 7 G. & J. 7; *Grammar School v. Burt*, 11 Vt. 632; *Brown v. Hummel*, 6 Penn. St. 86; *State v. Heyward*, 3 Rich. 389; *Backus v. Lebanon*, 11 N. H. 19; *Michigan State Bank v. Hastings*, 1 Doug. (Mich.) 225; *Bridge Co. v. Hoboken Co.*, 2 Beas. 81; *Miners' Bank v. United States*, 1 Green (Iowa), 553; *Edwards v. Jagers*, 19 Ind. 407; *State v. Noyes*, 47 Me. 189; *Bruffett v. G. W. R. R. Co.*, 25 Ill. 353; *Bank of the State v. Bank of Cape Fear*, 18 Ired. 75; *Hawthorne v. Culef*, 2 Wall. 10; *Central Bridge v. Lowell*, 15 Gray, 106; *State v. Tombeckee Bank*, 2 Stew. 30.

No one can have a vested right in the existing general laws of the state, which will preclude their amendment or repeal, for there is no implied promise on the part of the state to protect its citizens against such incidental injuries as may result from a change in the law.

"There are few laws which concern the general police of a state, or the government of its citizens, in their intercourse with each other or with strangers, which may not in some way or other affect the contracts which they have entered into or may thereafter form. For what are laws of evidence, or which concern remedies, frauds and perjuries, laws of registration, and those which affect landlord and tenant, sales at auction, acts of limitation, and those which may limit the fees of professional men, and the charges of tavern-keepers, and a multitude of others which crowd the Codes of every state, but laws which affect the validity, construction, or duration, or discharge of contracts." WASHINGTON, J., in *Ogden v. Saunders*, 12 Wheat. 259. Changes in such laws need not necessarily affect the obligation of contracts, and therefore changes which merely relate to the remedy may be altered by the legislature, if such alteration does not impair the obligation of the contract; and the contract is not impaired if the parties have left to them a substantial remedy according to the course of justice as it existed at the time when the contract was made. *Stocking v. Hunt*, 3 Denio, 274; *Butler v. Palmer*, 1 Hill, 324; *Van Rensselaer v. Ball*, 19 N. Y. (5 Smith) 100; *Grosvener v. Chesley*, 48 Me. 369; *Sanders v. Hillsborough Insurance Co.*, 44 N. H. 238; *Mechanics, etc., Bank Appeal*, 31 Conn. 63; *Clark v. Martin*, 49 Penn. St. 299; *Maynes v. Moore*, 16 Ind. 116; *Smith v. Packard*, 12 Wis. 371; *Coriell v. Ham*, 4 Greene (Iowa), 455; *Auld v. Butcher*, 2 Kan. 135; *Paschal v. Perez*, 7 Tex. 348, 365; *Rison v. Farr*, 24 Ark. 161.

Laws changing remedies for the enforcement of contracts will be valid, even though the new remedy be less convenient or less prompt than the old one. *Ogden v. Saunders*, 12 Wheat. 270; *Quackenbush v. Danks*, 1 Denio, 128; 3 id. 594; 1 N. Y. (1 Comst.) 129; *Morse v. Gould*, 11 N. Y. (1 Kern.) 281; *Penrose v. Erie Canal Co.*, 56 Penn. St. 46; *Tarpley v. Hamer*, 17 Miss. 810; *Bronson v. Newberry*, 2 Doug. (Mich.) 88; *Evans v. Montgomery*, 4 W. & S. 218; *Holloway v. Sherman*, 12 Iowa, 282; *Sprecker v. Wakeley*, 11 Wis. 432.

Although the law at the time of making the contract permits the creditor to take the body of his debtor in execution, yet the legislature may abolish this right and leave the creditor to his remedy against property alone. *Sturges v. Crowninshield*, 4 Wheat. 370; *Mason v. Haile*, 12 id. 370; *Bronson v. Newberry*, 2 Doug. (Mich.) 88; *Mazey v. Loyal*, 88 Ga. 540. So the laws relating to the exemption of property from execution are valid. *Bronson v. Kenzie*, 1 How. (U. S.) 811; *Quackenbush v. Danks*, 1 Denio, 128; 3 id. 594; 1 N. Y. (1 Comst.) 129; *Morse v. Gould*, 11 N. Y. (1 Kern.) 281; *Rockwell v. Huddell's Administrators*, 2

late are indeed thus far convertible terms: that one of these cannot subsist without the other.

This may lead us into a short inquiry concerning the nature of society and civil government; and the natural, inherent right which belongs to the sovereignty of a state, wherever that sovereignty be lodged, of making and enforcing laws.

The only true and natural foundations of society are the *wants and [*41] the fears of individuals. Not that we can believe, with some theoretical

writers, that there ever was a time when there was no such thing as society, either natural or civil; or when, from the impulse of reason, and through a sense of their wants and weaknesses, individuals met together in a large plain, entered into an original contract, and chose the tallest man present to be their governor. This notion, of an actually existing unconnected state of nature, is too wild to be seriously admitted; and besides it is plainly contradictory to the revealed accounts of the primitive origin of mankind. Families formed the first natural society, among themselves; which, every day extending its limits, laid the primary, though imperfect rudiments of civil or political society; when, however, a social community grew too large to subsist with convenience in that pastoral state, wherein the patriarchs appear to have lived, it necessarily, by various migrations, subdivided itself. Afterwards, as agriculture increased, which employs and can maintain a much greater number of hands, migrations became less frequent: and various tribes, which had previously separated, reunited; sometimes by compulsion and conquest, sometimes by accident, and sometimes perhaps by compact. But though society had not its formal beginning from any convention of individuals, actu-

Doug. (Mich.) 197; *Sprecker v. Wakeley*, 11 Wis. 432; *Cusie v. Douglas*, 3 Kan. 123; *Macey v. Loyal*, 38 Ga. 531; *Hill v. Kessler*, 63 N. C. 437; *Hardeman v. Downer*, 39 Ga. 425. But the increase in exemptions cannot go to the extent of rendering the remedy nugatory or impracticable. *Stephenson v. Osborne*, 41 Miss. 119.

A law which deprives a party of all legal remedy is clearly void, as it must necessarily impair the obligation of existing contracts. *Call v. Hagger*, 8 Mass. 423, 430; see *Griffin v. Wilcox*, 21 Ind. 370; *Penrose v. Erie Canal Co.*, 56 Penn. St. 46; *Jackoway v. Denton*, 25 Ark. 641; *Oatman v. Bond*, 15 Wis. 20.

No person can be deprived of his right to maintain an action merely because he participated in the rebellion against the government. *Rison v. Farr*, 24 Ark. 161; *McFarland v. Butler*, 8 Minn. 116; *Jackson v. Butler*, id. 117; see *Drehman v. Stifle*, 8 Wall. (U. S.) 599.

Valid contracts entered into while a statute is in force will remain valid notwithstanding the repeal of such statute. *Tuolumne Redemption Co. v. Sedgwick*, 15 Cal. 515; *McCauley v. Brooks*, 16 id. 11; *Commonwealth v. New Bedford Bridge*, 2 Gray, 339; *State v. Phalen*, 3 Harr. 441; *State v. Hawthorn*, 9 Mo. 389.

A statute which shortens in time for the redemption of land from a mortgage, after a foreclosure sale, is not void. *Butler v. Palmer*, 1 Hill, 324; *Robinson v. Hous*, 13 Wis. 346; *Smith v. Packard*, 12 id. 371; *State v. Commissioners of Schools and University Lands*, 4 id. 414. A statute exempting parties from prosecution for libel in publishing legislative debates, does not apply to libels published before the statute was enacted. *Sanford v. Bennett*, 24 N. Y. (10 Smith) 24.

But a right to penalties given by statute may be taken away by a repeal of the statute. *Hoppock v. Stone*, 49 Barb. 524.

Although a verbal promise to revive a debt may be valid at the time of making the contract, a statute subsequently enacted which requires a written promise, is constitutional and valid. *Joy v. Thompson*, 1 Doug. (Mich.) 373; *Kingley v. Cousins*, 47 Me. 91; see, also, *McLaren v. McMartin*, 36 N. Y. (9 Tiff.) 88; 33 How. 449; 3 Abb. N. S. 845; 1 Trans. App. 226. See post —. Note 80.

ated by their wants and their fears; yet it is the sense of their weakness and imperfection which keeps mankind together, which demonstrates the necessity of this union, and which therefore is the solid and natural foundation, as well as the cement of civil society. And this is what we mean by the phrase "original contract of society(*m*);" which, though perhaps in no instance has it ever been formally expressed at the first institution of a state, yet in nature and reason must always be understood and implied, in the very act of associating [*42] together: namely, that the whole should protect all its parts, *and that every part should pay obedience to the will of the whole; or, in other words, that the community should guard the rights of each individual member, and that (in return for this protection) each individual should submit to the laws of the community; without which submission of all it were impossible that protection could be certainly extended to any.

For when civil society is once formed, government at the same time results of course, as necessary to preserve and to keep that society in order. Unless Origin and object of government. some superior be constituted, whose commands and decisions all its members are bound to obey, they would still remain as in a state of nature, without any judge upon earth to define their several rights, and redress their several wrongs. But, as all the members which compose this society were naturally equal, it may be asked, in whose hands are the reins of government to be intrusted? To this the general answer is easy; but the application of it to particular cases has occasioned many of those mischiefs, which are apt to proceed from misguided political zeal. In general, all mankind will agree that government should be reposed in such persons, in whom those qualities are most likely to be found, the perfection of which is among the attributes of Him who is emphatically styled the Supreme Being; the three grand requisites, of wisdom, of goodness, and of power: wisdom to discern the real interest of the community; goodness to endeavour always to pursue that real interest; and strength, or power, to carry such knowledge and intention into action. These are the natural foundations of sovereignty, and these are the requisites which ought to be found in every well-constituted frame of government.

How the several forms of government we now see in the world at first actually began, is matter of great uncertainty, and has occasioned infinite disputes. However they began, or by what right soever they subsist, there is and must be [*43] in all of them a supreme, irresistible, *absolute, uncontrolled authority, in which the *jura summa imperii*, or the rights of sovereignty, reside. And this authority is placed in those hands, wherein (according to the opinion of the founders of such respective states, either expressly given, or collected from their tacit approbation,) the qualities requisite for supremacy, wisdom, goodness, and power, are the most likely to be found.

The political writers of antiquity will not allow more than three regular forms of government: the first, when the sovereign power is lodged in an Three forms of government. aggregate assembly, consisting of all the free members of a community, which is called a democracy; the second, when it is lodged in a council, composed of select members, and then it is styled an aristocracy; the last, when it is intrusted in the hands of a single person, and then

(*m*) See further as to the meaning of this phrase, *post*, p. 46.

it takes the name of a monarchy. All other species of government, they say, are either corruptions of, or reducible to, these three.

By the sovereign power, as was before observed, we may understand to be meant the power of making laws; for wherever that power resides, all others must conform to, and be directed by it, whatever appearance the outward form and administration of the government may put on. For it is at any time in the option of the legislature to alter that form and administration by a new edict or rule, and to put the execution of the laws into whatever hands it pleases: by constituting one, or a few, or many executive magistrates: and all the other powers of the state must obey the legislative power in the discharge of their several functions, or else the constitution is at an end. (10)

In a democracy, where the right of making laws resides in the people at large, public virtue, or goodness of intention, is more likely to be found, than ^{Advantages and disadvantages of each.} either of the other qualities of government. Popular assemblies are frequently foolish in their contrivance, and weak in their execution; but generally mean to do the thing that is right and just, and have always a degree of patriotism or public spirit. In aristocracies there is more wisdom to be *found than in the other frames of government; being composed, or intended to be composed, of the most experienced citizens: [*44] but there is less honesty than in a republic, and less strength than in a monarchy. A monarchy is, indeed, the most powerful of any; for by the entire conjunction of the legislative and executive powers, all the sinews of government are knit together, and united in the hand of the prince; but then there is imminent danger of his employing that strength for improvident or oppressive purposes.

Thus these three species of government have their several perfections and imperfections. Democracies are usually the best calculated to direct the end of the law; aristocracies to invent the means by which that end shall be obtained; and monarchies to carry those means into execution. And the ancients, as was observed, had in general no idea of any other permanent form of government than these three: for though Cicero (n) declares himself of opinion, *esse optime constitutam rempublicam, quæ ex tribus generibus illis, regali, optimo, et populari, sit modicè confusa*; yet Tacitus treats this notion of a mixed government, formed out of them all, and partaking of the advantages of each, as a visionary whim, and one which, effected, could never be lasting or secure (o).

But, happily for us of this island, the British constitution has long remained,

(n) De Rep. 1. 1, c. 29 and c. 45.

et constituta reipublica forma laudari

(o) *Cunctas nationes et urbes, populus, aut principes, aut singuli regunt: delectu ex his diuturnus esse potest.* Ann. 1. 4, c. 33.

(10) The unlimited power which the English people concede to their parliament, has no place in our institutions. In this country the people are regarded as the true and only source of legislative power. This power is exercised by representatives, but they are not at liberty to pass such laws as they please, regardless of constitutional restrictions. With us, a written constitution is the supreme law of the land, and neither legislatures nor courts have a right to disregard the commands and directions therein contained. Every act of the legislature which violates the constitution is entirely void, and it is the duty of the courts so to declare it, and to refuse to give effect to its provisions. See *Marbury v. Madison*, 1 Cranch, 177. See post —. Note 65.

and I trust will long continue, a standing exception to the truth of this observation. For, as with us the executive power of the laws is lodged in a single person, they have all the advantages of strength and dispatch, that are to be found in the most absolute monarchy: and as the legislature of the kingdom is intrusted to three distinct powers, entirely independent of *each other; first, the king; secondly, the lords, spiritual and temporal, which is an aristocratical assembly of persons selected for their piety and learning, their birth, their wisdom, their valour, or their property; and thirdly, the house of commons, freely chosen by the people from among themselves, which makes it a kind of democracy; as this aggregate body, actuated by different springs, and attentive to different interests, composes the British parliament, and has the supreme disposal of everything; there can no inconvenience be attempted by either of the three branches which will not be withstood by one of the other two; each branch being armed with a negative power, sufficient to repel any innovation which it shall think inexpedient or dangerous.

Here then is lodged the sovereignty of the British constitution; and lodged as beneficially as is possible for society. For in no other shape could we be so certain of finding the three great qualities of government so well and so happily united. If the supreme power were lodged in any one of the three branches separately, we should be exposed to the inconveniences of either absolute monarchy, aristocracy, or democracy; and so want two of the three principal ingredients of good polity,—virtue, wisdom, and power. If it were lodged in any two of the branches; for instance, in the king and house of lords, our laws might be providently made, and well executed, but they might not have always the good of the people in view: if lodged in the king and commons, we should want that circumspection and mediatory caution, which the wisdom of the peers is to afford: if the supreme rights of legislature were lodged in the two houses only, and the king had no negative upon their proceedings, they might be tempted to encroach upon the royal prerogative, or perhaps to abolish the kingly office, and thereby weaken (if not totally destroy) the strength of the executive power. But the constitutional government of this island is so admirably tempered and compounded, that nothing can [*46] *endanger or hurt it, but destroying the equilibrium of power between one branch of the legislature and the rest. For if ever it should happen that the independence of any one of the three should be lost, or that it should become subservient to the views of either of the other two, there would soon be an end of our constitution. The legislature would be changed from that which (upon the supposition of an original contract, either actual or implied) is presumed to have been originally set up by the general consent and fundamental act of the society: and such a change, however effected, is according to Mr. Locke (p) (who perhaps carries his theory too far) at once an entire dissolution of the bands of government; and the people are thereby reduced to a state of anarchy, with liberty to constitute to themselves a new legislative power (q).

(p) On government, part 2, s. 212.

(q) During the proceedings on the impeachment of Dr. Sacheverell (15 St. Tr. 1) we find Mr. Lechmere thus speaking to the Lords (Id. 61): "The nature of our constitution is that of a limited monarchy, wherein

the supreme power is communicated and divided between Queen, Lords, and Commons, though the executive power and administration be wholly in the Crown. The terms of such a constitution do not only suppose, but express, an original contract

Having thus cursorily considered the three usual species of government, and our own singular constitution, selected and compounded from them all, I proceed to observe, that, as the power of making laws constitutes the supreme authority, so wherever the supreme authority in any state resides, it is the right of that authority to make laws; that is, in the words of our definition, to prescribe the *rule of civil action. And this [*47] may be discovered from the very end and institution of civil states. For a state is a collective body, composed of a multitude of individuals, united for their safety and convenience, and intending to act together as one man. If it therefore is to act as one man, it ought to act by one uniform will. But, inasmuch as political communities are made up of many natural persons, each of whom has his particular will and inclination, these several wills cannot by any natural union be joined together, or tempered and disposed into a lasting harmony, so as to constitute and produce that one uniform will of the whole. It can therefore be no otherwise produced than by a political union; by the consent of all persons to submit their own private wills to the will of one man, or of one or more assemblies of men, to whom the supreme authority is intrusted: and this will of that one man, or assemblage of men, is in different states, according to their different constitutions, understood to be "law."

Thus far as to the right of the supreme power to make laws; but further, it is its duty likewise. (11) For, since the respective members are bound to conform themselves to the will of the State, it is expedient that they receive directions from the state declaratory of its will. But, as it is impossible, in so great a multitude, to give injunctions to every particular man, relative to each particular action, it is therefore incumbent on the state to establish general rules, for the perpetual information and direction of all persons in essential

between the Crown and the people, by which that supreme power was (by mutual consent, and not by accident) limited and lodged in more hands than one; and the uniform preservation of such a constitution for so many ages without any fundamental change demonstrates the continuance of the same contract. The consequences of such a frame of

government are obvious: that the laws are the rule to both, the common measure of the power of the Crown and of the obedience of the subject; and if the executive part endeavours the subversion and total destruction of the government, the original contract is thereby broken and the right of allegiance ceases."

(11) When the people, through the constitution, delegated the law-making power to the legislature, it conferred an authority and imposed a duty, which cannot be constitutionally exercised by any other body of men, nor by a vote of the whole people, even though referred to them by the legislature to determine by a popular vote. *Barto v. Himrod*, 6 N. Y. (4 Seld.) 483; *Rice v. Foster*, 4 Harr. 479; *Santo v. State*, 2 Iowa, 165; *People v. Collins*, 3 Mich. 843; *Railroad Co. v. Commissioners of Clinton Co.*, 1 Ohio St. 77; *Parker v. Commonwealth*, 6 Penn. St. 507; *Maize v. State*, 4 Ind. 342; *State v. Parker*, 26 Vt. 357, 362; *State v. Swisher*, 17 Tex. 441; *State v. Copeland*, 3 R. I. 33; *State v. Wilcox*, 45 Mo. 458. A statute, however, may be conditional, as to its taking effect upon the happening of some future specified event. *Starin v. Town of Genoa*, 23 N. Y. (9 Smith) 439, 447; *Peck v. Weddell*, 17 Ohio St. 271; *State v. Parker*, 26 Vt. 357; *State v. Kirkley*, 29 Md. 85; *Bull v. Read*, 13 Grat. 78; *Brig Aurora v. United States*, 7 Cranch, 382. When the law is complete, and the proper formalities of its enactment have been observed, it may be left to a vote to determine whether it shall be accepted. *Ib.*

Such references to the people of a particular locality are frequent, and sustained by the courts. *Clarke v. City of Rochester*, 28 N. Y. (1 Tiff.) 605, 634, 635; *Bank of Rome v. Village of Rome*, 18 N. Y. (4 Smith) 38; *Bank of Chenango v. Brown*, 26 N. Y. (12 Smith) 467; *Bull v. Read*, 13 Grat. 78; *Morford v. Unger*, 8 Iowa 82; *City of Patterson v. Society, etc.*, 4 Zab. 385; *Gorham v. Springfield*, 21 Me. 58; *Commonwealth v. Judges of Quarter Sessions*, 8

points, whether of positive or negative duty. And this, in order that every man may know what to look upon as his own, what as another's; what absolute and what relative duties are required at his hands; what is to be esteemed honest, dishonest, or indifferent; what degree every man retains of his natural liberty; what he has given up as the price of the benefits of society; and after what manner each person is to moderate the use and exercise of those rights [*48] which the *state assigns him, in order to promote and secure the public tranquillity.

From what has been advanced, the truth of the former branch of our definition is (I trust) sufficiently evident; that "municipal law is a rule of civil conduct prescribed by the supreme power in a state." I proceed now On the second branch of the definition of municipal law. to the latter branch of it; that it is a rule so prescribed, "commanding what is right, prohibiting what is wrong, and regulating matters in themselves indifferent."

Now, in order to do this completely, it is first of all necessary that the boundaries of right and wrong be established and ascertained by law. And when this is once done, it will follow of course that it is likewise the business of the law, considered as a rule of civil conduct, to enforce the rights, and to restrain or redress the wrongs, which have been ascertained. It remains, therefore, only to consider in what manner the law is said to ascertain the boundaries of right and wrong; and the methods which it takes to command the one and to prohibit the other.

For this purpose every law may be said to consist of several parts: one, declaratory; whereby the rights to be observed, and the wrongs to be eschewed, Every law should be declaratory, directory, remedial, and vindicatory. are clearly defined and laid down: another, directory; whereby the subject is instructed and enjoined to observe those rights, and to abstain from the commission of those wrongs: a third, remedial; whereby a method is pointed out to recover a man's private rights, or redress his private wrongs: to which may be added a fourth, usually termed the sanction or vindicatory branch of the law; whereby is signified what evil or penalty shall be incurred by such as commit any public wrong, and transgress or neglect their duty.

With regard to the first of these, the declaratory part of the municipal law, this mainly depends upon the wisdom and will of the legislator. Those rights Declaratory. even which God and nature have established, and which are

Penn. St. 391; *State v. Wilcox*, 45 Mo. 458; *Hobart v. Supervisors, etc.*, 17 Cal. 28; *Steward v. Jefferson*, 3 Harr. 335; *Burgess v. Pue*, 2 Gill. 11.

The legislature frequently submits questions to the inhabitants of localities as to the division of towns or counties, the fixing or change of the county seat, the division of school districts, as to the creation of debts for a specified object, and the like cases, and the courts sustain the proceedings. *People v. Reynolds*, 5 Gilm. 1; *Commonwealth v. Judges, etc.*, 8 Penn. St. 391; *Call v. Chadbourne*, 46 Me. 206; *Commonwealth v. Painter*, 10 Penn. St. 214; *Goddin v. Crump*, 8 Leigh, 120; *Bridgeport v. Housatonic R. R. Co.*, 15 Conn. 475; *Starin v. Genoa*, 23 N. Y. (9 Smith) 439; *Prettyman v. Supervisors, etc.*, 19 Ill. 406; *Bushnell v. Beloit*, 10 Wis. 195; *Stein v. Mobile*, 24 Ala. 591; *Hobart v. Supervisors*, 17 Cal. 23; *Clapp v. Cedar Co.*, 5 Iowa, 15; *Taylor v. Newbern*, 2 Jones' Eq. 141; *Nichol v. Mayor of Nashville*, 9 Humph. 252; *State v. Commissioners of Hancock*, 12 Ohio St. 596; *Powers v. Dougherty Co.*, 23 Ga. 65; *San Antonio v. Jones*, 28 Tex. 19; *Slack v. R. R. Co.*, 18 B. Monr. 1; *City of Aurora v. West*, 9 Ind. 74; *Cotton v. Commissioners of Leon*, 6 Fla. 610; *State v. Charleston*, 10 Rich. 491; *Thompson v. Lee Co.*, 3 Wall. 327; *Gibbons v. Mobile & G. M. R. R. Co.*, 36 Ala. 810; *State v. Linn Co. Court*, 44 Mo. 504.

*therefore called natural rights, such as life and liberty, may need the aid of human laws for their protection; and will receive additional [*49] strength when declared by the municipal law to be inviolable. On the contrary, no human legislature would be justified in abridging or destroying those rights, unless the owner should himself commit some act amounting to a forfeiture of them. So divine or natural duties (such, for instance, as the worship of God, the maintenance of children, and the like) may be enforced by and may receive sanction from the law of the land, being also declared to be duties by it. The case is the same as to criminal acts forbidden by the superior laws, and sometimes styled *mala in se*, such as murder, theft, and perjury; which contract some additional degree of turpitude from being declared unlawful by the inferior legislature. Albeit the legislature in all these cases acts only in subordination to the great Lawgiver, transcribing and publishing His precepts. Thus the declaratory part of the municipal law may be said to have some certain force and operation with regard even to such actions as are naturally and intrinsically right or wrong.

With regard to things in themselves indifferent, these are often regulated by statute, and further may become either right or wrong, just or unjust, duties or offences, according as the municipal legislator sees fit, for promoting the welfare of society, and more effectually carrying on the purposes of civil life. Thus our own common law has declared, that the goods of the wife do instantly upon marriage become the property and right of the husband; (12) and our statute law has declared smuggling to be a public offence: yet that right and this offence have no foundation in nature; they are merely created by the law, for the purposes of civil society. And sometimes, where the thing itself has its rise from the law of nature, the particular circumstances and mode of doing it become right or wrong, as the laws of the land shall direct. For instance, obedience to superiors is the doctrine of revealed as well *as of natural [*50] religion: but who those superiors shall be, and in what circumstances, or to what degrees, they shall be obeyed, it is the province of human laws to determine. And so, as to injuries or crimes, it must be left to our own legislature to decide, in what cases the seizing another's cattle shall amount to a trespass or a theft; and where it shall be a justifiable action, as when a landlord takes them by way of distress for rent.

Thus much for the declaratory part of the municipal law: and the directory stands much upon the same footing; for this virtually includes the former, the Directory. declaration being usually collected from the direction. The law which says, "thou shalt not steal," implies a declaration that stealing is a crime. And we have seen (r) that, in things naturally indifferent, the very essence of right and wrong depends upon the direction of the laws to do or to omit them.

(r) *Ante*, p. 85.

(12) In the United States this rule of the common law has been abrogated or modified in many of the states, and the real or personal property which the wife owned at marriage, or such as she subsequently acquires by gift, grant, bequest, devise, or otherwise, belongs to her in the same manner as though she were unmarried. As the rule is not the same in all of the states, the student must examine the law of the state in which he resides, if he desires specific information. See a valuable note to 1 Pars. on Cont. 370 to 380. See, also, Bishop on the Law of Married Women.

The remedial part of a law is so necessary, that laws must be very vague and imperfect without it. For in vain would rights be declared, in vain directed Remedial. to be observed, if there were no method of recovering and asserting those rights, when wrongfully withheld or invaded. This is what we mean, when we speak of the protection of the law. When, for instance, the declaratory part of the law has said, "that the field or inheritance, which belonged to Titius's father, is vested by his death in Titius:" and the directory part has "forbidden any one to enter on another's property, without the leave of the owner:" if Gaius, after this, will presume to take possession of the land, the remedial part of the law will then interpose its office; will make Gaius restore the possession to Titius, and also pay him damages for the invasion.

With regard to the sanction of laws, or the evil that may attend the breach [*51] of statutory requirements, or of *public duties; it is observable that human legislators have for the most part chosen to make the sanction Vindictory. of their laws rather vindictory than remuneratory, *i. e.*, to consist rather in punishments, than in actual particular rewards. Because, in the first place, the quiet enjoyment and protection of our civil rights and liberties, which are the sure and general consequence of obedience to the municipal law, are in themselves the best and most valuable of rewards. Because also, were the exercise of every virtue to be enforced by the proposal of particular rewards, it would be impossible for any state to furnish stock enough for so profuse a bounty. And further, because the dread of evil is a much more forcible principle of human action than the prospect of good(s). For which reasons, though a prudent bestowing of rewards is sometimes of exquisite use, yet we find that those civil laws, which enforce and enjoin our duty, seldom, if ever, propose any privilege or gift to such as obey the law; but constantly come armed with a penalty denounced against transgressors, either expressly defining the nature and quantity of their punishment, or else leaving it to the discretion of the judges, and of those intrusted with the care of putting the laws in execution.

Where also a law regulates a matter in itself indifferent, some specific ill consequence is appointed to follow the breach or non-observance of its requirements.

Of all the parts of a law the most effectual is the vindictory. For it is but lost labour to say, "do this, or avoid that," unless we also declare, "this shall be the consequence of your non-compliance." We must therefore observe, that the main strength and force of a law consists in the penalty annexed to it. Herein is to be found the principal obligation of human laws.

Legislators and their laws are said to compel and oblige; not that by any natural violence they so constrain *a man, as to render it impossible for [*52] him to act otherwise than as they direct, which is the strict sense of obligation: but because, by declaring and exhibiting a penalty against offenders, they bring it to pass that no man can easily choose to transgress the law; since, by reason of the impending correction, compliance is in a high degree preferable to disobedience. And, even where rewards are proposed as well as punishments threatened, the obligation of the law seems chiefly to consist in the penalty; for rewards, in their nature, can only persuade and allure; nothing is compulsory but punishment.

Human laws are, with the reservation already noticed (*i*), binding upon men's consciences. But if that were the only or most forcible obligation, the good only would regard the laws, the bad would set them at defiance. To perform natural duties, and to abstain from committing such offences as are *mala in se*, we are bound in conscience, because we are bound by superior laws, promulgated before our municipal laws were in being, to perform the one, and to abstain from the other. To those laws also which enjoin only positive duties, and forbid only such things as are not *mala in se*, but *mala prohibita* merely, without any intermixture of moral guilt, annexing a penalty to non-compliance, conscience is concerned, in yielding obedience and submission. (13)

So in regard to rights — when the law has determined a particular field to belong to Titius, it is a matter of conscience no longer to withhold or to invade it. When a contract or agreement has been entered into, it is matter of conscience faithfully and fully to perform it.

I have now gone through the definition laid down of a municipal law: and have shown that it is "a rule — of civil conduct — prescribed — by the supreme power in a state — commanding what is right, prohibiting what is wrong, and regulating matters in themselves indifferent;" *in the explication of which I have endeavoured to interweave a few useful principles concerning the nature of civil government, and the obligation of human laws. The mode of interpreting laws when enacted, will be considered at the end of the ensuing section.

(*i*) *Ante*, p. 85.

(13) Although an act may be innocent in itself, yet if a constitutional statute prohibits the act, and gives a penalty for a violation of the law, it will be legally as obligatory as though the prohibited act were illegal in its nature. There is a wide difference in the view of a court of conscience, in reference to the two acts, but a court of law is bound to carry all constitutional statutes into effect, irrespective of any question of mere ethics.

Every act done, and every contract made, which is in violation of a statute is void, whether the prohibition be in express terms, or by clear and necessary implication. It is the intention to prohibit the doing of the act, or the making of such contract, that renders the act or contract illegal. *DeBegins v. Armistead*, 10 Bing. 117; *Langton v. Hughes*, 1 M. & S. 593; *Wetherell v. Jones*, 3 B. & Ad. 221; *Cope v. Rowlands*, 2 Mees. & Wels. 149, 157; *Bensley v. Bignold*, 5 B. & Ald. 395; *Bull v. Chapman*, 8 Exch. 444; *Taylor v. Crowland Gas, etc., Co.*, 10 id. 283, 296; *Harris v. Runnells*, 12 How. (U. S.) 83; *Griffith v. Wells*, 3 Denio, 226; *Turck v. Richmond*, 18 Barb. 533; *Bracket v. Hoyt*, 9 Fost. 264; *Elkins v. Parkhurst*, 17 Vt. 105; *Territt v. Bartlett*, 21 id. 184; *Coombs v. Emery*, 14 Me. 404; *Hale v. Henderson*, 4 Humph. 199; *Wheeler v. Russell*, 17 Mass. 258; *Eberman v. Reitzel*, 1 W. & S. 181.

Where the sole object of the statute is to secure a revenue, and not to prohibit any act or contract for the protection of the public, there a neglect to comply with the statute will not render the act or the contract void, as in the case of an omission to procure a license to carry on a business. *Smith v. Mauhood*, 14 Mees. & Wels. 453, 463; *Brown v. Duncan*, 10 Barn. & Cress. 93; *Wetherell v. Jones*, 3 B. & Ad. 221; *Bailey v. Harris*, 12 Q. B. 905; *Foster v. Oxford, etc., R. R. Co.*, 13 C. B. 200; *Johnson v. Hudson*, 11 East, 180; *Griffith v. Wells*, 3 Denio, 226; *Larned v. Andrews*, 106 Mass. 435; *Aiken v. Blaisdell*, 41 Vt. 655.

Where the object of the statute is to protect the public from the evils of a general traffic in an article such as intoxicating liquors, and a penalty is imposed on those who sell without first obtaining a license, there any contract made in violation of the statute will be void. *Griffith v. Wells*, 3 Denio, 226; *Turck v. Richmond*, 18 Barb. 533; *Mabry's Executors v. Bullock*, 7 Dana, 837.

[*54]

*SECTION III.

THE LAWS OF ENGLAND.

THE municipal law of England, or the rule of civil conduct prescribed to the inhabitants of this kingdom, may be divided into two kinds: Division of the laws of England. I. The *lex non scripta*, the unwritten or common law(a); and II. The *lex scripta*, the written or statute law.

I. The *lex non scripta*, or unwritten law, includes: 1. General customs; I. *leges non scriptae*. 2. Particular or local customs, *i. e.*, customs prevailing in certain parts of the kingdom; and 3. Such portions of the *lex mercatoria* or law merchant as are not prescribed and regulated by statute.

In this part of the section the above-mentioned subdivisions of our unwritten law will be considered, and it will also be convenient to speak of some particular laws which have been partially adopted by our own, or which are by custom observed in certain courts and jurisdictions.

By *leges non scriptae*, I would not be understood to mean laws merely oral, or communicated from former ages to the present solely by word of mouth. It is true indeed that, in the profound ignorance of letters which formerly overspread the whole western world, all laws were entirely traditional, for this plain reason, [*55] because the nations amongst which they prevailed had but little *idea of writing. Thus the British as well as the Gallic Druids committed their laws as well as learning to memory(b); and it is said of the primitive Saxons here, as well as of their brethren on the continent, that *leges solâ memoriâ et usu retinebant*(c). But with us, at present, the monuments and evidences of our legal customs are contained in the records of the courts of justice, in books of reports and judicial decisions, and in the treatises of learned sages of the profession, preserved and handed down to us from times of high antiquity. However, I style these parts of our law *leges non scriptae*, because their original institution and authority are not set down in writing, as acts of Parliament are, but they receive their binding power, and the force of laws, by long and immemorial usage, and by their universal reception throughout the kingdom.

Our ancient lawyers, particularly Fortescue(d), insist that these customs are as old as the primitive Britons, and continued down, through the several mutations of government and inhabitants, to the present time, unchanged and unadulterated. This may possibly be the case as to some few; but in general, as Mr. Selden observes(e), this assertion must be understood with many grains of allowance, and only as signifying that there never was any formal exchange of one system of laws for another: though doubtless, by the intermixture of adventitious nations, the Romans, the Picts, the Saxons, the Danes, and the Normans, customs peculiar to them must have been insensibly introduced and incorporated with those which had been before established here; thereby in all probability improving the texture and wisdom of the whole by the accumulated wisdom of divers particular countries. Our laws, says Lord Bacon(f), are

(a) The term "common law" is sometimes used to signify the law administered in courts of common law, *i. e.*, as distinguished from equity, ecclesiastical, or martial law; and is sometimes used to signify the unwritten as distinguished from the statute law.

(b) Cæs. de B. G. lib. 6, c. 18.

(c) Spelm. Gl. 862.

(d) C. 17.

(e) Notes *ad idem*.

(f) See his Proposals for a Digest.

mixed as our language: and as our *language is so much the richer, the laws are the more complete. [*56]

"We ought not perhaps to suppose that among our Saxon forefathers, any more than among ourselves, there ever existed a complete *corpus juris Anglici(g)*," but should rather imagine that theirs, like our own, was a customary or common law, comprising records of decisions to serve as precedents for the future, or enactments passed in the Witenagemôts for the repeal, confirmation, amendment, or completion of the existing law(*h*).

Portions of the laws of Alfred, framed in part upon the Mercian laws of Offa(*i*), portions likewise of the laws of Edward the Confessor, and of other Anglo-Saxon kings, in form more or less authentic, yet remain to us; and in those ascribed to King Henry I., though probably compiled by a private person, the laws and legal usages of England, as they existed under the Confessor, seem to have been collected.

The laws of the Confessor, if complete and genuine, would have had for us a peculiar interest; they were repeatedly demanded by our ancestors, especially under Henry I., King Stephen, and Henry II., and may in some sense be looked on as the origin of our common or customary law. But though the fragments which have come down to us from Saxon and Anglo-Saxon, or even from Norman times, by no means justify the hypothesis that a legal code or assemblage of customs at all approaching to completeness then existed here, we may at all events affirm that from the date of Magna Carta a body of laws, known as the "Laws of England," has existed, drawn from many distinct sources, and largely permeated by feudal doctrines, yet quite independent of, and owning no subservience to, any other code or system of jurisprudence whatsoever.

Immeasurably the most perfect body of law from which *our own has borrowed is the Roman(*k*); but to the Saxons, the Danes, and Normans, [*57] we have yet more deeply been indebted, for by them has our national genius been bequeathed to us—by them have our liberties been assured. Vain certainly might be the effort to trace each component element in our laws and constitution to its proper source, to refer to its true origin each rule or maxim, which through revolving ages has been sanctioned. This may, however, partially be done, and as regards the parentage of leading principles, speculations may sometimes be hazarded, with a well-grounded conviction that they are just. We may believe that the great principle of personal liberty, the inherent love of freedom which has vindicated it, came to us, not from our Roman conquerors, but rather from those ruder tribes which subsequently established themselves amongst us. It is to our Anglo-Saxon ancestors, and, more remotely, to the races whence they sprung, that we are indebted for our fundamental liberties.

But whatever may have been the foundation of our common law, many of the rules and customs composing it are of higher antiquity than memory or history can reach: nothing being more difficult than to ascertain the precise beginning and first spring of an ancient and long-established custom. Whence it is that in our law the goodness of a custom depends upon its having been used time out of mind; or in the solemnity of our legal phrase, time whereof the memory of man runneth not to the contrary(*l*). This it is which gives it

(g) Ancient Laws and Inst. of England, Pref.

(h) *Ibid.*

(i) *Ibid.*

(k) *Post*, p. 80.

(l) *Post*, p. 68.

its weight and authority: and of this nature are the rules and customs which in part constitute the common law, or *lex non scripta*, of this kingdom.(14)

Customs are either: 1. General, which prevails throughout the whole kingdom; or, 2. Particular, which for the most part affect only the inhabitants of particular districts.

I. As to general customs, by these, wherever applicable, *proceedings [*58] and determinations in the kings ordinary courts of justice are guided

and directed; by these, for the most part, are settled—the course in which lands descend by inheritance; the manner of acquiring and transferring property; the solemnities and obligation of contracts; the rules of expounding wills, deeds, and acts of parliament; the respective remedies for civil injuries; the ingredients in some species of temporal offences; and an infinite number of minuter particulars, which diffuse themselves as extensively as the ordinary distribution of common justice requires. Thus, for example,—that there shall be four superior courts, the chancery (subdivided by statute into various tribunals), the king's bench, the common pleas, and the exchequer;—that the eldest son alone is heir to his ancestor;—that a deed is of no validity unless sealed and delivered;—that wills shall be construed more favourably, and deeds more strictly; that money lent upon bond is recoverable by action of debt;—that breaking the public peace is an offence, and punishable by fine and imprisonment;—all these are doctrines not originally prescribed by any existing statute or ordinance, but dependent upon immemorial usage, that is, upon common law, for their support.

Some have divided the common law into two principal grounds or founda-

(14) "The common law consists of those principles and maxims, usages and rules of action which observation and experience of the nature of man, the constitution of society and the affairs of life have commended to enlightened reason as best calculated for the government and security of persons and property. The principles are developed by judicial decisions, as necessities arise, from time to time, demanding the application of those principles to particular cases in the administration of justice. The authority of its rules does not depend upon positive legislative enactment, but upon the principles which they are designed to enforce, the nature of the subject to which they are to be applied, and their tendency to accomplish the ends of justice." GREENE, J., in *People v. Randolph*, 2 Park. 177; *Morgan v. King*, 30 Barb. 18; see 1 Wait's Pr. 1 to 4, § 1; id. 13, 14, §§ 9, 10.

The decisions of the English courts have been freely used in examining and deciding cases in the American courts. And whether regarded as binding authorities or not, they have frequently been of great service in establishing rules of law in this country.

In many of the States the English common law has been adopted by constitutional provision or legislative enactment, so far as it is adapted to our condition and system of government. To cite all the constitutional provisions or statutory enactments, or the decisions which adapt or recognize that common law, would be impracticable as well as useless.

As the principles of the common law in the different States are nearly the same in their general character, each State will intend that its common law and that of any of the other States is the same. *Abel v. Douglass*, 4 Denio, 305; *Throop v. Hatch*, 3 Abb. 23, 27, 28; *Seymour v. Sturgess*, 26 N. Y. (12 Smith) 134, 139; *Bradley v. Mutual Benefit Life Insurance Co.*, 3 Lans. 341, 344; *Waldron v. Ritchings*, 9 Abb. N. S. 359, 364; 3 Daly, 288, 292.

No such intentment is made as to statutes, and in the absence of proof that there is a statutory rule, it will be intended that the common law prevails. *Id.*; *Ellis v. Maxson*, 19 Mich. 186; S. C., 1 Am. Rep. 81.

Statutes of another State must be proved, like any other facts, by the party alleging their existence. *Cole v. Stone*, Hill & Denio, 360; *White v. Knapp*, 47 Barb. 549, 554; *Holmes v. Broughton*, 10 Wend. 75; *Lincoln v. Battelle*, 6 Wend. 475; *Monroe v. Douglass*, 5 N. Y. (1 Seld.) 447; *Uhler v. Semple*, 20 N. J. Eq. (5 C. E. Gr.) 288.

tions: 1. Established customs; such as the rule of primogeniture: and 2. Established rules and maxims; as, "the king can do no wrong," "no man is bound to accuse himself," and the like. But I take these to be one and the same thing. For the authority of such maxims rests entirely upon general reception and usage: and the only method of proving, that this or that maxim is a rule of the common law, is by showing that it has been always the custom to observe it.

But here a very natural and very material question arises: how are these customs or maxims to be known, and by whom is their validity to be determined? The answer is, by the judges in the several courts ^{must be settled by judicial decisions.} of justice. *They are the depositories of the laws; the [*59] living oracles, who must decide in all cases of doubt, and who are bound by oath to decide according to the law of the land. Their knowledge of that law is derived from experience and study; from the *viginti annorum lucubrationes*, which Fortescue(m) mentions; and from being long personally accustomed to judicial decisions of their predecessors. And indeed these judicial decisions are the principal and most authoritative evidence that can be given of the existence of such a custom as shall form a part of the common law. The ^{and preserved in our public records} judgment itself, and all the proceedings previous thereto, are registered and preserved under the name of "records," in public repositories(n); and to them frequent recourse is had, when any critical question arises in the determination of which former precedents may give light or assistance. Therefore, even so early as the Conquest, we find the *præteritorum memoria eventorum*, reckoned up as one of the chief qualifications of those who were held to be *legibus patriæ optime instituti(o)*. For it is an established rule to abide by former precedents, where the same points come again in litigation; as well to keep the scale of justice even and steady, and not liable to waver with every new judge's opinion; as also because the law in that case being solemnly declared and determined, what before was uncertain, and perhaps indifferent, is now become a permanent rule, which it is not in the breast of any subsequent judge to alter or vary from, according to his private sentiments; he being sworn to determine, not according to his own private judgment, but according to the known laws and customs of the land; not delegated to pronounce a new law, but to maintain and expound the old one. Yet this rule admits of exception, where the former determination is most evidently contrary to reason; much more if it be clearly contrary to the divine law. But even in such cases subsequent judges *do not pretend to make [*60] a new law, but to vindicate the old one from misrepresentation. For if it be found that the former decision is manifestly absurd or unjust, it is declared not that such a sentence was bad law, but that it was not law; that is, that it is not the established custom of the realm, as has been erroneously determined. And hence it is that our lawyers are with justice so copious in their encomiums on the reason of the common law; that they tell us, that the law is the perfection of reason, that it always intends to conform thereto, and that what is not reason is not law. Not that the particular reason of every rule in the law can at this distance of time be always precisely assigned; but it is sufficient that there be nothing in the rule flatly contradictory to reason, and then the law

(m) Cap. 8.

(n) See 1 & 2 Vic. c. 94, "for keeping safely the public records."

(o) Seld. Review of Tithes, c. 8.

will presume it to be well founded(*p*). And it has been an ancient observation, that whenever a standing rule of law, of which the reason perhaps could not be remembered or discerned, has been wantonly broken in upon by statutes or new resolutions, the wisdom of the rule has in the end appeared from the inconveniences that have followed the innovation.

The doctrine of the law then is this: that precedents and rules must in general be followed, unless flatly absurd or unjust: for though their reason be not obvious at first view, yet we owe such a deference to former judges as not to suppose that they acted wholly without consideration(*q*).⁽¹⁵⁾ To illustrate this doctrine by an example. It was determined, centuries ago, that any material alteration of a bond made in it even by a stranger, without the knowledge of the obligee, nullifies the instrument(*r*). Now this is a positive [*61] law, fixed and established by custom, which *custom is evidenced by judicial decisions; and therefore can never be departed from by any modern judge without a breach of his oath. And herein there is nothing repugnant to natural justice; though the reason of it may not be quite obvious to everybody. Nevertheless, it would not be in the power of a modern judge, on account of a supposed hardship upon the innocent obligee, to alter the rule which has been stated. And if any court were now to determine, that under the circumstances mentioned the bond was nevertheless valid, no subsequent judges would scruple to declare that such prior determination was unjust, was unreasonable, and therefore was not law. The law, indeed, and the opinion of the judge, are not always convertible terms, or one and the same thing; since sometimes the judge may mistake the law. As a general rule, however, the decisions of courts of justice are the evidence of what is common law: in the same manner as, in the civil law, what the emperor had once determined was to serve as a guide for the future(*s*).

(*p*) Herein agreeing with the civil law, "*Non omnium, quæ à majoribus constituta sunt, ratio reddi potest.*" "*Et ideo rationes eorum quæ constituuntur, inquiri non oportet: alioquin multa ex his, quæ certa sunt, subvertuntur.*" Dig. 1, 8, 20, 21.

(*q*) Generally as to the authority of de-

cided cases, see Ram's Science of Legal Judgment, chap. 3.

(*r*) *Pigot's case*, 11 Rep. 26. b.: *Whelpdale's case*, 5 Id. 119 a.

(*s*) *Si imperialis majestas causam cognitionaliter examinaverit, et partibus, cominus constitutis, sententiam dixerit, omnes omnino*

(15) When the courts have once settled a rule or principle of law, every person is justified in relying upon it as a rule which not only may, but must, be observed in the transaction of business, and in settling the rights of property and of persons.

It is only by enforcing this doctrine that there can be any certainty or safety in the dealings between men, or in the transfer or transmission of property.

And it is now a settled rule that the courts will follow and enforce a rule which has been deliberately settled, and especially if it has long been acted upon. *Oakley v. Aspinwall*, 13 N. Y. (3 Kern.) 500; *Emerson v. Atwater*, 7 Mich. 12, 23; *Reichert v. McClure*, 23 Ill. 516; *Bennett v. Bennett*, 84 Ala. 53, 56; *Fisher v. Horicon Iron Co.*, 10 Wis. 351; *Nelson v. Allen*, 1 Yerg. 376; *Boon v. Bowers*, 30 Miss. 246. See Ram on Legal Judgments, 235 to 242, Townsend's ed. Where the judgment is pronounced by an equally divided court, or because a statute requires an affirmance if a specified number of judges do not agree, such judgment is as conclusive upon the litigant parties as any other judgment; but it is of no force as a precedent. *Morse v. Gould*, 11 N. Y. (1 Kern.) 281, 285; *Bridge v. Johnson*, 5 Wend. 842; *People v. Mayor, etc., of N. Y.*, 25 id. 252; *Etting v. Bank of U. S.*, 11 Wheat. 59, 78; *Durant v. Essex Co.*, 7 Wall. 107, 113.

But, however well settled this general rule may be, it is a familiar fact that the courts occasionally overrule their previous decisions, and the number of overruled cases is quite large.

Not only are precedents to be followed, but in resolving a new point the argument from analogy may be resorted to. Thus Lord Bacon, speaking of cases omitted in law, says (*t*), that "the narrow compass of man's wisdom cannot comprehend all cases which time hath found out," and therefore cases omitted and new do often present themselves, but every new case does not require a new law; if so, the legislative power would have to be continually exercised. But though it differs from former cases in circumstances, yet it may fall under a general rule, or be proceeded upon by parity of reasoning, *ubi est eadem ratio—ibi idem est jus* (*u*). Yet, although the argument from *analogy may be made use of, apparent resemblances should be closely [*62] scanned, for sometimes before a searching scrutiny they disappear (*x*).

But how is a new case to be decided, when there is neither authority to guide, nor analogy which can be relied upon? (16) This must be done by calling in aid common sense, that discretion (*y*), which a mind imbued with

judices, qui sub nostro imperio sunt, sciunt hanc esse legem, non solum illi causæ pro quâ producta est, sed et in omnibus similibus. C. 1, 14, 12.

(*t*) Advancement of Learning.

(*u*) Cited per Sir R. Atkins, 6 St. Tr. 1087-8.

(*x*) An instance exemplifying what is said *supra* occurs in *Entick v. Carrington*, 19 St. Tr. 1029, where it was held that a warrant issued by a Secretary of State to search for and seize the papers of one accused of having published a seditious libel, is illegal. It is well known that a justice of the peace may grant a warrant to search for stolen goods, upon information that a theft has been committed, and that the goods are concealed in a certain place; and when such a warrant is granted, the constable or officer executing it may break open doors and boxes to search for the goods stolen. In *Entick v. Carrington* it was argued—and apparently with much

confidence—for the defendants, that a Secretary of State must possess at least an equal degree of power, for protection of the commonwealth, to issue his warrant to search for and seize seditious papers, as a magistrate possesses in regard to stolen goods. And Lord Camden admitted that the former case did bear a resemblance to the latter, though he proceeded to distinguish between them by reasoning which seems to be incontrovertible. Accordingly the argument from analogy, or what Lord Coke calls the *argumentum à simili*, and which he says *valet in lege* (Co. Litt. 191), should be used with due caution.

(*y*) "Discretion," said Lord Mansfield, in *Wilkes's case*, 4 Burr. 2539, "when applied to a court of law, means sound discretion guided by law. It must be governed by rule, not by humour. It must not be arbitrary, vague, and fanciful, but legal and regular."

(16) The expansive character of the common law adapts it to the circumstances of the particular case, and when new practices spring up, new combinations of facts arise, and cases are presented for which there is no precedent in judicial decision, the courts must be governed by the general principles, applicable to cases most nearly analogous, but modified and adapted to the new circumstances, by considerations of fitness and propriety, of reason and justice, which grow out of those circumstances.

And when a new practice or a new course of business arises, the rights and duties of parties are not without a law to govern them; for the general considerations of reason, justice, and policy, which underlie the particular rules of the common law, will still apply, when modified and adapted, by the same considerations, to the new circumstances. If these are such as to give rise to controversy and litigation, they soon, like previous cases, come to be settled by judicial exposition, and the principles thus settled soon come to have the effect of precise and practical rules. *Norway Plains Co. v. Boston and Maine Railroad*, 1 Gray, 263, 267, 268; *Bell v. The State*, 1 Swan. (Tenn.) 42. See, also, 1 Wait's Prac. 1 to 4, 13, 15.

With the advancing state of society, new questions are constantly arising for decision, and the courts adapt the practice and course of proceedings to the existing condition of things, instead of adhering to forms and rules which were established under different circumstances; and they do not decline the enforcement of rights or the administration of justice, because there is no remedy according to the old forms or rules. *Wallworth v. Holt*, 4 Mylne & Craig, 685. The principle upon which the courts proceed is, that the common law does not mould the habits, the manners, and the transactions of mankind, to inflexible rules, but adapts itself to the business and the circumstances of the times, and keeps pace with the improvements of the age. *Lyle v. Richards*, 9 Serg. & Rawle, 822, 851.

legal principles brings to bear in determining what is just: by calling in aid also considerations of expediency and public policy; and the argument *ab inconvenienti*, which Lord Coke, in commenting on Littleton (z), commends. For solving a difficulty, such as supposed, three practical suggestions may be offered. 1st. A case may be altogether new, or *prima impressionis*, and yet may disclose a right vested in the complainant to avail himself of a remedy by action, by suit, or perhaps by motion to the Court. 2ndly. Nevertheless, if a [*63] case *in specie*, such as that *proposed, has never occurred before, an argument may be adduced to this effect, that where a thing has never been done it ought never to be done (a). Attention, therefore, should critically be given to such a case. 3rdly. The apparent hardship which might result from deciding on particular facts in the way indicated by law, ought not to be allowed to warp or unduly influence the opinion of the student who speculates, or of the counsel who advises, or of the judge who adjudicates on a case. Hard cases, it has been sometimes said, make bad law (b).

The decisions of our superior courts are held in the highest regard, and are not only preserved as authentic records, but are handed out to public view in the numerous volumes of reports which furnish the lawyer's ^{explained in our reported cases.} library. These reports are histories of the several cases, with a short summary of the facts, the proceedings and pleadings in them, the arguments on both sides, and the reasons which the court gave for its judgment; taken down by persons present at the determination. The reports are extant in a regular series from the reign of king Edward II. inclusive; and from this time to that of Henry VIII. were taken by the prothonotaries, or chief scribes of the court, at the expense of the Crown, and published annually, whence they are known under the denomination of the Year Books. And it is to be wished that this beneficial custom had, under proper regulations, been uninterruptedly continued to this day; but though king James I., at the instance of Lord Bacon, appointed two paid reporters(c) for the purpose of noting down the decisions of the law courts, yet that wise institution was soon neglected, and from the reign of Henry VIII. to the present time the task has been executed by private contemporary hands; who, through haste, mistake, or want of skill, [*64] have sometimes published crude and imperfect *(perhaps contradictory) accounts of one and the same determination. Some of the most valuable of the ancient reports are those published by lord chief justice Coke; a man of infinite learning in his profession, though not a little infected with the pedantry and quaintness of the times in which he lived. However, his reports are so highly esteemed, that they are generally cited without the author's name(d).

Recently under the auspices of a council composed of leading members of the bar, reporters have been appointed for each of the principal courts of law and equity, who will henceforth furnish authentic records of proceedings in them.

Besides the reporters, there are certain writers to whom great veneration and respect are paid by students of the law. Such are Glanville and Bracton, Britton and Fleta, Hengham and Littleton, Statham, Brooke, Fitzherbert,

(s) Co. Litt. 66 a.

(a) Per Willes, C. J., Willes' Rep. 471-2.

(b) Broom's Leg. Max. 4th ed. 151.

(c) Pat. 15, Jac. I. p. 18; 17 Rym. 26.

(d) His reports, for instance, are styled *The Reports*; and in quoting them we usually say 1 or 2 Rep., not 1 or 2 Coke's Rep., as in citing other authors.

and Staundforde, with some others of ancient date; whose treatises are cited as authority, and as evidence that cases have formerly occurred in which such

and such points were determined, which are now become settled and first principles. One of the last of these methodical writers and digested by the sages of the law.

in point of time, whose works are of any intrinsic authority in courts of justice, and do not entirely depend on the strength of their quotations from older authors, is the learned judge just mentioned, sir Edward Coke; who has written four volumes of institutes, as he is pleased to call them, though they have little of the institutional method to warrant such a title. The first volume is a very extensive comment upon an excellent little treatise of tenures, compiled by Judge Littleton, in the reign of Edward IV. This comment is a rich mine of valuable common law learning, collected and heaped together from the ancient reports and year books, *but greatly [*65] defective in method(e). The second volume is a comment upon many old acts of parliament, without any systematical order; the third, a more methodical treatise of the pleas of the crown; and the fourth, an account of the several species of courts(f).

And thus much for the first ground and chief corner stone of the laws of England, which is general immemorial custom or common law, from time to time declared in the decisions of the courts of justice; which decisions are preserved among our public records, explained in our reports, and digested for general use in the authoritative writings of the venerable sages of the law.

The laws of the Roman people as practised in the times of their liberty, paid also a great regard to custom; adopting it, however, only when the written law was deficient; but the reasons alleged in the digest(g) will fully justify our own practise, in making the unwritten of equal authority with, when it is not contradicted by, the written law. "For since," says Julianus, "the written law binds us for no other reason but because it is approved by the judgment of the people, therefore those laws which the people have approved without writing ought also to bind every body. For where is the difference, whether the people declare their assent to a law by suffrage or by a uniform course of acting accordingly?" Thus did they reason while Rome had some remains of her freedom; but when the imperial tyranny came to be fully established, the civil laws speak a very different language. *Quod principi placuit leges habet vigorem, utpote cum lege regia(h) quæ de imperio ejus lata est populus ei, et in eum, omne suum imperium et potestatem conferat(i),* says *Ulpian [*66] (k). *Tam conditor quam interpret legum solus imperator juste existimabitur(l),* says the code. And indeed it is one of the characteristic marks of

(e) It is usually cited either by the name of Co. Litt. or as 1 Inst.

(f) These are cited as 2, 3, or 4 Inst. without any author's name.

(g) Dig. 1. 3. 23.

(h) By the *lex regia* we are not to understand any one law so called, but the law of the *comitia curiata*, by which the *imperium* was conferred. Sanders, Inst. Just. 23, 92.

(i) In Fortescue's Treatise, which was composed for the instruction of Prince Edward, son of Henry VI., the chancellor (c. 84) informs that prince that some of his royal ancestors had endeavoured to introduce the civil law into this country, because, says the author, "in that law the prince's pleasure

standeth in force of a law; but the laws of England admit no such maxim, or anything equivalent to it." One of the articles of impeachment against Wolsey was, that he had endeavoured to subvert "*antiquissimas leges hujus regni, universumque hoc regnum legibus imperialibus subicere.*" James I. highly extolled the civil law, and made no secret of his attachment to its arbitrary doctrines and maxims on all points of kingcraft. It was also somewhat encouraged by Charles I. under the advice of Laud. (Straff. Let. i. 180, 176, 201.)

(k) Dig. 1. 4. 1.; Inst. 1. 2. 6.

(l) C. I. 14. 12.

English liberty, that our common law depends upon custom; which carries with it this internal evidence of freedom, that it probably was introduced and maintained by the voluntary consent of the people.

2. Particular customs affecting particular districts or persons. 2. The second branch of the unwritten laws of England comprises particular customs, or laws which affect only the inhabitants of particular districts.(17)

(17) Custom is such a usage as by common consent and uniform practice has become the law of the place, or of the subject-matters to which it relates. Custom is the thing to be proved, and usage is the evidence of the custom. *Read v. Rann*, 10 B. & C. 440.

General customs are such as constitute a part of the common law, and extend to the whole country. Particular customs are those which are confined to a particular district. As a general rule, the knowledge of a custom must be brought home to a party who is to be affected by it. *Sipperly v. Stewart*, 50 Barb. 62, 68; *Duguid v. Edwards*, id. 288, 294.

But where it is shown that the custom is ancient, very general and well known, there will frequently be a presumption of law that the party had knowledge of it. *Hinton v. Locke*, 5 Hill, 437, 439; *Bartlett v. Pentland*, 10 B. & C. 760; *Clayton v. Gregson*, 5 A. & E. 303, 315; *Stevens v. Reeves*, 9 Pick. 197, 200; *Loud v. Hall*, 106 Mass. 404; *Whitehouse v. Moore*, 13 Abb. 142; *Pollock v. Stables*, 12 Q. B. 765; *Bayliffe v. Butterworth*, 1 Exch. 425; *Sutton v. Tatham*, 10 Ad. & E. 27.

Similar dealings between the same parties is a common ground of inferring knowledge of a custom. *Gabay v. Lloyd*, 3 B. & C. 793; *Bartlett v. Pentland*, 10 B. & C. 760; *Palmer v. Blackburn*, 1 Bing. 61; *Bridgeport Bank v. Dyer*, 19 Conn. 136.

Evidence of a custom or usage may be given in evidence to aid in the construction of a contract, either by fixing the meaning of words when doubtful, or by giving them a meaning wholly distinct from their ordinary and popular sense. *Child v. Sun Mutual Ins. Co.*, 3 Sandf. 26; *New York Belting and Packing Co. v. Washington Fire Ins. Co.*, 10 Bosw. 428, 433, 434; *Outwater v. Nelson*, 20 Barb. 29; *Whitmore v. Coats*, 14 Mo. 9; *Rindskoff v. Barrett*, 14 Iowa, 101.

Persons who are familiar with the customs where they reside or where they transact business, are generally presumed to make their contracts with reference to such customs; and, for that reason, stipulations not expressed in the contract may be inserted by proof of an established custom relating to the subject of such contract. *Hutton v. Warren*, 1 M. & W. 475; *Williams v. Gilman*, 3 Greenl. 276; *Syers v. Jonas*, 2 Exch. 111; *Potter v. Morland*, 3 Cush. 384; *Van Ness v. Pacard*, 2 Pet. 137, 148; *Wilcox v. Wood*, 9 Wend. 346; *Mangum v. Farrington*, 1 Daly, 236.

A custom to be binding, must be an *established* one, not one merely casual, but uniform and unvarying, general and not partial or personal, and known to the parties. *Barton v. McKelway*, 2 N. J. 165; *Wood v. Wood*, 1 C. & P. 59; *Lawrence v. McGregor*, Wright, 193; *The Paragon*, Ware, 323; *Cope v. Dodd*, 18 Penn. St. 33; *United States v. Buchanan*, 8 How. (U. S.) 83, 102; *Bartlett v. Pentland*, 10 B. & C. 760, 770; *Stevens v. Reeves*, 9 Pick. 197, 200, 500; *Martin v. Delaware Ins. Co.*, 2 Wash. C. C. 254; *Trott v. Wood*, Gallis, 443; *Macy v. Whaling Ins. Co.*, 9 Metc. 354, 365.

The proper office of a custom or usage in business is to ascertain and explain the intent of the parties; and it cannot be in opposition to any principle of general policy, nor inconsistent with the terms of the agreement between the parties, nor against the established principles of law. Breese, J., in *Bissell v. Ryan*, 23 Ill. 570; *Bolton v. Coulter*, 1 Watts, 360; *Frith v. Barker*, 2 Johns. 335; *Otsego County Bank v. Warren*, 18 Barb. 290, 295; *Hinton v. Locke*, 5 Hill, 437; *Suydam v. Clark*, 2 Sandf. 133; *Richardson v. Copeland*, 6 Gray, 536; *Steward v. Scudder*, 4 Zab. 96; *West v. Ball*, 12 Ala. 347; *Beckwith v. Farnum*, 5 R. I. 230; *Ripley v. Crooker*, 47 Me. 370; *Harper v. Pound*, 10 Ind. 82.

Where a custom is opposed to a well-settled rule of law, and is calculated and intended to violate such law, the custom will not be allowed to have any effect either upon the construction of contracts, or as to the rights of the parties. And, therefore, any custom which is designed to evade the usury laws will be void. *Dunham v. Gould*, 16 Johns. 367; *Bank of Utica v. Wager*, 2 Cow. 712; *Pratt v. Adams*, 7 Paige, 615; *Green v. Tyler*, 39 Penn. St. 361; *Delaplaine v. Crenshaw*, 15 Gratt. 457.

These particular customs, or some of them, are without doubt the remains of that multitude of local customs before mentioned, out of which a body of law was collected by king Alfred, by king Edgar, and by Edward the Confessor:—each district sacrificing some of its own special usages, in order that the whole kingdom might enjoy the benefit of one uniform and universal system of laws. But for reasons that have been long forgotten, particular counties, cities, towns, manors, and lordships, were very early indulged with the privilege of abiding by their own customs, in contradistinction to the rest of the nation at large: which privilege is confirmed to them by several acts of parliament(m).

Such is the custom of gavelkind in Kent and some other parts of the kingdom, which ordains, among other *things, that not the eldest son only [*67] of the father shall succeed to his inheritance, but all the sons alike: and that, though the ancestor be attainted and hanged, yet the heir shall succeed to his estate, without any escheat to the lord.—Such is the custom that prevails in divers ancient boroughs, and therefore called borough-English, that the youngest son shall inherit the estate, in preference to all his elder brothers.—Such is the custom in other boroughs that a widow shall be entitled, for her dower, to all her husband's lands; whereas at the common law she shall be endowed of one-third part only.—Such also are the special and particular customs of manors, of which every one has more or less, and which bind all the copyhold and customary tenants of the said manors.—Such likewise is the custom of holding inferior courts, with power of trying causes, in divers cities and trading towns; the right of holding which, when no royal grant can be shown, depends entirely upon immemorial and established usage.—Such, lastly, are many particular customs within the city of London with regard to trade apprentices, widows, orphans, and a variety of other matters. All these are contrary to the general law of the land, and are good only by special usage; though the customs of London have been confirmed by Act of Parliament(n).

The rules relating to particular customs regard either (1) the proof of their existence; (2) their legality when proved; or (3) the legal construction to be put upon them. And first we will consider the rules of proof.

As to gavelkind and borough-English, the law takes notice of them(o), and

(m) Mag. Cart. 9 Hen. 3, c. 9; 1 Edw. 3, st. 1296, 126; Pulling, *Laws and Customs of London*, 2, c. 9; 14 Edw. 3, st. 1, c. 1; 2 Hen. 4, c. 1. don, 2nd ed. 6.

(n) *The Case of The City of London*, 8 Rep. (o) Co. Litt. 175.

A custom is not legal if contrary to morality, religion, and the law of the land, but is unreasonable, and therefore not compulsory. *Holmes v. Johnson*, 42 Penn. St. 159.

No custom will be permitted to control, or vary, or contradict a written instrument in opposition to its express terms. *Dickinson v. Gay*, 7 Allen, 29; *Martin v. Maynard*, 16 N. H. 165; *Wheeler v. Newbould*, 16 N. Y. (2 Smith) 392; *Harper v. Pound*, 10 Ind. 82; *Hall v. Janson*, 4 Ell. & Bl. 504; *Foley v. Mason*, 6 Md. 37; *Sweet v. Jenkins*, 1 R. I. 147; *Linsley v. Lovely*, 26 Vt. 123; *Stewart v. Ranney*, 26 How. Pr. 279.

The proof of the existence of a custom must be furnished by the party who asserts that there is such a custom. The custom must be established by the evidence of witnesses who speak directly to the fact of the existence of the custom. *Lewis v. Marshall*, 7 Man. & Grang. 729; *Cope v. Dodd*, 13 Penn. St. 33; *Duwall v. Farmers' Bank of Maryland*, 9 Gill & J. 31; *Vail v. Rice*, 5 N. Y. (1 Seld.) 155, 158; See *Hamilton v. Nickerson*, 18 Allen, 851, as to the belief of a witness who has been long engaged in the business.

there is no occasion to prove the nature of such customs, but only that the lands in question are subject thereto. Other particular customs should perhaps be specially pleaded(*p*), and as well the existence [*68] *of such customs shown, as that the thing in dispute is within the custom alleged. The trial in both cases (to show the existence of the custom, as, "that in the manor of Dale lands shall descend only to the heirs male, and never to the heirs female;" and also to show "that the lands in question are within that manor") is by a jury of twelve men, and not by the judges; unless the same particular custom has been before tried, determined, and recorded in the same court(*q*)

The customs of London differ from all others in point of trial: for, if the existence of the custom be brought in question, it shall not be tried by a jury, but by a certificate from the lord mayor and aldermen by the mouth of their recorder(*r*); unless it be such a custom as the corporation is itself interested in, as a right of taking toll, &c., for then the law permits them not to certify on their own behalf(*s*).

When a custom is actually proved to exist, the next inquiry is into the legality of it; for, if it is not a good custom, it ought to be no longer used. *Malus usus abolendus est* is an established maxim of the law(*t*). To make a particular custom good, the following are necessary requisites:—

1. That it have been used so long, that the memory of man runneth not to the contrary.(18) So that, if any one can show the beginning of it, it is no good custom. Such is the rule at common law, whence it follows that no custom can prevail against an express act of parliament; since the statute itself is proof of a time when the custom did not exist(*u*).

[*69] *Legal memory refers back to the first year of the reign of king Richard I., a period so remote as to render necessary some modification of the rule above stated. A jury therefore was formerly held justified in presuming the immemorial existence of a custom on proof being adduced that it had

(*p*) Litt. s. 265.
(*q*) Dr. and St. 1, 10; Tayl. Evid., 4th ed., I. 7.
(*r*) *Appleton v. Stoughton*, Cro. Car. 516. For an account of the manner in which this is done, see Pulling, Laws and Customs of London, 11. When a custom has been once

certified by the recorder, the court in which it has been certified will take notice of it, and not require it to be certified a second time.

(*s*) *Day v. Savadge*, Hob. 85.

(*t*) Litt. s. 212; 4 Inst. 274.

(*u*) Co. Litt. 113, 115.

(18) In some of the states of the Union there could be no custom so ancient as that mentioned in the text. And, whatever may be the rule as to local customs which establish rights in favor of parties irrespective of contracts, no such rule obtains in relation to customs which are proved for the purpose of construing contracts made between parties. In the latter case, if the custom has existed long enough to raise a presumption that the contract was made with reference to its existence, that will be sufficient. *Smith v. Wright*, 1 Caines, 43, 45; *Treadwell v. Thorne*, 6 Cow. 270, 273; *Barton v. McKelway*, 2 Zab. (N. J.) 165, 175; *Dalton v. Daniels*, 2 Hilt. 472; *Dorchester v. New England Bank*, 1 Cush. 177, 188; *Townsend v. Whitby*, 5 Harr. (Del.) 55. Whether a custom actually exists, and whether the parties dealt with reference to it, are questions of fact to be settled upon the evidence given in the case. *Astor v. Union Ins. Co.*, 7 Cow. 202, 214, 216; *Niagara Fire Ins. Co. v. De Graff*, 12 Mich. 125; *Avery v. Stewart*, 2 Conn. 69; *Gordon v. Little*, 8 S. & R. 533; *Ford v. Tirrell*, 9 Gray, 401; *Fraylor v. Sonora & Co.*, 17 Cal. 594; *Cuthbert v. Cumming*, 10 Exch. 809; 11 id. 405; *Parker v. Ibbetson*, 4 C. B. N. S. 846; *Field v. Lelean*, 6 H. & N. 617.

existed for a much less period — *ex. gr.* for the period of twenty years(*x*), in the absence of evidence to rebut such presumption. But this state of the law being deemed unsatisfactory, the statute 2 & 3 Will. 4, c. 71, was passed, which in a large class of cases shortens the legal time of prescription to twenty years, making undisturbed usage for that period a bar or title in itself, unless enjoyed in virtue of an agreement between the parties.

2. A custom, in order to be valid, must have been continued.(19) Any interruption would cause a temporary ceasing: the revival gives it a new beginning, which will be within time of memory, and thereupon the custom uninterrupted. will be void. But this must be understood with regard to an interruption of the right; for an interruption of the possession only, for ten or twenty years, will not destroy the custom(*y*). As if the inhabitants of a parish have a customary right of watering their cattle at a certain pool, the custom is not destroyed, though they do not use it for ten years; it only becomes more difficult to prove: but if the right be any how discontinued for a day, the custom is quite at an end. A custom originating before the time of memory, and continuously recognized down to our own times has in fact become the law of the place where it exists(*z*).

3. The custom must have been peaceably enjoyed and acquiesced in; not subject to contention and dispute(*a*). (20) For as customs owe their origin and efficacy to common *consent, their being immemorially peaceably [*70]
enjoyed. disputed either at law or otherwise, is a proof that such consent was wanting.

(*x*) *Jenkins v. Harvey*, 1 Cr. M. & R. 877;
Ree v. Joliffe, 2 B. & C. 54; see *Bryant v.*
Foot, 36 L. J. Q. B. 85.

(*y*) Co. Litt. 114.

(*z*) *Judgm. Tyson v. Smith*, 9 Ad. & E. 425

(*a*) Co. Litt. 114.

(19) To render a custom valid the usage must be constant and continued, and not occasional or fluctuating. *Lawrence v. McGregor*, Wright, 193; *The Paragon*, Ware, 322; *Nott v. Wood*, 1 Gallie, 443; *Martin v. Delaware Ins. Co.*, 2 Wash. C. C. 254; *Rapp v. Palmer*, 3 Watts, 178; *Cope v. Dodd*, 13 Penn. St. 83; *United States v. Buchanan*, 8 How. (U. S.) 88, 102; *Dean v. Swoop*, 2 Bin. 72.

(20) Interest is not recoverable upon an unliquidated account, unless there is an agreement, express or implied, for its payment; or, in other words, there must be an assent to paying such interest. *Hadley v. Ayres*, 12 Abb. N. S. 240, 242; *Holmes v. Rankin*, 17 Barb. 454, 456; *Esterly v. Cole*, 1 Barb. 285; 3 N. Y. (3 Comst.) 502. A general usage in a neighborhood to let cattle run at large on the highways and on unfenced lands will not bind those who do not adopt such usage; but, if a party adopts it himself, his act will be evidence of a license that his neighbor's cattle may run on his uninclosed lands. *Wheeler v. Rowell*, 7 N. H. 515, 517.

A general usage, like that of depositing lumber on the banks of a river, not accompanied by a claim of title, or an intention of occupying the land to the exclusion of the owner's rights, cannot furnish any legal presumption of a right. *Bethum v. Turner*, 1 Me. (1 Greenl.) 102.

Raftsmen on navigable streams cannot establish a custom among themselves of anchoring their rafts in such a manner as to deprive wharf owners of access to their wharfs. *Harrington v. Edwards*, 17 Wis. 586.

A customary right to do any thing upon the land of another is a right adverse to that of the owner of the soil, and must have been acquiesced in by him, and its existence must not have been the subject of contention and dispute. *Knowles v. Dow*, 22 N. H. (2 Fost.) 387, 409, 410.

A usage prevailing in a particular town that a livery-stable keeper should have a lien on horses for their keeping does not create such lien. *Saint v. Smith*, 1 Cold. (Tenn.) 51.

4. A custom must be reasonable(*b*); or rather, taken negatively, it must not be unreasonable; which is not always, as Sir Edward Coke says(*c*), to be understood of every unlearned man's reason, but of artificial and legal reasonable. reason, warranted by authority of law.(21) Upon which account a custom may be good, though the particular reason of it cannot be assigned; for it suffices, if no good legal reason can be assigned against it. Thus a custom in a parish that no man shall put his beasts into the common till the third of October, would be good; and yet it might be hard to show the reason why that day in particular is fixed upon, rather than the day before or after. But a custom, that no cattle shall be put in till the lord of the manor has first put in his, is unreasonable, and therefore bad: for peradventure the lord will never put in his; and then the tenants will lose all their profits(*d*).

The following cases will further exemplify what is meant by the reasonableness or unreasonableness of a custom:—A custom for the lord, the owner of coal mines within the manor, to dig the mines and lay the rubbish in heaps near the pits upon the surface of land being customary tenements and parcel of the manor, there to remain and continue at the will and pleasure of the lord, has been held bad; because the right claimed involved the destruction of the whole profits of the land, and it would therefore be unreasonable to presume a reservation so entirely inconsistent with the grant of the tenements(*e*). And a custom which would have enabled the lord to undermine the houses of the copyholders, and, without any notice to them, to cause their houses to fall, [*71] no *compensation being made for the damage thus caused, was held to be unreasonable and void(*f*). On the other hand, the following custom was held not to be unreasonable: That every liege subject of the realm exercising the trade or calling of a victualler, might enter upon that part of the waste of a manor upon which a fair by prescription was appointed to be held, and there, for the convenient carrying on of his trade, erect a booth and stall, and place posts and tables there, and continue the same so erected until the termination of the fair so holden, yielding and paying to the lord of the manor the sum of two-pence when lawfully demanded(*g*).

(*b*) Litt. s. 212.

(*c*) Co. Litt. 62.

(*d*) Judgm. *Tyson v. Smith*, 9 Ad. & E. 423.
Co. Copyh. s. 33.

(*e*) *Broadbent v. Wilks*, Willes, 360; S. C. 1 Wils. 63.

(*f*) *Hilton v. Lord Granville*, 5 Q. B. 701.

(*g*) *Tyson v. Smith*, 9 Ad. & E. 406.

No custom can arise in relation to acts done by the license of the owner of lands. *Mills v. Mayor, etc., of Colchester*, L. R., 2 C. P. 476, 486.

A plea that the inhabitants of a town took seaweed on the land of an individual is bad. *Nudd v. Hobbes*, 17 N. H. 524.

A license to enter on land and take fish cannot be implied by proving a usage or custom, in the county at large, for every person to enter on such land and take fish. *Winder v. Blake*, 4 Jones' Law (N. C.), 332.

(21) Whether a usage is reasonable is a question of law for the court. *Bowen v. Stoddard*, 10 Metc. 375, 381; *Bourke v. James*, 4 Mich. 338; *Cuthbert v. Cumming*, 10 Exch. 309; 11 id. 405. No custom or usage will be sanctioned by the court or enforced unless reasonable and convenient, and adapted not only to increase facilities in trade, but to the promoting of just dealing in the intercourse between parties. *Macy v. Whaling Ins. Co.*, 9 Metc. 354, 363; *Bryant v. Commonwealth Ins. Co.*, 6 Pick. 131; *Bowen v. Stoddard*, 10 Metc. 375, 381; *Holmes v. Johnson*, 42 Penn. St. 159; *Nudd v. Hobbs*, 17 N. H. 527; *Miller v. Pendleton*, 8 Gray, 547; *Sweeting v. Pearce*, 7 C. B. N. S. 449.

5. A custom ought to be certain(*h*). (22) A custom, that lands shall descend to the most worthy of the owner's blood, is void; for how shall this worth be determined? but a custom that they shall descend to the next certain. male of the blood, exclusive of females, is certain, and therefore good(*i*). A custom to pay two-pence an acre in lieu of tithes is good; but to pay sometimes two-pence and sometimes three-pence, as the occupier of the land pleases, is bad for its uncertainty. Yet a custom to pay a year's improved value for a fine on a copyhold estate is good; though the value is a thing uncertain: for the value may at any time be ascertained; and the maxim of law is *id certum est, quod certum reddi potest*(*j*).

A custom, for all the customary tenants of a manor having gardens, parcels of their estates, to take pasturable turf at all times when necessary, and in unlimited quantity, from a waste within the manor, for making and repairing grass-plots in their gardens for the improvement thereof, and for making and [*72] repairing the banks *and mounds of the hedges and fences of the customary estates, was held bad as being indefinite, uncertain, and destructive of the common(*k*). But a custom or immemorial usage in a manor for the copyholders of inheritance, without licence of the lord, to break the surface and dig and get clay without limit from and out of their copyhold tenements for the purpose of being made into bricks, to be afterwards sold by them off the manor, for purposes not connected with the manor, was held to be a good answer in an action of ejectment for a forfeiture(*l*).

(*h*) *Blewett v. Tregonning*, 3 Ad. & E. 554, and cases *infra*.

(*i*) 1 Roll Abr. 565. A right to glean in the harvest field cannot be claimed at common law; neither have the poor of a parish, legally settled there, any such right. *Steel v. Houghton*, 1 H. Bl. 51.

(*j*) Broom's Leg. Max. 4th ed. 599.

(*k*) *Wilson v. Willes*, 7 East, 121.

(*l*) *Marquis of Salisbury v. Gladstone*, 9 H. L. Cas. 692, where, in answer to the argument that the custom stated *supra* was unreasonable as tending to the destruction or annihilation of the lord's land, Lord Cranworth said: — "It is true that a custom, to be valid, must be reasonable. It is not easy to define the meaning of the word 'reasonable' when applied to a custom regulating the relation between a lord and his copyholders. That relation must have had its origin in remote times by agreement between the lord as absolute owner of the whole manor in fee simple, and those whom he was content to allow to occupy portions of it as his tenants at will. The rights of these tenants must have depended in their origin entirely on the will of the lord, and it is hard to say how any stipulations regulating such rights can, as between the tenant and the lord, be deemed void as being unreasonable. *Cujus est dare ejus est dis-*

ponere. Whatever restrictions, therefore, or conditions, the lord may have imposed, or whatever rights the tenants may have demanded, all were within the competency of the lord to grant or of the tenants to stipulate for. And if it were possible to show that before the time of legal memory any lawful arrangement had been actually come to between the lord and his tenants as to the terms on which the latter should hold their lands, and that arrangement had been afterwards constantly acted on, I do not see how it could ever be treated as being void because it was unreasonable. In truth, I believe that when it is said that a custom is void because it is unreasonable, nothing more is meant than that the unreasonable character of the alleged custom conclusively proves that the usage, even though it may have existed immemorially, must have resulted from accident or indulgence, and not from any right conferred in ancient times on the party setting up the custom. . . . The custom here insisted on is one which affects no one except the lord and the tenant insisting on the custom, and I can see no ground for holding that it was impossible, or even improbable, that it might have been the result of arrangements between the lord and his tenants before the time of legal memory."

(22) Certainty in a custom is one of the most indispensable qualities, and when the alleged custom is vague or indefinite, it will not be sustained by the courts. *Wallace v. Morgan*, 23 Ind. 400, 408; *Padwick v. Knight*, 7 Exch. 854; *Strong v. Grand Trunk Railway Co.*, 15 Mich. 206, 221.

[*73] 6. A custom, though established by consent, must be *(when established) compulsory; and not left to the option of every man, compulsory. whether he will use it or no. (23)

Therefore a custom, that all the inhabitants shall be rated towards the maintenance of a bridge, will be good; but a custom that every man is to contribute thereto at his own pleasure, is idle and absurd, and indeed no custom at all.

7. Customs must be consistent with each other: one custom cannot be set up in opposition to another. For if both are really customs, then both are of equal antiquity, and both established by mutual consent: which and consistent with other customs. to say of contradictory customs is absurd(m).

8. As to the interpretation of special customs. Customs, in derogation of the common law, must be construed strictly(n).(24) Thus, by the custom of gavelkind, an infant of fifteen years may by one species of conveyance (called a deed of feoffment) convey away his lands in fee simple, or for ever. Yet this custom does not empower him to use any other conveyance, for the custom must be strictly pursued(o).

[*74] Lastly, a special custom must submit to the king's *prerogative; that is to say, it loses its effect when the subject-matter to which it relates becomes vested in the sovereign. Therefore, if the king purchases lands of the nature of gavelkind, where all the sons inherit equally; yet, upon the king's demise, his eldest son shall succeed to those lands alone(p). And thus much as to those particular customs which affect particular persons or districts only.

(m) *Aldred's Case*, 9 Rep. 57.

(n) Per Bayley, J., *Richardson v. Walker*, 2 B. & C. 839. Co. Cop. 33. Thus where there is a custom that lands shall descend to the eldest sister, the courts will not extend this to an eldest niece. *Denn v. Spray*, 1 T. R. 466.

(o) Co. Cop. s. 83; Macpherson, Inf. 472-4. In *Muggleton v. Barnett*, 2 H. & N. 653, the question in an action of ejectment was respecting the course of descent of copyhold land in virtue of a manorial custom; and there Cockburn, C. J., after adverting to the rule that customs are to be strictly construed, observed that that rule must itself receive a reasonable interpretation; for when such doctrine was laid down customs were looked upon with disfavour, as being encroachments

on the common law. "Later historical researches have shown, however, that, instead of this being the case, these local customs are remnants of the older English tenures, which, though generally superseded by the feudal tenures introduced after the dominion of the Normans had become firmly established, yet remained in many places, probably in manors which, instead of passing into the possession of Norman lords, continued in the hands of the English proprietors. These customs, therefore, are not merely the results of accident or caprice, but were originally founded on some general principle or rule of descent, the influence of which may still be felt."

(p) Co. Litt. 15, b.

(23) One who employs a broker to transact business for him, will be bound by the customs of brokers whether he knew of them or not. *Whitehouse v. Moore*, 18 Abb. 142; *Pollock v. Stables*, 12 Q. B. 765; *Bayliffe v. Butterworth*, 1 Exch. 425; *Sutton v. Tatham*, 10 Ad. & El. 27.

(24) Courts are not inclined to sustain customs which tend to vary the common-law obligations of the parties, or to subject them to liabilities which depend entirely upon such customs. *Bissell v. Ryan*, 23 Ill. 566; *Ooze v. Heasley*, 19 Penn. St. 245; *Rogers v. Mechanics' Ins. Co.*, 1 Story, 608; *Schooner Reeside*, 2 Sumn. 569; *Dickinson v. Gay*, 7 Allen. 87; *Caldwell v. Dawson*, 4 Metc. (Ky.), 121; *Stoeper v. Whitman*, 6 Binn. 416; *Rogers v. Brenton*, 10 Q. B. 57.

Customs may be, and frequently are, abrogated by statute. *Truscott v. Merchant Tailors' Co.*, 11 Exch. 855; *Cooper v. Hubback*, 12 C. B. N. S. 456.

3. The third ingredient in our *lex non scripta* comprises so much of the law merchant as is not identical with our customary law (included under the two preceding heads), or has not been constituted by act of parliament(*q*).

3. The Law Merchant.

The customs of merchants, when firmly established and generally acknowledged, long since formed for them a code differing in many respects essentially from that which our common law, unaided or unaffected by such usages, would have afforded. "The custom of merchants," it has been said(*r*), "is part of the law of England, and courts of law must take notice of it as such. There may, indeed, be some questions depending upon customs amongst merchants where, if there be a doubt about the custom, it may be fit and proper to take the opinion of merchants thereupon;" *i. e.*, by examining them as witnesses; but when once established and judicially settled, the *lex mercatoria* is part of the law of the land. And again, the custom of merchants, when established *and settled by known decisions, "is the general law of the kingdom," [*75] and therefore ought not to be left to a jury after it has been already settled by judicial determination(*s*).

The deference to mercantile customs and usages on many occasions shown by our judicial tribunals is curious and worthy of regard. In former times (though the practice latterly has sunk into desuetude) it was no uncommon thing for a judge to confer, touching points of mercantile law, with those supposed to be conversant with it; thus, Lord Chancellor Hardwicke is reported(*t*) to have consulted with merchants who had been examined as witnesses in a cause upon the point which there called for adjudication, and the decree subsequently made by him in the case was moulded in accordance with their opinion. Again, a question of some importance having arisen upon a sea policy of insurance, Lord Mansfield(*u*) observed, that "in all mercantile transactions the great object should be certainty, and therefore it is of more consequence that a rule should be certain than whether the rule be established one way or another." Accordingly, in the case *sub judice*, his lordship consulted persons conversant with mercantile affairs, and thus allowed himself to be guided to a conclusion.

Mercantile law consists then, in part, of a collection *of usages existing amongst merchants, such usages being either general or local. The [*76] distinction, indeed, is obvious between a general and a merely local usage; for instance, between a course of practice recognized as incident to a bill of exchange and a custom prevailing at a particular stock market, or at a particular port. A local custom may, by being tacitly incorporated with a contract,

(*q*) For our law merchant consists of three portions:—1. Usages of trade and customs recognised amongst merchants. 2. Rules and doctrines of our unwritten or customary law, applicable *inter mercatores* as well as amongst persons non-mercantile. 3. Enactments having reference to mercantile matters, persons, or remedies.

(*r*) Per Wilmot, J., *Edie v. East India Co.*, 2 Burr. 1228.

(*s*) Per Foster, J., 2 Burr. 1226. "Before the time of Lord Mansfield," says Buller, J., "we find that, in courts of law, all the evidence in mercantile cases was thrown together; they were left generally to a jury, and they produced no established principle.

From that time we all know the great study has been to find some certain general principles, which shall be known to all mankind, not only to rule the particular case then under consideration, but to serve as a guide for the future. Most of us have heard these principles stated, reasoned upon, enlarged, and explained, till we have been lost in admiration at the strength and stretch of the human understanding." Lord Mansfield "may be truly said to be the founder of the commercial law of this country." *Lickbarrow v. Mason*, 2 T. R. 78.

(*t*) *Kruger v. Wilcox*, Ambler, 252.

(*u*) *Vallejo v. Wheeler*, 1 Cowp. 143.

be, in truth, a law to the contracting parties; yet such a custom must, when relied upon, be established by evidence, and will not be taken judicial notice of without proof. On the other hand, "When a general usage has been judicially ascertained and established, it becomes a part of the law merchant, which courts of justice are bound to know and recognise. Such has been the invariable understanding and practice in Westminster Hall for a great many years; there is no decision or *dictum* to the contrary; and justice could not be administered if evidence were required to be given *toties quoties* to support such usages if issue might be joined upon them in each particular case" (x).

On the other hand, a usage of trade prevailing in a particular place must be proved at *Nisi Prius* by the party seeking to avail himself of it, though the validity of the custom may be disputed on the ground that it is unreasonable(y) or indefinite; and the inference that parties contracting at, or in reference to, the place where the custom exists mean to be bound by it, may be rebutted [*77] *by showing that one of the litigating parties was ignorant of its existence(z).

Mercantile law has gradually become incorporated with the *lex non scripta*, in virtue of our being pre-eminently a mercantile people, and by reason of the extreme anxiety evinced by our courts to facilitate trading operations and to dispense in favour of traders with much of that technical strictness which must in other cases be observed. In construing, for instance, a mercantile instrument, evidence has long been admitted to show the significance amongst merchants of the words and phrases contained in it. And thus the meaning of some peculiarly-worded documents(a), constantly in use amongst merchants, has become quite as familiar to lawyers as to them.

Our common law, then, has paid especial deference to the usages of commerce, and to the opinions of commercial men — for *cuiuslibet in sua arte perito credendum est* — it has also habitually put a liberal construction upon contracts obtaining amongst merchants. (25)

(x) Per Lord Campbell, *Brandão v. Barnett*, 12 Cl. & F. 805. As exemplifying the proposition in the text, see *The King v. Humphrey*, 1 M'Cl. & Yo. 191, where the question was as to the right of a wharfinger to claim a general lien, and where Graham, B., observed that the usage of trade constitutes the recognised law of the land, and the law will adopt it, and adopt it for this plain reason: that where there is a prevalent and universal course and usage of trade, all mankind are deemed to contract upon the footing and foundation of that established course and practice. See also *Marzetti v. Williams*, 1 B. & Ad. 415; *Rolin v. Steward*, 14 C. B. 595.

(y) *Cuthbert v. Cumming*, 10 Exch. 809; S. C. 11 Id. 405.

(z) *Sweeting v. Pearce*, 7 C. B. N. S. 449; S. C. 9 Id. 534.

(a) With respect to a sea policy of insurance, Buller, J., remarked in *Brough v. Whitmore*, 4 T. R. 210, that it has at all times been considered in courts of law as "an absurd and incoherent instrument, but it is founded on usage, and must be governed and construed by usage." Similarly, in *Pelly v. Royal Exchange Assurance Company*, 1 Burr. 847, the same learned judge observed: "Regard being had to 'the nature, object, and utility of this kind of contract, consequences have been drawn from, and a system of construction has been established upon, the ancient and inaccurate form of words in which the instrument is conceived. The mercantile law in this respect is the same all over the world. For, from the same premises the same conclusions of reason and justice must follow.'"

(25) Among general customs none is more conspicuous or important than the *lex mercatoria*, or law merchant, which is a branch of the law that has been deduced from the practice and customs of merchants, aided and regulated by a long series of judicial decisions, as well as by express statutes. The laws relating to bills of exchange, promissory notes, checks, insurance policies and all other mercantile contracts, are as certain and as binding upon parties as any other laws. *Bellamy v. Majoribanks*, 7 Exch. 889; *Brandao v. Barnett*, 3 C. B. 519, 530; S. C., 12 C. & F. 787; Byles, J., in *Hare v. Henty*, 10 C. B. N. S. 85; *Bar-*

It may be convenient, before concluding this section, to notice briefly those peculiar laws which by custom are adopted and used in certain peculiar courts and jurisdictions. Of such laws, Equity, by far the most important, will be separately considered in the third volume of these Commentaries. I shall here accordingly speak only of *the civil and canon laws. These are set forth in the pandects, the codes, [*78] and the institutes; and enforced by councils, decrees, and decretals, as also by an immense number of expositions, glosses, decisions, and treatises of the learned in both branches of the law.

Peculiar laws used in particular courts and jurisdictions. Equity.

Authority of the civil and canon laws.

Nevertheless it is not on account of their being written laws, that either the canon law, or the civil law, has any obligation within this kingdom: neither do their force and efficacy depend upon their own intrinsic authority. They bind not the subjects of England, because their materials were collected from popes or emperors; were digested by Justinian, or declared to be authentic by Gregory. These considerations give them no authority here: for the legislature of England does not, nor ever did recognise any foreign power as superior or equal to it in this kingdom; or as having the right to give law to any, the meanest, of its subjects. But the strength which either the papal or imperial laws have obtained in this realm, is thus far only that they have been admitted and received by immemorial usage and custom in some particular cases, and some particular courts; or else, because they are in some other cases introduced by consent of parliament, and then they owe their validity to our *leges scriptæ*, or statute law. This is expressly declared in those remarkable words of the statute 25 Henry 8, c. 21, addressed to the king's majesty—"This is your grace's realm, recognising no superior under God but only your grace, hath been and is free from subjection to any man's laws, but only to such as have been devised, made, and ordained within this realm for the wealth of the same; or to such other as, by sufferance of your grace and your progenitors, the people of this your realm have taken at their free liberty, by their own consent, to be used among them; and have bound themselves by long use and custom to the observance of the same: not as to the observance of the laws of any foreign prince, potentate, or prelate; but as to the customed and ancient laws of this *realm, originally established as laws of the same, by the said sufferance, [*79] consents, and custom; and none otherwise."

By the "civil" law, is generally understood the civil or municipal law of the Roman empire, as comprised in the institutes, the code and the digest of the emperor Justinian, and the novel constitutions of himself and some of his successors. Of which, as there will frequently be occasion to cite them, it may not be amiss to give a short and general account.

The law of Rome (*b*) (founded first upon the regal constitutions of its ancient kings, next upon the twelve tables of the *decemviri*, then upon the laws or statutes enacted by the senate or people, the edicts of the prætor, and the *responsa prudentum*, or opinions of learned lawyers, and lastly upon the imperial decrees, or constitutions of successive emperors) had grown to so great

(b) Of which the constituent parts are well described in Dr. Irving's Introduction to the study of the Civil Law.

neti v. Brandao, 6 Man. & Grang. 680, 665. The law merchant need not be pleaded or proved. *Ib.* It is binding upon all without proof, as the court will take notice of it judicially. *Ib.*

a bulk as to render applicable to it the expression of Livy (c), "*immensus aliarum super alias accervatarum legum cumulus*." This evil was in part remedied by the collections of two private lawyers, Gregorius and Hermogenes; and then by the emperor Theodosius the younger, by whose orders a code was compiled, A.D. 438, being a methodical collection of imperial constitutions, with emendations and retrenchments; this Theodosian code was promulgated in the western as well as in the eastern empire; and to this it is probable that the Franks and Goths paid much regard in framing legal constitutions for their newly-erected kingdoms. For Justinian commanded only in the eastern remains of the empire; and it was under his auspices that the body of civil law was compiled and finished by Tribonian and other lawyers, A.D. 529 (d).

[*80] This, in its present form, consists of, 1. The institutes, which contain the elements or first principles of the Roman law, in four books. 2. The digest, or pandects, in fifty books, containing the opinions and writings of eminent lawyers, digested in a systematical method. 3. A new code, or collection of imperial constitutions, in twelve books; the lapse of a whole century having rendered the former code of Theodosius imperfect, as well as 4. The novels, or new constitutions; and 5. Certain edicts of Justinian, posterior in time to the other books, and being a supplement to the original compilation. These form, in strictness, the body of Roman law, or *Corpus juris civilis*, the study of which, however, gradually fell into neglect and oblivion, till it revived about the middle of the twelfth century, when the policy of the Roman ecclesiastics gave new vogue and authority to the civil law, introduced it into several nations, and occasioned that mighty inundation of voluminous comments, with which this system of law, more than any other, has been loaded.

Not only the Roman law, but also the commentaries upon it, may be cited and appealed to in our courts as containing the opinions of learned persons (e) upon matters which are brought even at this day *sub judice*. That doctrines expounded in the *Corpus juris civilis*, or in the glosses upon it, have become blended and incorporated with our own law — that such doctrines are sought for when needed, and are sometimes applied by our judges, may readily be shown (f), *ex. gr.* in regard to contracts (g) and the classification of bailments (h), the law of easements and servitudes (i), the right to subterranean water (k) or to land formed by alluvion of the sea (l); and

(c) L. 3, c. 84. Some writers, misapprehending a passage in Eunapius, have estimated that these laws were equal in bulk to many camels' load. See Irving, *Introd. Civ. L.*, 4th ed. 31 (5).

(d) The code contained in this compilation was commenced in the year 528.

(e) In *Ryall v. Rowles*, 1 Ves. Sen. 370, the work of Domat on Partnership, l. 1. fo. 155, is cited by Lee, C. J., with the remark that a civil law writer may be cited, not as authority on which a judgment is to be founded in our courts, but as exhibiting the opinions of a learned man.

(f) See the judgments of the late learned Lord Justice Knight Bruce, *passim*.

(g) *Vide* Dig. 50, tit. 17.

(h) Judgment of Lord Holt, *Oggs v. Bernard*, 2 Lord Raym. 909.

(i) *Smith v. Kenrick*, 7 C. B. 565; *Baind v. Williamson*, 15 C. B. N. S. 376.

(k) *Acton v. Blundell*, 12 M. & W. 324. See *Chasemore v. Richards*, 7 H. L. Cas. 387.

(l) *Gifford v. Lord Yarborough*, 5 Bing. 163, 167, where Best, C. J., after observing that Bracton had quoted, in regard to alluvion, the text of the civil law, remarked that our own law had been much improved by incorporating with it portions of the civil law, and added: "We know that many of the maxims of the common law are borrowed from the civil law, and are still quoted in the language of the civil law. Notwithstanding the clamour raised by our ancestors

generally, where express authorities in our own law are wanting, precedents or analogies will be sought for in the digest of Justinian (*m*).

In determining, however, the extent of our obligations to the Roman law, we must not solely be influenced by the number of direct references to it, which we may find in the reports; nor must we rest satisfied with extracting from them cases which may have been expressly decided in accordance with the opinions of lawyers collected and classified in the digest; we must regard also the general influence which so refined a body of law as that of Rome may have exercised when the cruder notions of jurisprudence, derived from Teutonic nations, had become gradually capable of being systematised, polished, and improved. We must, in short, regard the broad principles discernible in certain branches of our laws, and compare them with such as in corresponding portions of the more ancient code may be apparent. We shall thus probably conclude—not that sagacious intellects have at *distant epochs and [*82] upon independent reasoning applied fortuitously to similar states of facts similar or identical rules of law—but rather that our modern jurists have largely benefited by the laborious researches of their predecessors—that the fruit of “collective wisdom” has not been put aside untasted (*n*).

Yet whilst acknowledging that we have largely borrowed from the Roman law, we must not ascribe to it any direct intrinsic authority binding on our courts; for instance, in *Ball v. Herbert* (*o*), the question was: Have the public at common law (irrespective of custom) a right to tow vessels on either bank of an ancient navigable river? Does any such right exist at common law as evidenced by the judgments of our courts and the opinions of learned writers? In support of an affirmative answer to this question, a passage was cited from Bracton, who, speaking of navigable rivers, says, *Riparum etiam usus publicus est, jure gentium, sicut ipsius fluminis*. This passage from Bracton (quoted by Callis, the great authority on the law of sewers), “plainly appears,” said Buller, J., “to have been taken from the Roman law (*p*), and whether or not that has been adopted by our common law is to be seen by looking into our books—and there it is not to be found.” Accordingly, the Court of Queen’s Bench decided, in *Ball v. Herbert*, against the existence of the right which was asserted.

The canon law is a body of Roman ecclesiastical law, relative to such matters as that church either has, or pretends to have, the proper jurisdiction over. It is compiled from the opinions of the ancient Latin fathers, *the decrees of general councils, and the decretal [*83] epistles and bulls of the holy see. About the year 1151, Gratian, an Italian monk, reduced these ecclesiastical constitutions into some method, in

for the restoration of the laws of Edward the Confessor, I believe that these, and all the Norman customs which followed, would not have been sufficient to form a system of law sufficient for the state of society in the time of Henry III. (when Bracton wrote.) Both courts of justice and law writers were obliged to adopt such of the rules of the Digest as were not inconsistent with our principles of jurisprudence.”

(*m*) See, for instance, *Humphries v. Brogden*, 12 Q. B. 739; *Rowbotham v. Wilson*, 8 H. L. Cas. 348; *Buckhouse v. Bonomi*, 9 Id. 508.

(*n*) *Ante*, p. 56. In deciding a case upon principle where no direct authority can be cited from our books, it affords no small evidence of the soundness of the conclusion come to, if it proves to be supported by the civil law, “the fruit of the researches of the most learned men, the collective wisdom of ages, and the groundwork of the municipal law of most of the countries in Europe.” Per Tindal, C. J., 12 M. & W. 853.

(*o*) 8 T. R. 253.

(*p*) Inst. l. 2, tit. 1, s. 4.

three books; which he entitled *concordia discordantium canonum*, but which are generally known by the name of *decretum Gratiani*. These reached as low as the time of pope Alexander III. The subsequent papal decrees, to the pontificate of Gregory IX., were published in much the same method, under the auspices of that pope, about the year 1230, in five books; entitled *decretales*, or *decretalia Gregorii noni*. A sixth book was added by Boniface VIII. about the year 1298, which is called *liber sextus decretalium*. The Clementine constitutions, or decretals of Clement V., were in like manner authenticated in 1317 by his successor John XXII.; who also published twenty constitutions of his own, called the *extravagantes Joannis XXII.*: all which in some measure answer to the novels of the civil law. To these have been since added some decrees of later popes, in five books, called *extravagantes communes*. And all these together, Gratian's decree, Gregory's decretals, the sixth decretal, the Clementine constitutions, and the extravagants of John and his successors, form the *Corpus juris canonici*, or body of the Roman canon law.

Besides these pontifical collections, which during the times of popery were received as authentic in this island as well as in other parts of Christendom, there is also a kind of national canon law, composed of legatine and provincial constitutions, and adapted only to the exigencies of this church and kingdom. The legatine constitutions were ecclesiastical laws, enacted in national synods, held under the cardinals Otho and Othobon, legates from pope Gregory IX. and pope Clement IV. in the reign of king Henry III. about the years 1220 and 1268. The provincial constitutions are principally the decrees of provincial synods, held under divers archbishops of Canterbury, from Stephen Langton in the *reign of Henry III. to arch-
[*84] bishop Chichele in the reign of Henry V.; and adopted also by the province of York(q) in the reign of Henry VI.(r). At the dawn of the Reformation, in the reign of king Henry VIII., it was enacted in parliament(s) that a review should be had of the canon law by a commission composed of ecclesiastics and laymen, with power to abrogate and confirm, and that such portion as should be approved and found consistent with the law of England, should be valid and in force; and further, that until such commission should have accomplished the work assigned to it, the existing canon law, in so far as

(q) Burn's Eccl. Law, pref. viii.

(r) 2 Reeves, Hist. Eng. L. 78. The English constitutions have been commented upon by several English canonists, the chief of whom is Lyndwood, who lived in the beginning of the 15th century.

(s) Stat. 25 Hen. 8, c. 19, which recites that the clergy besought the king that the constitutions and canons should be committed to the examination and judgment of his highness and of thirty-two of his highness' subjects, whereof sixteen were to be of the clergy; and that such constitutions and canons as should be thought and determined by the said two-and-thirty persons, or the more part of them, worthy to be abrogated and annulled, should be abolished and made of no value accordingly; and such other of the same constitutions and canons as by the said two-and-

thirty, or the more part of them, should be approved to stand with the laws of God, and consonant to the laws of this realm, should stand in their full strength and power, the king's most royal assent being first had and obtained to the same. This ecclesiastical commission was extended by 27 Hen. 8, c. 15, beyond the then session of parliament, and by 35 Hen. 8, c. 16, during the life of the king. The 25 Hen. 8, c. 19, s. 7, also enacted that "such canons, constitutions, ordinances, and synodals provincial, being already made, which be not contrariant or repugnant to the laws, statutes, and customs of this realm, nor to the danger or hurt of the king's prerogative royal, shall now still be used and executed as they were afore the making of this act," until otherwise ordered by the commissioners.

it was not repugnant to the laws of the realm, should be exercised. This statute of Henry was confirmed by the 1 Eliz. c. 1. Intermediately, however, between the passing and confirmation of that statute, viz., in the third year of Edward VI., commissioners, composed of members as well lay as ecclesiastical, had been *appointed to frame new canons, but the completion of their [*85] work was prevented by the king's death(*t*). The review thus projected of the canon law never having been effected, its authority in England depends mainly upon the statutes which have been cited.

It is doubtless true that at the commencement of the reign of James I. certain constitutions and canons were made in convocation and ratified by the king(*u*). With regard to which Lord Hardwicke(*x*) declared, that "not having been confirmed by parliament, they do not *proprio vigore* bind the laity." There are, nevertheless, many provisions contained in these canons which are declaratory of the ancient usage and law of the church of England received and allowed here which, in that respect and by virtue of such ancient allowance, will bind the laity; but that is an obligation antecedent to, and not arising from this body of canons(*y*).

*The opposition of the judges to the *Articuli Cleri*, presented by [*86] archbishop Bancroft on behalf of the clergy, A. D. 1605, and to the pretensions of the ecclesiastics in their attempted infringements on the common law, was very resolute(*z*); and the statute of Merton, already cited(*a*), with Lord Coke's commentary upon it, shows that at a much earlier date the doctrines of the canon law had not been allowed to prevail against the law of England, yet sometimes our courts have expressly appealed to the canon, as they have done to the civil law, to guide them under peculiar circumstances(*b*); and where the Roman law and the canon law differ, our common law holds

(*t*) The provisions and objects of the statutes (cited *supra* (*s*)) not having been carried into effect in the reign of Henry VIII., the 8 & 4 Edw. 6, c. 11, appointed a new commission, also directed to thirty-two persons, to prepare a code of canon law. By a committee of eight out of the said thirty-two commissioners, a work analogous to the Roman decretals was composed, called "*Reformatio Legum Ecclesiasticarum*," which is spoken of by Sir W. Scott in *Hutchins v. Denziloe*, 1 Hag. Con. 179, "as a work of great authority in determining the practice of these times, whatever may be its correctness in matters of law." In the reign of Mary all the above acts were repealed, but in the reign of Elizabeth they were revived, and extended to the queen's heirs and successors; but no future steps were taken to carry the purposes of 25 Hen. 8, c. 19, into practical execution.

(*u*) These canons are set out in Burn's *Eccles. L.*, 9th ed. iv. 680, *et seq.*

(*x*) *Middleton v. Crofts*, 2 Atk. App. 658.

(*y*) Cited Judgm., *Marshall v. Bishop of Exeter*, 29 L. J. C. P. 354; S. C. 7 C. B. N. S. 658; 6 Id. 716. "If canon law be made part of the law of this land, then is it as much the law of the land, and as well and by the same authority, as any other part of the law of the land. And if it be not made the law of the land, then it hath no more effect than a law of Utopia; therefore the canon law in force here is the law of the land." Judgm.,

Edes v. Bishop of Oxford, Vaugh. 21. See also the preamble to stat. 25 Hen. 8, c. 21.

(*z*) 2 Inst. 599; Hall. Const. Hist. Eng., 8th ed. i. 824.

(*a*) *Ante*, p. 18. The peculiar doctrine of the canonists as to the effect of a subsequent marriage upon the condition and heritable qualifications of the *ante-natus*, came under the notice of the Court of Q. B., A. D. 1836, in the case of *Doe v. Vardill*, 5 B. & C. 438; 2 Cl. & F. 571; 7 id. 895, where the question was mooted, whether a child born in Scotland of unmarried parents, who subsequently intermarried, was capable of inheriting land in England? He was held not to be so. "One rule," said Littledale, J., "applicable to every course of descent is, that the heir must be born in lawful matrimony. That was settled by the Statute of Merton, and we cannot allow the comity of nations to prevail against it."

(*b*) In *Bennell v. Bishop of Lincoln*, 8 Bing. 272, 273, Best, C. J., observes:—"If it be asked what have the judges of the common law, when giving judgment in an action of *quare impedit*, to do with the canon law, I answer, that where the right of presentation is derived from the church [as it was in the case *sub judice*], it can only be decided by that law. Ecclesiastical presentations having no connection with lay property, but existing only as rights of the church, are governed by the laws of the church. The

itself free, if so inclined, to elect between them. For instance, in ascertaining the next of kin of an intestate who are to have the benefit of the statute of [*87] distributions(c), the *mode of computation used by civilians, which differs from that of the canon law, has been by us adopted; whereas in computing the degrees of collateral consanguinity our law follows the canonists, and not the civilians(d).

There are three existing species of courts, in which the civil or canon laws are permitted (under different restrictions) to be used. 1. The courts of the archbishops and bishops, and their derivative officers, called, in our law, courts christian, *curiæ christianitatis*, or the ecclesiastical courts. 2. The courts of admiralty. 3. The chancellor's court of the university of Cambridge(e). In these courts the reception of the civil and canon law in general and the different degrees of that reception are grounded entirely upon custom; corroborated in the latter instance by act of parliament, ratifying those charters which confirm the customary law of the university. The more minute consideration of these tribunals will fall properly under that part of our Commentaries which treats of the jurisdiction of courts. It will suffice at present to remark a few particulars relative to them all, which may serve to inculcate more strongly the doctrine laid down concerning them (f).

1. And, first, the courts of common law have the superintendency over these courts; to keep them within their respective jurisdictions, to determine wherein they exceed them, to restrain and prohibit such excess(g), and are controlled. (in case of contumacy) to punish the officer who executes, [*88] *and in some cases the judge who enforces, the sentence so declared to be illegal.(h).

2. The common law has reserved to itself the exposition of all such acts of parliament as concern either the extent of these courts, or the matters depending before them. And, therefore, if these courts either refuse to allow these acts of parliament, or will expound them in any other sense than what the common law puts upon them, the king's courts at Westminster will grant prohibitions to restrain and control them(i).

3. An appeal(k) lies from all these courts(l), whence it appears that the civil and canon laws, though admitted in some cases by custom in some courts, are only subordinate laws, *leges sub graviore lege*; and thus admitted, and an appeal lies from them. restrained, altered, new-modelled, and amended, they are by no

ecclesiastical law is for the decision of such questions, and must be taken notice of by the judges of the courts of common law in deciding them. Tithes are a spiritual right, and as such they were originally recoverable only in the ecclesiastical courts. Actions may now be brought for subtraction of tithes in the courts of common law, but those courts, in deciding what tithes are due, and how they ought to be set out, consult the ecclesiastical law."

(c) Which is mainly founded on the 118th Novel of Justinian.

(d) Co. Litt. 24 a.

(e) The proceedings in this court are according to the rules of the civil law, which do not require a jury. Report Univ. Cambridge, p. 5. By 25 & 26 Vict. c. 26, s. 12,

the Vice-Chancellor of the University of Oxford is empowered to make rules regulating the practice and forms of procedure in his court.

(f) Hale Hist. c. 2.

(g) In *The King v. Eyre*, Str. 1087, Lord Talbot said that the Court of Chancery could not trust the ecclesiastical courts to determine what is a matter merely spiritual. See *Ex parte Jenkins*, 1 B. & C. 655.

(h) 2 Inst. 628; Broom's Constitut. L., p. 776, *et seq.*

(i) See *Hall v. Maule*, 7 Ad. & E. 721.

(k) From the court of the Chancellor of Cambridge University an appeal lies to the Senate. Report Univ. Cambridge, p. 5.

(l) *Post*, vol. iii.

means with us a distinct independent species of laws, but are under the control of the customary or unwritten laws of England.

II. Let us next proceed to the *leges scriptæ*, the written laws of the kingdom; which are acts or statutes, made by the sovereign, by and with the advice and consent of the lords spiritual and temporal, and commons, in parliament assembled. The oldest of these now extant, and printed in our statute-book, is the famous *magna carta* of king John, as confirmed in parliament 9 Henry III.: though doubtless there were many acts(*m*) before that time, the records of which are now lost, and the determinations of which are at present perhaps currently received as maxims of our common law.

The manner of making these statutes will be considered hereafter, when we examine the constitution of *parliament. At present we will only take notice of the different kinds of statutes; and of some general rules of policy and construction with regard to them(*n*). [*89]

First, as to their several kinds. Statutes are either public or private(*o*). A public act is, strictly speaking, an universal rule, that regards the whole community.(26) Private acts are rather exceptions than rules, being those which only operate upon particular persons, and private

(*m*) *Ante*, p. 56.

(*n*) The method of citing acts of parliament is various. Many of our ancient statutes are called after the name of the place where the parliament was held that made them; as the statutes of Merton and Marleberge, of Westminster, Gloucester, and Winchester. Others are denominated from their subject; as the statutes of Wales and Ireland, the *articuli cleri*, and the *prærogativa regis*. Some are distinguished by their initial words, as the statutes of *quia emptores*, and that of *circumspecte agatis*. But the most usual method of citing a statute is by naming the year of the king's reign in which it was

made, together with the chapter or particular act, according to its numeral order, as 9 Geo. 2, c. 4. All the acts of one session of parliament taken together make properly but one statute; and, therefore, when two sessions have been held in one year, we usually mention stat. 1 or 2. Thus the Bill of Rights is cited as 1 W. & M. st. 2, c. 2, signifying that it is the second chapter or act of the second statute, or the laws made in the second session of parliament in the first year of king William and queen Mary.

(*o*) On the origin of private acts, see Reeves, History of the English Law, iii. 379; iv. 129; Dwarr. Stats. 2nd ed. 462.

(26) The definition in the text serves the general purpose of a definition. And to that may be added a few illustrations from the reported cases. The general rule is, that public statutes need not be pleaded or proved, as the courts will take judicial notice of them. *Shaw v. Tobias*, 3 N. Y. (8 Comst.) 188, 190; *Brown v. Harmon*, 21 Barb. 508; *Methodist Episcopal Church v. Pickett*, 19 N. Y. (5 Smith) 482, 486; 2 Wait's Law & Pr. 303, 304; *Evans v. Browne*, 30 Ind. 514. To this rule, however, there are exceptions, as the party must plead the statute of limitations. N. Y. Code, § 74; *Clinton v. Eddy*, 37 How. 23; 54 Barb. 54; *Bucklin v. Chapin*, 1 Lans. 443. A demurrer is not sufficient, even when the complaint shows on its face that the action is barred by the statute. *Sands v. St. John*, 36 Barb. 628; 23 How. 140; 29 id. 574; *Voorhies v. Voorhies*, 24 Barb. 150; *Fellers v. Lee*, 2 id. 488. Usury must be pleaded, or the defense will not be available. *Morford v. Davis*, 28 N. Y. (1 Tiff.) 481; *Fay v. Grimstead*, 10 Barb. 321; *Gould v. Segee*, 5 Duer, 260; *Young v. Rummell*, 2 Hill, 478.

Special provisions of a statute in regard to a particular subject will prevail over general provisions in the same or other statutes, so far as there is a conflict. *State v. Gotze*, 22 Wis. 363; *Brown v. County Commissioners*, 21 Penn. St. (9 Harris) 87. But where the provisions of a general law, applicable to the whole state, are repugnant to the provisions of a previously enacted special law, applicable in a particular locality only, the passage of such general law does not operate to modify or repeal the special law, either in whole or in part, unless such modification or repeal is provided for by express words, or arises by necessary implication. *State v. Mills*, 84 N. J. L. 177.

concerns: such as the Romans entitled *senatus-decreta*, in contradiction to the *senatus-consulta*, which regarded the whole community(*p*). Thus, to show the distinction, the statute 13 Eliz. c. 10, to prevent spiritual persons from making leases for longer terms than twenty-one years, or three lives, is a public act; it being a rule prescribed to the whole body of spiritual persons in the nation: but an act to enable the bishop of Chester to make a lease to A. B. for sixty years, concerns only the parties and the bishop's successors; and is therefore a private act.(27) Every act, however, is now to be deemed public, and is to be judicially noticed unless otherwise declared(*q*).

[*90] *In parliamentary language, statutes are further subdivided as follows: Public acts are subdivided into general, as the Reform Act, the annual Mutiny Act, &c.; local, as church building acts, canal and railway acts, parish acts, county acts, &c.; and personal, as patent acts, attainder acts, &c. Private acts are subdivided into local, as enclosure acts, &c.; and personal, as estate acts, naturalisation acts, &c.(*r*). The printed statutes are also, for convenience of reference and citation, classed under four heads, viz.: public general acts; local

(*p*) Gravin, Orig. 1, s. 24.

(*q*) 13 & 14 Vict. c. 21, s. 7.

(*r*) "Whether an act is public or private (meaning thereby local and personal, as opposed to general), does not depend upon any technical considerations (such as having a

clause or declaration that the act shall be deemed a public act), but upon the nature and substance of the case." Per Wigram, V., C., *Dawson v. Paver*, 5 Hare, 484; *Cock v. Gent*, 12 M. & W. 234.

To constitute an act a public statute it is not necessary that it should extend to all parts of the state; if it extends to all persons who do or omit specified acts within described limits this is sufficient. *People v. Davis*, 61 Barb. 456; *Pierce v. Kimball*, 9 Greenl. 54; *Burnham v. Webster*, 5 Mass. 286.

Acts for the establishment of towns and counties, and fixing their boundaries, and providing for the erection of public buildings, and for public highways and fences, are public acts. *Stephenson v. Doe*, 8 Blackf. 508; *Gorham v. Springfield*, 8 Shep. 58; *East Hartford v. Hartford Bridge*, 10 How. (U. S.) 511; *Mills v. St. Clair*, 8 id. 569; *Commonwealth v. Springfield*, 7 Mass. 9. An act chartering a bank has been considered a public act. *Bank of Utica v. Smedes*, 3 Cow. 662; *Smith v. Strong*, 2 Hill, 241; *Crawford v. Planters and Merchants' Bank*, 6 Ala. 389.

(27) By the common law, it is required that all private statutes should be pleaded. 1 Bla. Com. 86; Steph. Plead. 347; Dwarries on Stat. 53, Potter's ed. A special or private act has been defined to be one that the courts will not notice unless pleaded and proved like any other fact. *Hingle v. State*, 24 Ind. 29, 34; *Toledo, etc., Railway Co. v. Nordyke*, 27 id. 95. A private act which directs the sale of the property of a person by the attorney-general, without warranty, and to pay the money received thereon to certain creditors, does not take away the rights of third persons. *Jackson ex dem. Gratz v. Catlin*, 2 Johns. 248; 8 id. 520.

By the constitution of New York, bills for local or private purposes must receive the assent of two-thirds of the members of both branches of the legislature. An appropriation for the improvement of a particular river is a local act, although the public might be incidentally benefited, if such money is to be expended in a particular locality, and the people of that locality are to be directly and mainly benefitted. *People v. Allen*, 42 N. Y. (3 Hand) 378; reversing S. C., 1 Lans. 248. So of an appropriation for the construction of a bridge at a particular locality. *People v. Supervisors of Chautauqua*, 43 N. Y. (4 Hand) 10, 20. An act is local within the meaning of the constitution, which, in its subject, relates to but a portion of the people of the state or their property; and may not, either in its subject, operation, or immediate and necessary results, affect the people of the state or their property in general. Id.

An act relating to the fees of the sheriff of a particular county is also local. *Gaskin v. Meek*, 8 Abb. N. S. 319; 42 N. Y. (3 Hand) 186. So of an act amending the charter of a particular city, and authorizing the raising and expenditure of money. *People v. O'Brien*, 38 N. Y. (11 Tiff.) 193; S. C., 6 Trans. App. 90; *People v. Hills*, 35 N. Y. (8 Tiff.) 449.

acts declared public; private acts, printed by the queen's printer, and whereof the printed copies may be given in evidence; and private acts not printed.

A statute is sometimes designated as declaratory, or remedial, or penal, or repealing. Declaratory, where the old custom of the kingdom having almost

fallen into disuse, or become disputable, parliament has thought
Declaratory.

proper, *in perpetuum rei testimonium*, and for avoiding all doubts and difficulties, to declare what the common law is and ever has been(s). (28) Thus the statute of Treasons, 25 Edw. 3, c. 2, does not make any new species of treasons; but only, for the benefit of the subject, declares and enumerates those several kinds of offence which before were treason at the common law.

Remedial. Remedial statutes are those which are made to supply such defects, and abridge such superfluities, in the common law, as arise

either from the general imperfection of all human laws, from change of time and circumstances, from the mistakes and unadvised determinations of unlearned (or even learned) judges, or from any other cause whatsoever. (29) *And [*91] this being done, either by enlarging the common law where it was too narrow and circumscribed, or by restraining it where it was too lax and luxuriant, has occasioned a subdivision of remedial acts of parliament into enlarging and restraining, or enabling and disabling statutes. A penal statute

Penal.

Repealing.

is one by which a forfeiture is inflicted for transgressing the provision contained therein(t). A repealing act revokes and cancels a former statutory law(u).

Such being the mode of classifying and designating statutes, it may not be amiss to add a few observations concerning the construction and interpretation of them.

When any doubt arose upon the construction of the Roman laws, the usage

(s) As to the assumption that the customary law is always existing unchanged, *ante*, p. 59. been repealed by the 19 & 20 Vict. c. 64; 24 & 25 Vict. c. 101; and 26 & 27 Vict. c. 125.

(t) Darr. Stat. 2nd ed. 479. See also the 24 & 25 Vict. c. 95.

(u) Many obsolete statutes have recently

(28) A statute is sometimes enacted for the purpose of declaring what was the intention or meaning of a prior statute. Such a statute may establish what the future rule of law shall be, but it cannot affect vested rights, nor control the courts in their construction of the prior statute. *Greenough v. Greenough*, 11 Penn. St. 489, 494; *Reiser v. Tell Association*, 89 id. 137; *Post Master General v. Early*, 12 Wheat. 148; *Bassett v. United States*, Mott & Hunt, 448; *Salter v. Tobias*, 8 Paige, 338; *Muin v. Green*, 82 Barb. 448, 457. A declaratory statute which introduces a new rule, while professing to express the intention of the legislature as to a prior act, will not be permitted to have any influence with the court as to the proper construction of the prior statute; as that will be construed upon its face, and as though no declaratory statute had been passed. *People v. Board of Supervisors of New York*, 16 N. Y. (2 Smith) 425, 431, 432; *Dash v. Van Kleeck*, 7 Johns. 477; *Ogden v. Blackledge*, 2 Cranch, 272; *Young v. Beardsley*, 11 Paige, 98; *Bingham v. Supervisors*, 8 Minn. 441.

(29) A remedial statute ought to be liberally construed so as to meet and secure the end in view; and so as to prevent a failure of the remedy. *Hudler v. Golden*, 36 N. Y. (9 Tiff.) 446; 2 Trans. App. 816; *Jackson v. Warren*, 82 Ill. 331; *Cullerton v. Mead*, 22 Cal. 95; *Wolcott v. Pond*, 19 Conn. 597; *Pearson v. Lovejoy*, 53 Barb. 407; 35 How. 193.

Where the common law gives a remedy, and another is provided by statute, the latter is cumulative, unless made exclusive by the statute. *Candee v. Hayward*, 37 N. Y. (10 Tiff.) 653; 5 Trans. App. 194.

was to state the case to the emperor in writing, and take his opinion upon it. This was certainly a bad method of interpretation. To interrogate the legislature to decide particular disputes, is not only endless, but affords great room for partiality and oppression. The answers of the emperor were called his rescripts, and these had in succeeding cases the force of perpetual laws; though they ought to be carefully distinguished, by every rational civilian, from those general constitutions which had only the nature of things for their guide. The emperor Macrinus, as his historian Capitolinus informs us, had once resolved to abolish these rescripts, and retain only the general edicts: he could not bear that the hasty and crude answers of such princes as Commodus and Caracalla should be revered as laws. But Justinian thought otherwise (*x*), and he has preserved them all. In like manner the canon laws, or decretal epistles of the popes, are all of them rescripts in the strictest sense. Contrary to all true forms of reasoning, they argue from particulars to generals.

Rules of legislative policy.

[*92] *In construing statutes, certain rules of legislative policy, as well as the recognised canons of interpretation, should be kept in view.

I. Rules of legislative policy widely applicable, are as under:—

1. Parliament will be presumed to legislate prospectively, not retrospectively; and statutes are, therefore, to be construed as prospective unless they expressly made applicable to transactions past or pending. This rule is “one of such obvious convenience and justice” that it must be adhered to, unless in cases where there is something on the face of the enactment putting it beyond doubt that the legislature meant it to operate retrospectively” (*y*). (30)

2. Where the common law and a statute differ, the common law gives place

(*x*) Inst. i. 2, 6. *dass*, 7 Moore P. C. C. 289; *Williams v. Smith*,
(*y*) Per Rolfe, B. *Moon v. Durden*, 2 Exch. 4 H. & N. 559; *Jackson v. Woolley*, 8 E. & B. 22, recognised *Pettamberdass v. Thackoorsey* 778.

(80) No principle of law, or rule of construction is better settled in this country than that which declares that every statute is to be deemed prospective in its operation; unless by the express language of the act, or by necessary implication a retroactive effect is to be given to it. *People ex rel. Peak v. Supervisors of Columbia Co.*, 43 N. Y. (4 Hand) 130; *Murray v. Gibson*, 15 How. (U. S.) 421; *Hastings v. Lane*, 3 Shep. 134; *Price v. Mott*, 52 Penn. St. 315; *Albyer v. State*, 10 Ohio St. 588; *State v. Barbee*, 3 Ind. 253; *Dow v. Norris*, 4 N. H. 16; *Wires v. Farr*, 25 Vt. 41; *Plumb v. Sawyer*, 21 Conn. 351; *Davison v. Johnnot*, 7 Metc. 339; *Boyd v. Barrenger*, 23 Miss. 220, 269.

Where a statute by its terms, or by necessary implication, operates so as to impair vested rights, it will be held invalid, and the courts will not enforce it. *Ib. Morse v. Gould*, 11 N. Y. (1 Kern.) 281; *Westervelt v. Gregg*, 12 id. (3 id.) 203.

But a retroactive statute which merely affects the remedy, but does not destroy or materially impair it, will be valid. And, therefore, an act which exempts certain property from levy and sale on execution is valid, even in reference to contracts made or debts incurred before the passage of the statute. *Morse v. Gould*, 11 N. Y. (1 Kern.) 281. See, also, *Stocking v. Hunt*, 3 Denio, 274; *Conkey v. Hart*, 14 N. Y. (4 Kern.) 22; *Van Rensselaer v. Snyder*, 13 N. Y. (8 id.) 299. A statute which suspends the remedy, but does not impair its ultimate validity or enforcement, is valid. *Wolfskiel v. Mason*, 16 Abb. 221; affirmed, 84 How. 629 *n*.

So a statute is valid although it limits or abridges the time within which the remedy must be enforced. *Butler v. Palmer*, 1 Hill. 324. See *ante*, note 9.

to the statute; and an old statute gives place to a new one(z).(31) And this upon a general principle of universal law, *leges posteriores priores contrarias abrogant*: consonant to which, it was laid down by the law of the twelve tables at Rome, *quod populus postremum jussit*, *id jus ratum esto*. But this is to be understood only when the latter statute is couched in negative terms, or where its matter is so clearly repugnant, that it necessarily implies a negative. As, if a former act says, that a juror upon such a trial shall have twenty pounds a year; and a new statute afterwards enacts, that he shall have twenty marks: here the latter statute, though it does not express, yet necessarily implies a negative, and *virtually repeals the former. For if twenty marks be made a qualification [*93] sufficient, the former statute which requires twenty pounds is at an end(a). But if both acts be merely affirmative, and the substance such that both may stand together, here the latter does not repeal the former, but they shall both have a concurrent efficacy. If by a former law an offence be indictable at the quarter sessions, and the latter law makes the same offence indictable at the

(z) If two acts of parliament, having been passed during the same session, and coming into operation on the same day, be repugnant to each other, the act which last received the royal assent will be considered *pro tanto* a repeal of the other for that purpose, unless

the latter act contain something which manifests an intention that the earlier should continue unrepealed. *Re v. Justices of Middlesex*, 2 B. & Ad. 818; *Paget v. Foley*, 2 Bing. N. C. 679.

(a) 1 Jenk. Cent. 2, 78.

(31) Repeals by implication are not favored, and where the new statute does not in terms repeal the old law, both will stand, so far as effect can be given to them. *Davies v. Fairbairn*, 3 How. (U. S.) 636; *Morris v. Delaware, etc., Canal Co.*, 4 Watts & Serg. 431; *Canal Co. v. Railroad Co.*, 4 Gill & Johns. 1; *Naylor v. Field*, 5 Dutch. 287; *Bowen v. Lease*, 5 Hill. 221; *State v. Berry*, 12 Iowa, 58; *Dodge v. Gridley*, 10 Ohio, 177; *McCool v. Smith*, 1 Black. (U. S.) 459; *Wyman v. Campbell*, 6 Port. 219. Where the two statutes can be so construed that both may stand this will be done. *Id.* A strict construction is given to a statute which is an innovation upon the rules of the common law. *McCluskey v. Cromwell*, 11 N. Y. (1 Kern.) 593; *M'Queen v. Middletown Manufacturing Co.*, 16 Johns. 57; *Gibson v. Jenney*, 15 Mass. 205; *Wilber v. Crane*, 13 Pick. 290; *Sibley v. Smith*, 2 Mich. 486; *Souter v. Sea Witch*, 1 Cal. 162; *Rus v. Alter*, 5 Denio, 119.

Statutes in derogation of common right are strictly construed. *Bloodgood v. Mohawk & Hudson R. R. Co.*, 18 Wend. 9, 41; *Bridgewater & Utica Plank Road Co. v. Robbins*, 22 Barb. 662, 667; *Freethy v. Freethy*, 42 id. 641, 645; *Wright v. Briggs*, 2 Hill. 77; *Sharp v. Spier*, 4 id. 76; *Cruger v. Dougherty*, 43 N. Y. (4 Hand) 107, 121; *Westbrook v. Willey*, 47 N. Y. (2 Sick.) 457, 460; *People ex rel. Freeman v. Hulburt*, 46 N. Y. (1 Sick.) 110, 113; *Sewall v. Jones*, 9 Pick. 412; *Smith v. Spooner*, 3 id. 229. And so as to statutes which grant exclusive privileges to individuals or corporations. *Mohawk Bridge Co. v. Utica & Schenectady R. R. Co.*, 6 Paige, 554; *Cayuga Bridge Co. v. Magee*, 6 Wend. 85; *Young v. Mackenzie*, 8 Kelly, 81; *Chenango Bridge Co. v. Binghamton Bridge Co.*, 27 N. Y. (13 Smith) 93; *Commonwealth v. Pittsburgh, etc., R. R. Co.*, 24 Penn. St. 159; *Camden & Amboy R. R. Co. v. Briggs*, 2 N. J. 623; *Perrine v. Chesapeake & Delaware Canal Co.*, 9 How. (U. S.) 172; *Mills v. St. Clair Co.*, 8 id. 569; *Bradley v. N. Y. & N. H. R. R. Co.*, 21 Conn. 294, 306.

Where a statute of another state or country is adopted, which statute has received a judicial construction there, it will be presumed that the legislature intends that the statute is to be taken with that construction. *Draper v. Emerson*, 22 Wis. 147; *State v. Macon County Court*, 41 Mo. 453; *Campbell v. Quinlin*, 3 Scam. 288; *Tyler v. Tyler*, 19 Ill. 151; *Pennock v. Dialogue*, 2 Pet. 1; *Waterford, etc., Turnpike v. People*, 9 Barb. 161; *Kirkpatrick v. Gibson*, 2 Brock. Marsh. 388; *Drennan v. People*, 10 Mich. 169; *State v. Swope*, 7 Ind. 91; *Commonwealth v. Hartnett*, 3 Gray, 450; *Duramus v. Harrison*, 28 Ala. 326; *Adams v. Field*, 21 Vt. 256; *Myrick v. Hasey*, 27 Me. 9.

assizes; here the jurisdiction of the sessions is not taken away, but both have concurrent jurisdiction, and the offender may be prosecuted at either: unless the new statute subjoins express negative words, as, that the offence shall be indictable at the assizes, "and not elsewhere" (b).

3. Formerly, if a statute repealing a prior statute was itself repealed, the original enactment, if nothing inconsistent with such an intention appeared,

If a repealing statute be repealed the first statute is not thereby revived, unless by express words.

revived, and became again operative, without any formal words for that purpose (c). (32) But it is now enacted that "where any act repealing in whole or in part any former act is itself repealed, such last repeal shall not revive the act or provisions before repealed," unless words be inserted reviving them (d). And wherever "any act shall be made repealing in whole or in part any former act, and substituting some provision or provisions instead of the provision or provisions repealed, such provision or provisions so repealed shall remain in force until the substituted provision or provisions shall come into operation by force of the last made act" (e).

4. Acts of parliament derogatory from the power of subsequent parliaments bind not (f). So the statute 11 Hen. 7, c. 1, which directs that no person, for assisting a king *de facto* shall be attainted of treason by [*94] act of *parliament or otherwise, is held to be good only as to common prosecutions for high treason; but will not restrain or clog any parliamentary attainder (g). Because the legislature, being in truth the sovereign power, is always of equal, always of absolute, authority: it acknowledges no superior upon earth, which the prior legislature must have been, if its ordinances could bind a subsequent parliament. And upon the same principle Cicero, in his letters to Atticus, treats with a proper contempt these restraining clauses, which endeavoured to tie up the hands of succeeding legislatures. "When you repeal the law itself," says he, "you at the same time repeal the prohibitory clause, which guards against such repeal" (h). (33)

(b) *Foster's Case*, 11 Rep. 56, 68; *Mitchell v. Brown*, 1 E. & E. 267, 274.

(c) *The Bishops' Case*, 12 Rep. 7.

(d) 13 & 14 Vict. c. 21, s. 5.

(e) *Id.* s. 6.

(f) Bac. Max. reg. 19.

(g) 4 Inst. 43.

(h) *Cum lex abrogatur, illud ipsum abrogatur, quo non eam abrogari oporteat.* L. 8, Ep. 23.

(32) The common-law rule has been extensively adopted in the several states of the Union, and there are numerous decisions to the effect that when a statute, which repeals another, is itself repealed, the former statute is revived, and continues in force. *Brinkley v. Swicegood*, 65 N. C. 626; *Doe v. Naylor*, 2 Blackf. 32; *Commonwealth v. Mott*, 21 Pick. 492; *Directors of the Poor v. Railroad Co.*, 7 Watts & Serg. 236; *James v. Dubois*, 1 Harr. 285; *Harrison v. Walker*, 1 Kelly, 32; *Calvert v. Makepeace*, 1 Smith, 86; *Hastings v. Aiken*, 1 Gray, 163; *Jane v. Buzzard*, 1 Hemp. 259; *Sarsfield v. Van Vaughner*, 14 Abb. 297.

(33) Every statute enacted by our legislature may be repealed by any subsequent legislature, with the exception of statutes which are in the nature of contracts, or where rights have become vested under them. *Thorpe v. Rutland & Burlington R. R. Co.*, 27 Vt. 140; *Kellogg v. City of Oshkosh*, 14 Wis. 623; *Bloomer v. Stolley*, 5 McLean, 158, 161.

If the statute is in the nature of a contract, the legislature cannot repeal it, as such legislation would be unconstitutional. *Brooklyn Central R. R. Co. v. Brooklyn City R. R. Co.*, 32 Barb. 358; *Benson v. Mayor, etc., of N. Y.*, 10 Barb. 223; *Dartmouth College v. Woodward*, 4 Wheat. 518; *New Jersey v. Wilson*, 7 Cranch, 164; *People v. Platt*, 17 Johns. 195; *McLaren v. Pennington*, 1 Paige, 103; *Binghamton Bridge*, 3 Wall. 51.

5. Acts of parliament that are impossible to be performed can have no validity; and should there arise out of a statute, if literally construed, any absurd consequence, manifestly contradictory to common reason, a more liberal construction would be put on it so as to avoid, if possible, such collateral consequence. I lay down the rule with these restrictions; though it is sometimes laid down more largely, that acts of parliament contrary to reason are void⁽ⁱ⁾.⁽³⁴⁾ But if the parliament will positively enact a thing to be done which is unreasonable, I know of no power in the ordinary forms of the constitution vested with authority to control it: and the examples usually alleged in support of this sense of the *rule do none of them prove, that where the main object of a statute is unreasonable, the judges are at liberty to reject it; for that were to set the judicial power above the legislative, which would be subversive of all government. But where general words, if applied to a particular state of facts, would lead to an unreasonable consequence, there the judges are in decency to conclude that this consequence was not intended or foreseen by parliament, and they will strive to expound the statute so as to avoid it. Thus, if an act of parliament gives a man power to try all causes that arise within his manor of Dale; yet if a cause should arise in which he himself is party, the act is construed not to extend to that, because it is unreasonable that any man should determine his own quarrel^(k). But, if we could conceive it possible for parliament to enact that he should try as well his own causes as those of other persons, there is no court that has power to

(i) Such was the language of Lord C. J. Hobart in *Day v. Savadge*, Hob. 87. Lord Coke, in *Bonham's case*, 8 Rep. 115, 118 a, lays down the principle in more guarded terms thus:—"If an act of parliament be against common right and reason, or repugnant or impossible to be performed, the common law will control it and adjudge it to be void." To this doctrine Lord C. J. Holt as-
 sented, in *The City of London v. Wood*, 12 Mod. 687; and it was said in 10 Mod. 115, that "an act of parliament against natural equity must be void from its first creation, for *jura naturæ sunt immutabilia, et leges legum*. But this must be a very clear case, and judges will strain hard rather than interpret an act of parliament, void *ab initio*."

(k) *Dr. Bonham's case*, 8 Rep. 118.

(34) In this country the constitutions of the United States and those of the several states, have so limited the powers of the legislature, and have so guarded the rights of the people, that the questions most usually presented to the courts are those relating to the constitutionality of the law, rather than to the question how far a statute may be void by reason of its injustice. And it is a familiar rule that every statute which violates either a state constitution or that of the United States, is invalid, and will not be enforced by the courts. How far the conduct or motives of legislators will be noticed by the courts was discussed in *Fletcher v. Peck*, 6 Cranch, 87, 130, 181.

"There ought to be no limitation to the power of the legislature of an independent state, except what may be found in the fundamental law and the great and eternal principles of justice, morality and religion" per Cady, J., in *Beecher v. Allen*, 5 Barb. 188.

It may be laid down as the law of our American courts, that a statute which does not violate any provision of the state or national constitutions, cannot be held void merely because it violates the principles of right and of natural justice. *Calder v. Bull*, 3 Dallas, 386, 399; *Satterlee v. Matimore*, 2 Peters, 380; *Fletcher v. Peck*, 6 Cranch, 87; *Weister v. Hade*, 52 Penn. St. 478; *Sharpless v. Mayor, etc., of Philadelphia*, 21 Penn. St. 147, 161; *People v. Supervisors of Orange*, 27 Barb. 575, 593; 17 N. Y. (3 Smith) 285; *People v. Tynbee*, 2 Park. 490, 533; *Knight v. Campbell*, 62 Barb. 16, 28; *Dow v. Norris*, 4 N. H. 16; *Hartford Bridge Co. v. Union Ferry Co.*, 29 Conn. 210; *Newland v. Marsh*, 19 Ill. 376, 384; *Harrison v. State*, 23 Md. 468, 491; *Myers v. English*, 9 Cal. 341; *Morrison v. Springer*, 15 Iowa, 304; *Lewis v. Webb*, 8 Greenl. 826; *Tyler v. People*, 8 Mich. 320; *Franklyn Bridge Co. v. Wood*, 14 Ga. 80. See Cooley on Const. Lim. 168, 187, and notes. See *post*.

defeat the intent of the legislature, when couched in such evident and express words as leave no doubt whether it was the intent of the legislature or no.

II. The fairest and most rational method of interpreting the will of the legislator, is by exploring his intentions at the time when the law was made, by signs the most natural and probable.⁽³⁵⁾ And these signs are either the words, the context, the subject-matter, the effects and consequence, or the spirit and reason of them all. The principal rules for interpreting statutes are as under:—

1. Statutory words are generally to be understood in their usual and most known signification, and to be read in their natural and ordinary sense^(l); not so much regarding the propriety of grammar^(m) as their general and popular use.⁽³⁶⁾ Thus the law mentioned by Puffendorf⁽ⁿ⁾, which forbad a layman to “lay hands” on a *priest, was adjudged to extend to him who had hurt a priest with a weapon. Again; terms of art, or technical terms, must be taken according to the acceptation of the learned in each art, trade, and science.⁽³⁷⁾ So in the act of settlement,

(l) *Birks app., Allison resp.*, 18 C. B. N. 23. *visat chartam*, applies to statutes as well as to deeds. Broom’s Leg. Max., 4th ed. 658.

(m) For the maxim, *mala grammatica non* (n) Law of N. and N., 5, 12, 8.

(35) If a contemporaneous construction by the legislature of the same words can be discovered, it is high evidence of the sense intended. *Knight v. Campbell*, 63 Barb. 17, 28; *Philadelphia R. R. Co. v. Catawissa R. R. Co.*, 53 Penn. St. 20. So a contemporaneous interpretation of a statute under which rights of property have been acquired, will be upheld, when this can be properly done. *Warfield, In re*, 22 Cal. 51.

The practical construction given to a state statute by the public officers of the state, although not admitted as controlling, is not overlooked, and may be regarded as decisive in a case of doubt. *Union Ins. Co. v. Hoge*, 21 How. (U. S.) 35. In construing ancient statutes, contemporaneous construction, as evidenced by usage, will not be departed from without most cogent reasons; and if the construction be doubtful, usage will control. *Chestnut v. Shane*, 16 Ohio, 599; *Rogers v. Goodwin*, 2 Mass. 475; *Packard v. Richardson*, 17 id. 122, 144; *Opinion of the justices*, 8 Pick. 517.

(36) In the construction of a statute in which the words are plain and explicit, and the sense evident and clear, there is no room for construction, but merely for the application of the statute to the subject-matter before the court; and in such a case, words ought never to be supplied, changed, or qualified. *Lane v. Schomp*, 20 N. J. Eq. (5 C. E. Gr.) 82; *Hyatt v. Taylor*, 42 N. Y. (3 Hand) 258; *Rich v. Keyser*, 54 Penn. St. 86; *Manuel v. Manuel*, 13 Ohio St. 458; *Ingalls v. Cole*, 47 Me. 530; *Coffin v. Rich*, 45 id. 507; *Mayor of Wetumpka v. Winter*, 29 Ala. 651; *Quigley v. Gorham*, 5 Cal. 418; *Alexander v. Worthington*, 5 Md. 471; *Bidwell v. Whitaker*, 1 Mich. 469; *In re Murphy*, 3 Zab. 180; *Ezekiel v. Dixon*, 3 Kelly, 146.

Words in common use are to be taken in their natural, plain and ordinary signification. *Schriefer v. Wood*, 5 Blatchf. C. C. 215; *Philadelphia, etc., R. R. Co. v. Catawissa R. R. Co.*, 53 Penn. St. 20; *Gross v. Fowler*, 21 Cal. 892.

Where a statute contains a provision that it shall receive a certain construction, the courts are bound by that construction, although the language would otherwise have received a different construction. *Smith v. State*, 28 Ind. 321. A statute must receive a sensible construction, even though such construction qualifies the universality of the language. *People v. Admire*, 39 Ill. 251.

A term in use in the English law, used in a statute without any definition of its meaning, is to be construed according to the sense in which it is understood in the English law. *McCool v. Smith*, 1 Black. (U. S.) 459.

(37) The true sense of words used in a statute is to be ascertained generally by taking them in their ordinary and popular signification: or, if they are terms of art, in their technical signification. *Green v. Weller*, 32 Miss. (3 George) 650; *Ex parte Hall*, 1 Pick. 261.

where the crown of England is limited "to the princess Sophia, and the heirs of her body, being protestants," it becomes necessary to call in the assistance of lawyers, to ascertain the precise idea of the words, "heirs of her body," which in a legal sense comprise certain only of her lineal descendants.

The construing of a statute doubtless may, by the foregoing canon of interpretation and by the rules which follow, be facilitated. A capacity, however, for rightly apprehending the meaning of the legislature where their language is ambiguous or perplexed, can but be acquired gradually by practical experience and by a careful study of decided cases. Should the intention of the lawgiver *prima facie* be uncertain, and the phraseology which he uses seem obscure, recourse must not be had to more recondite maxims of construction until the primary maxim has been applied and been found to fail. It was long since resolved^(o)—that judges ought not to make any construction against the express letter of a statute; for nothing can so exhibit the meaning of the makers of an act as their own direct words—*index animi sermo*. "And it would be dangerous to give scope to make a construction in any case against the express words when the meaning of the makers doth not appear to the contrary, and when no inconvenience will thereupon follow: and therefore in such cases *a verbis legis non est recedendum*"^(p).

2. One part of a statute must be so construed by another, that the whole may (if possible) stand: *ut res magis valeat, quam pereat*.⁽³⁸⁾ As if land Every part of a statute must, if possible, stand. be vested in the king and his heirs by act of parliament, saving the right *of A.; and A. has at that time a lease of it for [*97] three years: here A. shall hold it for his term of three years, and afterwards it shall go to the king. For this interpretation furnishes matter for every clause of the statute to work and operate upon.

3. In conformity with the preceding rule, if words happen to be dubious, we may establish their meaning from the context; with which it may be of sin-

(o) *Edrich's Case*, 5 Rep. 118.

4th ed. 548, 551—4, and the cases there col-

(p) In elucidation of the above remarks, lected.
the reader is referred to Broom's Leg. Max.,

Legal terms used in a statute receive their technical meaning unless the contrary intention is plainly apparent; but this rule does not apply to the organic law, for the latter must be construed according to the meaning of those who adopted it. *State v. Mace*, 5 Md. 471; *Clark v. City of Utica*, 18 Barb. 451; *Knight v. Campbell*, 62 id. 16, 23; *Merchants' Bank v. Cook*, 4 Pick. 405, 411; *Snell v. Bridgewater*, 24 id. 296, 300.

(38) The intention of the legislature is to be deduced from a view of the entire statute. *Ogden v. Strong*, 2 Paine's C. C. 584. If the language is not explicit, the intention is to be collected from the context, from the occasion or necessity of the law, from the mischief felt, and from the object and remedy designed.

A statute must be so construed as to give effect, if possible, to every portion of it, and without rejecting any part as surplusage, or treating it as a repetition of a provision already made. *Gates v. Salmon*, 35 Cal. 576; *Lacey v. Moore*, 6 Coldw. (Tenn.) 348; *Leversee v. Reynolds*, 13 Iowa (5 With.), 310; *Ellison v. Mobile, etc.*, R. R. Co., 35 Miss. (7 George) 572; *Brooks v. Mobile School Commissioners*, 31 Ala. 227; *People v. Burns*, 5 Mich. 114; *Board of Comr. of LaGrange Co. v. Outler*, 6 Ind. 354; *James v. Dubois*, 1 Harr. 285.

If different parts of a statute are irreconcilably repugnant, the latter part will prevail. *Packer v. Sunbury and Erie R. R. Co.*, 19 Penn. St. 211; *Townsend v. Brown*, 4 Zab. 80, 86, 89; *Attorney-General v. Chelsea Water Works*, Fitzg. 195.

In cases of ambiguity, reference should be made to the context. In cases of ambiguous use to compare a word or sentence, whenever the language of a statutory provision is ambiguous, equivocal or intricate. (39) Thus the preamble is often called in to help the construction of an act of parliament (r). (40)

Of the same nature and use is the comparison of a law with other laws made by the same legislator, which have some affinity with the subject, or which

(r) "But," says Lord Bacon, "though the intent and mind of the law may be sometimes drawn from the preambles, yet its latitude and extent should by no means be derived from them; for the preamble frequently fixes upon a few of the more plausible and special particulars by way of example, whilst the law contains many more; or, on the contrary, the law restrains and limits many things, the reason whereof it were not necessary to insert in the preamble. Wherefore the extent of the law is to be derived from the body of the law, the preamble often exceeding or falling short of this extent."

In *R. v. Pierce*, 8 M. & S. 66, Lord Ellenborough said:—"It cannot by any means be regarded as a universal rule that large and comprehensive words in the enacting clause of a statute are to be restrained by the preamble. In a vast number of acts of parliament, although a particular mischief is recited in the preamble, yet the legislative provisions extend far beyond the mischief recited. And whether the words shall be restrained or not must depend on a fair exposition of the particular statute in each particular case, and not upon any universal rule of construction." See also *Salkeld v. Johnson*, 1 Hare, 196, 207.

(39) Where the meaning of a statute is doubtful or ambiguous; where the clauses are confused and contradictory, and the word such as to admit of two senses; the court will adopt that construction which will best carry into effect the just and reasonable intention of the legislature. And if any part of a statute is intricate, obscure or doubtful, the true way to discover the intent is to consider the other parts of the act; for the words and meaning of one part of a statute frequently lead to the sense of another, and in the construction of one part of a statute, every other part ought to be taken into consideration. *Magruder v. Carroll*, 4 Md. 335; *James v. Dubois*, 1 Harr. 285; *United States v. Freeman*, 8 How. (U. S.) 556, 565.

In a case of doubtful meaning, the intention of the legislature may be ascertained by a resort to the usage and practice under the statute. *Kernion v. Hills*, 1 La. Ann. 419; *Attorney-General v. Bank of Cape Fear*, 5 Ired. Eq. 71; *Love v. Hinckley*, 1 Abb. Adm. 436.

But proof of usage is not admissible to aid in the construction of a statute which, upon its face, is not doubtful as to its meaning. *Bailey v. Rolfe*, 16 N. H. 247.

(40) Anciently, titles were not prefixed to statutes; and afterward, when they came to be introduced, they were usually prefixed by the clerk of the house in which the bill first passed. At the present day, the constitutions of some of the states require that the title shall correctly indicate the purpose of the law; and, therefore, the title now possesses an importance formerly unknown.

The general rule, irrespective of the constitutional provision mentioned, is, that where the body of the statute appears ambiguous or doubtful, the title may be resorted to as a guide to the intent of the legislature. *Cohen v. Barrett*, 5 Cal. 195; *Bradford v. Jones*, 1 Md. 351; *United States v. Webster*, Davels, 88; *State v. Stephenson*, 2 Bailey, 384; *Burgott v. Burgett*, 1 Ham. 469; *United States v. Palmer*, 3 Wheat. 610; *Eastman v. McAlpin*, 1 Kelly, 157; *Bristol v. Barker*, 14 Johns. 205.

The title is no part of an act, and can be resorted to only when there is doubt as to the meaning of the enacting words. *Commonwealth v. Slifer*, 53 Penn. St. 71; *Connecticut, etc., Ins. Co. v. Albert*, 39 Mo. 181; *Eastman v. McAlpin*, 1 Kelly, 157.

The title of an act cannot be used to extend or to restrain any of the provisions contained in the body of the act. *Goodrich v. Russell*, 42 N. Y. (3 Hand) 184; *Hadden v. The Collector*, 5 Wall. (U. S.) 107; *United States v. Briggs*, 9 How. (U. S.) 351; *Blus v. McDuffie*, Busbee's Law (N. C.), 181.

The preamble may be resorted to in case the body of the statute is doubtful or ambiguous. *People v. Utica Ins. Co.*, 15 Johns. 357, 390; *Jackson v. Gilchrist*, id. 89; *Edwards v. Pope*, 3 Scam. 465; *Holbrook v. Holbrook*, 1 Pick. 250; *Flynn v. Abbott*, 16 Cal. 358; *Constantine v. Van Winkle*, 6 Hill, 177, 184; *United States v. Webster*, Davels, 88.

expressly relate to the same point(s).(41) And when the written law of England declares that "whosoever shall be convicted of murder shall suffer death as a felon"(t), we must resort *to the customary law of England [*98] to learn what murder is, because the statute which affixes a punishment to the crime of murder abstains from defining it.

4. The effects and consequence which will ensue if a particular meaning be put upon statutory words, may be regarded ; so that where words literally

The consequence of a particular interpretation may be considered. we may a little deviate from the received sense of them, if by so doing effect can be given to the apparent or presumable intention

of the legislature.(42) Therefore the Bolognian law, mentioned by Puffendorf(u), which enacted, "that whoever drew blood in the streets should be punished with the utmost severity," was held after a long debate not to extend to the surgeon who opened the vein of a person who fell down in the street in a fit.

The rule under our notice has been thus stated(x) :—" Words which are plain

(e) Per Bayley, J., 9 B. & C. 885. If one statute prohibit certain acts, and another statute be afterwards made inflicting penalties on persons who do those acts, both must be construed together. Plowd. 206; 1 Price, 189.

(t) 24 & 25 Vict. c. 100, s. 1.

(u) Law of N. and N., l. 5, c. 12, s. 8. So

the statute (1 Ed. 2) *De frangentibus prisonam* enacts that a prisoner who breaks prison is guilty of felony ; but if the prison be on fire, this is not so, "for he is not to be hanged because he would not stay to be burnt." Plowd. 18.

(x) Per Parke, B., *Miller v. Salomons*, 7 Exch. 546; 8 Id. 778.

(41) As one part of a statute is sometimes considered in construing another part of it, so a comparison of one law with other laws made by the same legislature, or upon the same subject, or relating to the same point, is frequently made with advantage. And, it is to be inferred, that a code of statutes relating to one subject is governed by one spirit and policy, and is intended to be consistent and harmonious in its several parts and provisions.

It is, therefore, an established rule of law that all statutes in *pari materia* are to be taken together, as if they were one law ; and they are required to be compared together in the construction of statutes, because they are considered as framed upon one system, and as having one object in view. *Patterson v. Winn*, 11 Wheat. 385; *Schooner v. Harriet*, 1 Story, 251; *Le Roy v. Chabolla*, 2 Abb. U. S. 448; *Green v. Commonwealth*, 12 Allen, 155; *Billingalea v. Baldwin*, 23 Md. 85; *Robbins v. Omnibus R. R. Co.*, 32 Cal. 472; *United States v. Collier*, 3 Blatchf. C. C. 325; *McLaughlin v. Hoover*, 1 Oregon, 81; *McIntyre v. Ingraham*, 35 Miss. (6 George) 25; *Fort v. Burch*, 6 Barb. 60, 74; *Henry v. Tilson*, 17 Vt. 479; *Mendon v. Worcester Co.*, 10 Pick. 235; *Frink v. King*, 3 Scam. 144; *Hayes v. Hanson*, 12 N. H. 284; *Manuel v. Manuel*, 18 Ohio St. 458. But, although statutes relating to the same subject are to be construed together, this rule does not go to the extent of controlling the language of subsequent statutes by any supposed policy of previous ones. *Goodrich v. Russell*, 42 N. Y. (3 Hand) 177.

(42) Considerations of evil and hardship may properly exert an influence in giving construction to a statute, when its language is ambiguous ; but not when it is plain and explicit. *Collins v. Carman*, 5 Md. 503. When the language of a statute is doubtful, an argument from inconvenience will have weight, but not otherwise. *Langdon v. Potter*, 3 Mass. 215, 221; *Gore v. Brazier*, id. 523, 539; *Ayres v. Knox*, 7 id. 306; *Putnam v. Longley*, 11 Pick. 457, 490; *Rogers v. Goodwin*, 2 Mass. 475; *Pitman v. Flint*, 10 Pick. 506; *Henry v. Tilson*, 17 Vt. 479; *State v. Mayhew*, 2 Gill. 487; *Essex Co. v. Pacific Mills*, 14 Allen, 389; *Isaacs v. Steels*, 3 Scam. 97; *Chesnut v. Shane's Lessee*, 16 Ohio, 599; *Britton v. Ferry*, 14 Mich. 53, 66; *Plummer v. Plummer*, 37 Miss. 185; *Moers v. Reading*, 21 Penn. St. 188; *Union Ins. Co. v. Hoge*, 21 How. (U. S.) 35, 66.

It is only when all other means of ascertaining the legislative intention fail that a court may look to the effects of a law ; and, then, their interpretation becomes a sort of practical legislation. *Dudley v. Reynolds*, 1 Kan. 285, 289.

enough in their ordinary sense may, when they would involve any absurdity or inconsistency, or repugnance to the clear intention of the legislature, to be collected from the whole of the act or acts *in pari materia* to be construed with it, or other legitimate grounds of interpretation, be modified or altered so as to avoid that absurdity, inconvenience, or repugnance, but no further, for then we may predicate that the words never could have been used by the framers of the law in such a sense."

5. A saving, totally repugnant to the body of the act, is void.⁽⁴³⁾ If therefore an act of parliament vests land in the king and his heirs, saving the right of all persons whatsoever; or vests the land of A. in the king, saving the right of A.: in either of these cases the saving is totally repugnant to the body of the statute, and (if good) would render the statute of no effect or operation; and therefore the saving is void, and the land vests absolutely in the king(y).

6. Statutory words are always to be understood as having regard to the subject-matter; for that is supposed to be in the eye of the legislator, and all his expressions are to be read as if directed to that end.⁽⁴⁴⁾ Thus, when a law of Edward III.^(z) forbids all ecclesiastical persons to purchase "provisions" at Rome, it might seem to prohibit the buying of grain and other victuals there; but when we consider that the statute was made to

(y) 1 Rep. 47.

But a proviso (that is, a clause engrafted upon a preceding and complete enactment, 9 B. & C. 886), though totally repugnant to the body or provision of the act shall not be void, but shall stand; being held to be a repeal of the preceding enactment, by analogy to the well-known rule of construction applicable

to testamentary instruments:—that a later clause, if inconsistent with a former one, expresses the last intention, and revokes the preceding expressions. Fitz. 195; Bac. Abr. Statute.

(z) 27 Edw. 3, st. 1, c. 1; 2 Reeves' Hist. Eng. L. 879.

(43) The office of a proviso, generally, is either to except something from the enacting clause or to qualify or restrain its generality, or to exclude some possible ground of misinterpretation of it, as to extending to cases not intended by the legislature to be brought within its purview. *Minis v. United States*, 15 Pet. 428, 445; *Wayman v. Southard*, 10 Wheat. 1, 30.

A proviso is a limitation of power, and amounts to a negation of all authority, beyond its prescribed and clearly defined limits. *Commissioners of Kensington v. Keith*, 2 Penn. St. 218, 220.

If the proviso in a statute be contrary to the purview, the proviso is valid, and not the purview. *Thomson v. Brown*, 4 Zab. 80, 86, 89. In interpreting a section of a statute which remains in force, resort may be had to a proviso to it, although the proviso is repealed. *Bank for Savings v. The Collector*, 3 Wall. (U. S.) 495, 513.

A statute which has a saving clause as to certain rights existing at the time of its passage, relates to the time when the statute takes effect, and not to the time of its enactment. *Rogers v. Vass*, 6 Clarke (Iowa), 405, 408.

A statute which makes a change in school districts, but saves rights in favor of parties holding contracts, obligations, rights or liens upon such districts or their property, will save a right of action against a district which, before such change, committed a trespass by taking a third person's dwelling-house. *Gould v. Sub-District No. 3 of Eagle Creek School District*, 7 Minn. 208, 214.

(44) See note 36 for the cases relating to this rule. Courts cannot supply defective enactments by an attempt to carry out fully the purposes which may be supposed to have occasioned those enactments. *Swift v. Luce*, 27 Me. 285. It is the subject matter of a statute which furnishes the means of construction. *Ezekiel v. Dixon*, 3 Kelly, 146; *Barker v. Esty*, 19 Vt. 131.

repress the usurpations of the papal see, and that the nominations to benefices by the pope were called "provisions," we shall see that the restraint is intended to be laid upon such provisions only.

7. A statute, which treats of things or persons of an inferior rank, is not by general words to be extended to those of a superior degree(a). (45) For instance, a statute treating of "deans, prebendaries, parsons, vicars, and others having spiritual promotion," is held not to extend to bishops, though they have spiritual promotion; deans being the highest persons named, and bishops being of a still higher order(b).

Statutes treating of inferiors are not to be extended to superiors.

8. A most effectual way of discovering the true meaning of a law, when the words are dubious, is by considering the reason and spirit of it; or the cause *which moved the legislature to enact it.(46) For when [*100] this reason ceases, the law itself ought likewise to cease with it. An instance of this is given in a case put by Cicero(c).

The reason and spirit of the law must be considered.

(a) *Vide per* Pollock, C. B., *Lyndon v. Stanbridge*, 2 H. & N. 51.

(b) 2 Rep. 46.

(c) *De Rhet.* l. 1, c. 11.

(45) It will not be assumed that a state has stripped itself of any portion of its sovereignty by an act of the legislature, unless the language is too clear to admit of doubt. *Gilman v. Shoboygan*, 2 Black. (U. S.) 510, 513.

A state is not bound by the general provisions of a statute by which any of its prerogatives, rights, titles or interests would be divested, unless the statute be made by express words to extend to and include the state in its provisions. *State v. Kinne*, 41 N. H. 238. A state is a "person," within the meaning of a statute, which punishes the fraudulent alteration of a public record, "with intent that any person may be defrauded." *Martin v. State*, 24 Tex. 61.

General words in a statute do not include nor bind the sovereign power; it is bound only by express terms or necessary implication. *United States v. Hewes*, Crabbe, 807; *State v. Milburn*, 9 Gill. 379; *State v. Garland*, 7 Ired. 48.

A statute, enumerating things or persons of an inferior dignity, shall not be construed to extend to those of a superior dignity. *Woodworth v. Paine*, Breese, 294, 374; *Lyndon v. Stanbridge*, 2 Hurlst. & Norm. 45, 51.

Ordinarily, a statute which, in general terms, speaks of plaintiffs and defendants, applies to persons only, and not to states, counties and municipal corporations. *Schuyler Co. v. Mercer Co.*, 4 Gilm. 20. The rule that the government is not bound by a law unless expressly named does not apply to acts of legislation which lay down general rules of procedure in civil actions. *Green v. United States*, 9 Wall. (U. S.) 655; *Attorney-General v. Radloff*, 10 Exch. 84. A law, general in its nature, binds minors and married women, although they are not specially named. *Warfield v. Fox*, 53 Penn. St. 382.

(46) The great fundamental rule in construing statutes is to ascertain the intention of the legislature; and, to attain this object, every part of a statute must be viewed in connection with the whole, so as to make all the parts harmonize, if practicable, and to give a sensible and intelligent effect to each; and, then, so to construe it as to accomplish the end which the legislature had in view, and not so as to defeat it. *State v. Blair*, 32 Ind. 313; *Ogden v. Strong*, 2 Paine's C. C. 584; *State v. King*, 44 Mo. 283; *George v. Board of Education*, 33 Ga. 344; *Horton v. Mobile School Commissioners*, 43 Ala. 598; *Bingham v. Supervisors*, 8 Minn. 441; *Jersey Co. v. Davison*, 5 Dutch. (N. J.) 415; *Waterliet Turnpike Co. v. McKean*, 6 Hill, 616, 619; *Shrewsbury v. Boylston*, 1 Pick. 105; *Simonds v. Powers*, 28 Vt. 354; *Ingraham v. Speed*, 30 Miss. (1 George) 410; *Stanisls v. Raymond*, 4 Cush. 314.

If a statute is susceptible of two different constructions, by one of which it would be constitutional, and by the other unconstitutional, the preference will be that the statute is constitutional. *People v. Supervisors of Orange*, 17 N. Y. (3 Smith) 235, 241; *Clarke v. City of Rochester*, 24 Barb. 446, 471; *Dow v. Norris*, 4 N. H. 17; *Newland v. Marsh*, 19 Ill. 384; *Neal v. Roberts*, 1 Dev. & Batt. 81; *Blair v. Ridgely*, 41 Mo. 63; *Inkster v. Carver*, 16 Mich. 461; *Taylor v. Flint*, 35 Ga. 124; *Newell v. People*, 7 N. Y. (8 Seld.) 9, 109.

There was a law, that those who in a storm forsook the ship, should forfeit all property therein; and that the ship and lading should belong entirely to those who staid in it. In a dangerous tempest all the mariners forsook the ship, except only one sick passenger, who by reason of his disease was unable to get out and escape. By chance the ship came safe to port. The sick man kept possession, and claimed the benefit of the law. Now here all the learned agree, that the sick man is not within the reason of the law; for the reason of making it was, to give encouragement to such as should venture their lives to save the vessel: but this is a merit which he could never pretend to, who neither staid in the ship upon that account, nor contributed anything to its preservation.

From this method of interpreting laws, by the reason of them, arises what we call the equity of a statute; equity being generally defined by Grotius(*d*)—
The "equity of of a statute." "the correction of that, wherein the law (by reason of its universality) is deficient."(*47*) In accordance, however, with remarks before made(*e*), recourse must not be had to this method of construction unless where effect can thus only be given to the intent of the enactment(*f*).

[*101] 9. There are three points to be considered in the construction of all remedial statutes; the old law, the *mischief, and the remedy: that is how the common law stood at the making of the act; what the mischief was for which the common law did not provide; and what remedy the parliament has provided to cure this mischief. And it is the business of the judges so to construe the act as to suppress the mischief and advance the remedy(*g*).(*48*) To exemplify this by

(*d*) De *Æquitate*, s. 3.

(*e*) *Ante*, p. 96.

(*f*) "It is, in my opinion, so important for the court, in construing modern statutes, to act upon the principle of giving full effect to their language, and of declining to mould that language in order to meet either an alleged convenience or an alleged equity, upon doubtful evidence of intention, that nothing will induce me to withdraw a case from the operation of a section which is within its words, but clear and unambiguous evidence that so to do is to fulfil the general intent of the statute; and also that to adhere to the literal interpretation, is to decide inconsistently with other and overruling provisions of the same statute." *Per* Coleridge, J., *R. v. St. Pancras*, 6 A. & E. 7.

(*g*) *Heydon's Case*, 8 Rep. 7, where the judges resolved:—"that in all statutes, be

they penal or beneficial, restricting or enlarging of the common law, four things are to be discerned and considered, *viz.*—(1) What was the common law before the making of the act? (2) What was the mischief and defect against which the common law did not provide? (3) What remedy the parliament hath resolved and applied to cure the disease of the commonwealth? and (4) the true reason of the remedy.

"It was then held to be the duty of the judges at all times, to make such construction as should suppress the mischief and advance the remedy, putting down all subtle inventions and evasions for continuance of the mischief *et pro privato commodo*, and adding force and life to the cure and remedy, according to the true intent of the makers of the act *pro bono publico*."

(*47*) In law, all cases cannot be foreseen or expressed; and the object of interpreting laws by what is called equity, is to supply this deficiency as far as possible, by a recurrence to natural principles of justice. Statutes in derogation of the common law are not extended by an equitable construction. *Rus v. Alter*, 5 Denio, 119; *Allen v. Cook*, 26 Barb. 374, 382; *Smith v. Brackett*, 36 id. 571; *Sharp v. Speir*, 4 Hill, 76; *Cruger v. Dougherty*, 43 N. Y. (4 Hand) 107, 122; *Wilbur v. Crane*, 13 Pick. 284; *Lock v. Miller*, 8 Stew. & Port. 13.

(*48*) A remedial act should be so construed as most effectually to meet the beneficial end in view, and to prevent a failure of the remedy; and, as a general rule, a remedial statute ought to be construed liberally.

A construction the most reasonable and the best suited to accomplish the general purpose of the statute will be applied to a remedial statute where the words are not clear or precise.

reference to the restraining statute, 13 Eliz. c. 10, by the common law, ecclesiastical corporations might let on as long leases as they thought proper: the mischief was, that they let on long and unreasonable leases, to the impoverishment of their successors: the remedy applied by the statute was by making void all leases by ecclesiastical bodies for longer terms than three lives or twenty-one years. Now in the construction of this statute it is held, that leases, though for a longer term, if made by a bishop, are not void during the bishop's continuance in his see; or, if made by a dean and chapter, they are not void during the continuance of the dean: for the act was made for the benefit and protection of the successor(h). The mischief is therefore sufficiently suppressed by vacating these leases after the determination of the interest of the grantors; but the leases, during their continuance, being not within the mischief, are not within the remedy.

*10. Penal statutes must be construed strictly(i); this rule being [*102]
Penal statutes are to be construed strictly. founded on the tenderness of the law for the rights of individuals(k), and its regard for the personal liberty of the subject(l).(49)

11. Statutes against frauds are to be liberally and beneficially expounded.
 (50) This may seem in contradiction to the last rule; most statutes against

(h) Co. Litt. 45; *Case of Lincoln College*, 3 Rep. 60; *Bishop of Salisbury's Case*, 10 Rep. 58.

(i) *Ex. gr.*, if the law be, that for a certain offence a man shall lose his right hand, and the offender has already lost his right hand, he shall not lose his left hand, but the crime shall rather pass without punishment. Bac. Max. 58, 59.

(k) Hence the law of England does not in general "allow of offences by construction,

and no case shall be holden to be reached by penal laws, but such as are within both the spirit and the letter of such laws. If this rule be violated," said Best. C. J. (*Fletcher v. Lord Sondes*, 8 Bing. 580), "the fate of accused persons is decided by the arbitrary discretion of judges, and not by the express authority of the laws." As to constructive treason, *post*, vol. iv.

(l) *Vide per Lord Abinger, C. B., Henderson v. Sherborn*, 2 M. & W. 236.

Sproul v. Lawrence, 33 Ala. 674; *Wolcott v. Pond*, 19 Conn. 597; *Hudler v. Golden*, 86 N. Y. (9 Tiff.) 446; 2 Trans. App. 816; *Holmes v. Carley*, 81 N. Y. (4 Tiff.) 289; *Weed v. Tucker*, 19 N. Y. (5 Smith) 422, 438.

Statutes giving a right of appeal are always liberally construed in furtherance of justice, and such an interpretation as will work a forfeiture of such right will not be favored. *Pearson v. Lovejoy*, 53 Barb. 407; 35 How. 195; *Converse v. Burrows*, 2 Minn. 229, 240.

A statute which authorizes the redemption of lands sold for taxes ought to receive a liberal and benign construction in favor of those whose estates would otherwise be devested. *Dubois v. Hepburn*, 10 Pet. 1, 22.

(49) A penal statute is strictly construed, and is not extended by implication to cases not clearly within the letter and spirit of the act. *Atlanta v. White*, 33 Ga. 229; *Dent v. State*, 42 Ala. 514; *Steel v. State*, 26 Ind. 82; *Hall v. State*, 20 Ohio, 7; *Warner v. Commonwealth*, 1 Penn. St. 154; *State v. Solomons*, 3 Hill (S. C.), 96; *Bettis v. Taylor*, 8 Port, 564; *Andrews v. United States*, 3 Story, 202.

But the construction is not to be so strict as to exclude a case which is within the words of the statute according to their ordinary acceptation; nor so as to defeat the evident intention of the legislature. *United States v. Wilson*, Baldw. 79; *American Fur Co. v. United States*, 2 Pet. 386; *United States v. Willberger*, 5 Wheat. 76; *United States v. Morris*, 14 Pet. 464; *Commonwealth v. Loring*, 8 Pick. 370; *Crawford v. State*, Minor, 143; *Butler v. Bicker*, 6 Greenl. 268; *Daggett v. State*, 4 Conn. 61; *Sprague v. Birdsell*, 2 Cow. 419.

(50) Statutes which have for their object the suppression or prevention of fraud, are liberally construed for the purpose of securing such a result.

A very large collection of authorities will be found in the English and American notes to *Twyne's Case*, in 1 Smith's Leading Cases.

frauds being in their consequences penal. But a distinction is here to be taken: where the statute acts upon the offender, and inflicts a penalty, as a fine, it is then to be taken strictly: but when the statute acts upon the offence, by setting aside the fraudulent transaction, here it is to be construed liberally. Upon this footing the statute of 13 Eliz. c. 5, which avoids all gifts of goods, &c., made to defraud creditors "and others," was held to extend by the general words to a gift made to defraud the queen of a forfeiture(m). (51)

[*103]

* SECTION IV.

THE COUNTRIES SUBJECT TO THE LAWS OF ENGLAND.

The kingdom of England, over which our municipal laws have jurisdiction, includes not, by the common law, either Wales, Scotland, Ireland, Berwick-upon-Tweed, or any other part of the king's dominions, except England only. And yet the civil laws and local customs of this territory now prevail in part or altogether, with more or less restriction, throughout many other districts; of which it will be proper to take a review, before we consider the kingdom of England itself, the original and proper subject of these laws.

Wales continued independent of England, unconquered and uncultivated, in the primitive pastoral state which Cæsar and Tacitus ascribe to Britain in general, for some centuries from the time of the hostile invasions of the Saxons, when the ancient and Christian inhabitants of the island retired to those natural intrenchments, for protection from their pagan visitants. But when these invaders themselves were con-

(m) *Troyn's case*, 3 Rep. 80, where we read as follows:—"Because fraud and deceit abound in these days more than in former times, it was resolved in this case by the whole Court that all statutes made against fraud should be liberally and beneficially expounded to suppress the fraud." Again—in *Fermor's case*, 3 Rep. 77, we are told that: "If any doubt be conceived on the words or meaning of an enactment, it is good

to construe it according to the reason of the common law;" and "the common law doth so abhor fraud and covin that all acts, as well judicial as others, of themselves just and lawful, being mixt with fraud and deceit, are in judgment of law wrongful and unlawful. *Quod alias bonum et justum est, si per vim vel fraudem petatur, malum et injustum efficitur.*"

(51) In the revision of statutes, a mere change in the phraseology will not be construed to be a change of the law, unless that intention is apparent. *People v. Deming*, 1 Hilt. 271; *Overfield v. Sutton*, 1 Metc. (Ky.) 621; *Burnham v. Stevens*, 33 N. H. 247; *Crowell v. Crane*, 7 Barb. 191; *Matter of Brown*, 21 Wend. 316; *Hall v. Western Transportation Co.*, 34 N. Y. (7 Tiff.) 284, 287; *Ennis v. Crump*, 6 Tex. 34.

The punctuation of a statute, as printed, affords no very decisive test of construction; but may be regarded as one indication of the meaning. *United States v. Railroad Cars*, 1 Abb. U. S. 196. The phrase "pursuant to law," found in 10 U. S. Stat. at L. 161, must be held, on account of its punctuation, to apply to the attendance of witnesses before commissioners only. *Cummings v. Akron Cement, etc., Co.*, 6 Blatchf. 509. For the purpose of arriving at the intention of the legislature, the courts will disregard the punctuation, or re-punctuate, if need be, to render the true meaning of the statute. *Hamilton v. Steamboat R. B. Hamilton*, 16 Ohio St. 428. In construing a statute, punctuation is not regarded. *Cushing v. Warrick*, 9 Gray, 382.

verted to Christianity, and settled into regular and potent governments, this retreat of the ancient Britons grew every day narrower; they were overrun by little and little, gradually driven from one fastness to another, and by repeated losses abridged of their wild independence. Very early in our history we find their princes doing homage to the crown of England; till at length in the reign of Edward I., who may justly be styled the conqueror of Wales, the line of their ancient princes was abolished, and the king of England's *eldest son became by creation their titular prince; the territory of Wales being then entirely re-annexed (by a kind of feudal resumption) to the dominion of the crown of England(a); or as the *statutum Walliæ* (12 Edw. 1) expresses it, "*terram Walliæ cum incolis suis, prius nobis jure feodali subjectam jam sui gratiâ in proprietatis nostræ dominium obstaculis quibuscunque cessantibus totaliter et cum integritate convertit, et coronæ regni Angliæ tanquam partem corporis ejusdem annexit et univit.*" By this statute of Wales material alterations were made in divers parts of the laws prevailing there, so as to reduce them nearer to the English standard, especially in the forms of judicial proceedings: but there was still retained very much of their original polity; particularly the rule of inheritance, viz., that lands were divided equally among all the issue male, and did not descend to the eldest son alone(b). By other subsequent statutes the provincial immunities of the Welsh were still further abridged: but the finishing stroke to their independence was given by the 27 Hen. 8, c. 26, which at the same time gave the utmost advancement to their civil prosperity, by admitting them to a thorough communication of laws with the subjects of England. Thus were this brave people gradually conquered into the enjoyment of true liberty; being insensibly put upon the same footing as, and made fellow-citizens with their conquerors. A generous method of triumph, which the republic of Rome practiced with great success; till she reduced Italy to her obedience, by admitting the vanquished states to partake of the Roman privileges.

This statute, 27 Hen. 8 enacts, *inter alia*—1. That the dominion of Wales shall be for ever united to the kingdom of England. 2. That all Welshmen born shall have the same liberties as other the king's subjects. 3. That lands in Wales shall be inheritable according to the *English tenures and rules of descent. 4. That the laws of England, and no other, shall be used in Wales. And 5. That the county of Monmouth shall become an English county. The statute 34 and 35 Henry 8, c. 26, confirms the preceding enactment, divides the principality into twelve shires, and reduces it into very much the same order in which it stands at this day, except in so far as it had a separate judicial system(c), which was abolished by the statute 1 Will. 4, c. 70. [*105]

The kingdom of Scotland, notwithstanding the union of crowns on the accession of their king James VI. to the throne of England, continued a separate and distinct kingdom for above a century longer. By an Laws of Scotland before the union. act of parliament (1 Jac. 1, c. 1) it was indeed declared (in support of which declaration, however, there is no historical evidence), that these two mighty, famous, and ancient kingdoms had formerly been one. And sir Edward Coke observes(d), how marvellous a conformity there was, not only in the religion and language of the two nations, but also in their ancient laws

(a) Vaugh. 400.

(b) 4 Reeves' Hist. Eng. L. 203.

(c) Reeves' Hist. Eng. L. iv. 194.

(d) 4 Inst. 345.

the descent of the crown, their parliaments, their titles of nobility, their officers of state and of justice, their writs, and their customs. Upon which account he supposes the common law of each to have been originally the same; especially as their most ancient and authentic book, called *regiam majestatem*(e), and containing the rules of their ancient common law, is extremely similar to that of Glanvil (f), which contains the principles of English law, as it stood in the reign of Henry II. And the many diversities subsisting between the two laws at present, may be well enough accounted for, from a diversity of practice in [*106] two large and *uncommunicating jurisdictions, and from the acts of two distinct and independent parliaments, which in many points altered and abrogated the old common law of both kingdoms.

However, sir Edward Coke, and the politicians of that time, conceived great difficulties in carrying out the projected union: but these were afterwards overcome, and the great work was happily effected A. D. 1707; when twenty-five articles of union were agreed to by the parliaments of both nations; the purport of the most considerable being as follows. That—

1. On the first of May, 1707, and for ever after, the kingdoms of England and Scotland shall be united into one kingdom, by the name of Great Britain.

2. The succession to the monarchy of Great Britain shall be the same as was before settled with regard to that of England.

3. The united kingdom shall be represented by one parliament.

4. There shall be a communication of all rights and privileges between the subjects of both kingdoms, except where it is otherwise agreed.

9. When England raises about £2,000,000 by a land tax, Scotland shall raise £48,000.

16, 17. The standards of the coin, of weights, and of measures, shall be reduced to those of England, throughout the united kingdom.

18. The laws relating to trade, customs, and the excise, shall be the same in Scotland as in England. But all the other laws of Scotland shall remain in force; though alterable by the parliament of Great Britain. Yet with this caution: that laws relating to public policy are alterable at the discretion of the parliament; laws relating to private right are not to be altered but for the evident utility of the people of Scotland.

22. Sixteen peers are to be chosen to represent the peerage of Scotland in parliament, and members (the *number whereof is now such as hereinafter specified), to sit in the house of commons.

23. The sixteen peers of Scotland shall have all privileges of parliament; and all peers of Scotland shall be peers of Great Britain, and rank next after those of the same degree at the time of the union, and shall have all privileges of peers; except sitting in the house of lords, the privileges depending thereon, and particularly the right of sitting on the trial of a peer.

25. All laws and statutes in either kingdom, so far as contrary to or inconsistent with the terms of these articles to be void.

These are the principal of the twenty-five articles of union, which are ratified and confirmed by the statute 5 Ann. c. 8, in which two acts of parliament are

(e) The Scotch municipal law is to a great extent founded on the civil law, as well in criminal as in civil matters. Most of the distinctions between the Scotch law and our own are traceable to this source. Robert's Hist. of Scot. i. 48; Erskine's Inst. i. 1, s. 41.
(f) 1 Reeves' Hist. Eng. L. 225.

roited; the one of Scotland, whereby the church of Scotland and also the four universities of that kingdom are established for ever, and all succeeding sovereigns are to take an oath inviolably to maintain the same; the other of England, 5 Ann. c. 6, whereby the acts of uniformity of 13 Eliz. and 13 Car. 2 (except as the same had been altered by parliament at that time) and all other acts then in force for the preservation of the church of England, are declared perpetual; and it is stipulated, that every subsequent king and queen shall take an oath inviolably to maintain the same within England, Ireland, Wales, and the town of Berwick-upon-Tweed. And it is enacted, that these two acts "shall for ever be observed as fundamental and essential conditions of the union."

Upon these articles and the act of union, it is to be observed: 1. That the two kingdoms are now so inseparably united, that nothing can ever disunite them again; except the mutual consent of both, or the successful assertion by either of a claim to independent national existence. 2. That whatever else may be deemed "fundamental and essential conditions," the preservation of the two churches of England and Scotland, in the same state that they were in at the time of the union, and the maintenance of the acts of uniformity which establish our common prayer, are expressly declared so to be(g). 3. That therefore any alteration in the constitution of either of those churches, or in the liturgy of the church of England (unless with the consent of the respective churches, collectively or representatively given), would be an infringement of these "fundamental and essential conditions," and greatly endanger the union. 4. That the municipal laws of Scotland are ordained to be still observed in that part of the island, unless altered by the imperial legislature(h), and although parliament has in many particulars thought fit to legislate for Scotland, her municipal laws in other respects continue locally in full force, whereas the common laws of England have, generally speaking, no force or validity in Scotland.

The town of Berwick-upon-Tweed was originally part of the kingdom of Scotland(i); and, as such, was for a time reduced by king Edward I. into the possession of the crown of England: and during such its subjection, it received from that prince a charter, which (after its subsequent cession by Edward Balliol, to be for ever united to the crown and realm of England) was confirmed by king Edward III. with some additions; particularly, that it should be governed by the laws and usages which it enjoyed during the time of king Alexander, that is, before its

(g) An act of parliament to repeal or alter the Act of Uniformity in England, or to establish episcopacy in Scotland, would nevertheless, in point of authority, be valid and binding; and, notwithstanding such an act, the union would continue unbroken. Nay, each of these measures might be safely and honourably pursued, if respectively agreeable to the sentiments of the English church, or of the kirk in Scotland. But it would be neither prudent, nor consistent with good faith to venture upon either of those steps by a spontaneous exertion of the inherent powers of parliament, or at the instance of mere individuals.

(h) When it is intended that Scotland shall not be included in an act of parliament, a special clause should be inserted for that purpose. Per Lord Mansfield, *R. v. Cowle*, 2 Burr. 858.

(i) "Berwick was originally part of Scotland, and afterwards brought within the kingdom of England. But though it forms part of the kingdom of England, it is not within the county of Northumberland. The charter of the inhabitants of this town has been confirmed by act of Parliament, and therefore we are bound to take judicial notice of it." Per Best, C. J., *Mayor of Berwick v. Shanks*, 8 Bing. 461.

reduction by Edward I. Its constitution was new-modelled, and put upon an English footing by a charter of king James I.: and all its liberties, franchises, and customs, were confirmed in parliament by the statutes 22 Ed. 4, c. 8, and 2 Jac. 1, c. 28. This town, indeed, derived some local peculiarities from the ancient laws of Scotland(*j*), yet is clearly part of the realm of England, is represented by burgesses in the house of commons, and bound by all acts of the British parliament, whether specially named or otherwise. And it was (perhaps superfluously) declared and enacted by statute 20 Geo. 2, c. 43, s. 3, that where England only has been or shall be mentioned in any act of parliament, the same notwithstanding has been and shall be deemed and taken to comprehend and include the dominion of Wales and town of Berwick-upon Tweed.

Moreover the writs or processes of the courts of Westminster run into Berwick, as into the principality of Wales, and it has been solemnly adjudged(*k*) that all prerogative writs (as those of *mandamus*(*l*), *prohibition*, *habeas corpus*(*m*), *certiorari*, &c.) may issue to Berwick, and that indictments and other local matters arising in the town of Berwick may be tried by a jury of the county of Northumberland(*n*). Also by the 109th section of the Municipal Corporations Reform Act (*o*), it was *enacted that Berwick-upon-Tweed [*110] should thenceforth be taken to be a "county of a town corporate"(*p*), except so far as relates to the return of a member to serve in parliament.

As to Ireland, which, until A. D. 1801, was a kingdom distinct from England, Ireland was a distinct kingdom till the act of union. though dependent upon and subordinate to it, some brief historical disquisition may be proper.

Upon king Henry VIII. was conferred, by an act of the Irish parliament(*q*) the title of "king" of that country, in lieu of the style *Dominus Hiberniæ*, which had been previously borne by an English sovereign(*r*).

The inhabitants of Ireland are, for the most part, descended from the English, who planted it as a kind of colony, after the conquest of it by king Henry II.; and the laws of England were then received and sworn to by the Irish nation, assembled at the council of Lismore(*s*). And as Ireland, thus conquered, planted, and governed, continued in a state of dependence, it was necessarily obliged to conform to, and be bound by, such laws as the superior state thought proper to prescribe.

At the time of this conquest the Irish were governed by what they called the Brehon law, so styled from the Irish name of judges, who were denominated Brehons. The Brehon law. hons(*t*). But king John in the twelfth year of his reign went into Ireland, and carried over with him many able sages of the law; and there by his letters patent, in right of the dominion of conquest, is said to have ordained and established that Ireland should be governed by the laws of England(*u*), which

(*j*) Hale, Hist. C. L. 183; 1 Sid. 382, 462; 2 Show. 865.

(*k*) Cro. Jac. 548; 2 Rol. Abr. 292; stat. 11 Geo. 1, c. 4; 2 Burr. 884, 885.

(*l*) Tapping on Mandamus, 811.

(*m*) Valuable information respecting this writ is given in the Pref. to *The Canadian Prisoners' Case* (edit. by Mr. Fry).

(*n*) In *R. v. Cowle*, 2 Burr. 884, Lord Mansfield collected and methodized the learning respecting Berwick-upon-Tweed.

(*o*) 5 & 6 Will. 4, c. 4, s. 76; and see 6 & 7 Will. 4, c. 103, s. 6.

(*p*) As to which see *post*, p. 142.

(*q*) 83 Hen. 8, c. 1; 85 Hen. 8, c. 3; with which compare stat. 83 Hen. 8, pref.

(*r*) Stat. Hiberniæ, 14 Hen. 8.

(*s*) Pryn. on 4 Inst. 249.

(*t*) 4 Inst. 858; Edm. Spencer's *State of Ireland*, p. 1518, edit. Hughes.

(*u*) Vaugh. 294; 2 Pryn. Rec. 85; 7 Rep. 28.

letters patent sir Edward Coke(v) apprehends to have been there confirmed in parliament. *But to this ordinance many of the Irish were averse to conform, and still stuck to their Brehon law: so that both Henry [*111] III.(x) and Edward I.(y) were obliged to renew the injunction; and at length in a parliament holden at Kilkenny, 40 Edward III. under Lionel, duke of Clarence, the then lieutenant of Ireland, the Brehon law was formally abolished, it being unanimously declared to be indeed no law, but a lewd custom crept in of later times. And yet, even in the reign of queen Elizabeth, the wild natives still kept and preserved their Brehon law: which is described(z) to have been a "rule of right unwritten, but delivered by tradition from one to another, in which oftentimes there appeared great show of equity in determining the right between party and party, but in many things repugnant quite both to God's laws and man's." The latter part of this character alone is ascribed to it, by the laws before cited of Edward I. and his grandson.

But as Ireland was a distinct dominion, and had parliaments of its own, it is to be observed, that though the immemorial customs, or common law of England, were made the rule of justice in Ireland also, yet no acts of English parliament, since the twelfth of king John, extend into that kingdom; unless it were specially named, or included under general words, such as, "within any of the king's dominions."

And this is particularly expressed, and the reason given in the Year Books(a): "a tax granted by the parliament of England shall not bind those of Ireland, because they are not summoned to our parliament:" and again, "Ireland hath a parliament of its own, and maketh and altereth laws; and our statutes do not bind them, because they do not send *knights to our parliament: [*112] but their persons are the king's subjects, like as the inhabitants of Calais, Gascoigne, and Guienne, while they continued under the king's subjection." And this is in accordance with an established maxim, that the general run of laws, enacted by a superior state, are supposed to be calculated for its own internal government, and do not extend to its distant dependencies; which, bearing no part in the legislature, are not therefore in its ordinary and daily contemplation. But, when the sovereign legislative power sees necessary to extend its care to any of its subordinate dominions, and mentions them expressly by name, or includes them under general words, there can be no doubt but then they are bound by its laws(b).

The original method of passing statutes in Ireland was nearly the same as in England, the chief governor holding parliament at his pleasure, which enacted such laws as they thought proper(c). But an ill use being made of this liberty, particularly by lord Gormanstown, deputy-lieutenant in the reign of Edward IV. (d), a set of statutes was there enacted in the 10 Hen. VII. (Sir Edward

Poynings' laws. Poynings being then lord deputy, whence they are called Poynings' laws), one of which(e), in order to restrain the power as well of the deputy as of the Irish parliament, provided: 1. That before any parliament

(v) 1 Inst. 141.

(x) 1 Rym. Foed. 442.

(y) *Pro eo quod leges quibus utuntur Hybernici Deo detestabiles existunt, et omni juri dissimulant, adeo quod leges censeri non debeant;—nobis et consilio nostro satis videtur expediens, eisdem utendas concedere leges Anglicanas.* 3 Pryn. Rec. 1218.

(z) Edm. Spenser, *ubi supra*.

(a) 20 Hen. 6, 8; 2 Ric. 8, 12.

(b) Year Book, 1 Hen. 7, 3; *Calvin's Case*, 7 Rep. 22.

(c) Irish Stat., 11 Eliz. Stat. 8, c. 8.

(d) Irish Stat. 10 Hen. 7, c. 23.

(e) Cap. 4, expounded by the Irish Stat. 8 & 4 Ph. & M. c. 4.

was summoned or holden, the chief governor and council of Ireland should certify to the king under the great seal of Ireland the considerations and causes thereof, and the articles of the acts proposed to be passed therein. 2. That after the king, in his council of England, shall have considered, approved, or altered the said acts or any of them, and certified them back under the great seal of England, and should have given licence to summon and hold a parliament, then the same should be summoned and held; *and therein [*113] the said acts so certified, and no other, should be proposed, received, or rejected(*f*). But as this precluded any law from being proposed, but such as was preconceived before the parliament was in being, which occasioned many inconveniences and made frequent dissolutions necessary, it was provided by the statute of Philip and Mary before cited(*g*), that any new propositions might be certified to England in the usual forms, even after the summons and during the session of parliament. By this means, however, there was nothing left to the parliament in Ireland, but a bare negative or power of rejecting, not of proposing or altering any law. The usage, however, afterwards was that bills might be framed in either house, under the denomination of "heads for a bill or bills;" and in that shape offered to the consideration of the lord lieutenant and privy council: who upon such parliamentary intimation, or otherwise upon the application of private persons, received and transmitted such heads, or rejected them without any transmission, to England. And with regard to Poynings' law in particular, it could not have been repealed or suspended, unless the bill for that purpose, before being certified to England, had been approved by both the houses(*h*).

But the Irish nation, being excluded from the benefit of the English statutes, were deprived of many good and profitable laws, made for the improvement of the common law: and, the measure of justice in both kingdoms becoming thence no longer uniform, it was therefore enacted by another of Poynings' laws(*i*), that all acts of parliament, before made in England, should be of force within the realm of Ireland(*k*). But, by the same rule, that laws made in England, between king John's time and Poynings' law were not, with some peculiar exceptions(*l*), *binding in Ireland, it follows that no acts of the English parliament made since the 10 Hen. 7 now bind the people of Ireland, unless specially named or included under general words(*m*). And on the other hand it is equally clear, that where Ireland is particularly named, or is included under general words, it is bound by such acts of parliament. For this follows from the very nature and constitution of a dependent state: dependence being very little else, but an obligation to conform to the will or law of that superior person or state, upon which the inferior depends. The

(*f*) 4 Inst. 353.

(*g*) Irish Stat. 3 & 4 Ph. & M. c. 4.

(*h*) Irish Stat. 11 Eliz. stat. 3, c. 38.

(*i*) Cap. 22.

(*k*) 4 Inst. 351.

(*l*) Prynne, in his learned argument, in *Lord Maguire's Case*, 4 St. Tr. 653, has enumerated several English statutes from the time of king John, by which Ireland was bound. In that case Lord Connor Maguire, baron of Inneskillin, who had been the principal contriver and instigator of the Irish rebellion and massacre in the time of Charles

I., had been brought to England to be tried in the King's Bench at Westminster, by a Middlesex jury, and the question was whether the prisoner was ousted of his trial by his peers in Ireland by force of the statute 35 Hen. 8, c. 2. The court overruled the prisoner's plea, which decision was approved of by a resolution of the two houses of Parliament. Lord Maguire was, therefore, found guilty, and executed as a traitor. See also *Campbell v. Hall*, Cowp. 210.

(*m*) 12 Rep. 112.

original and true ground of this superiority, in the present case, is what we usually call, though somewhat improperly, the right of conquest: a right allowed by the law of nations, if not by that of nature: but which in reason and civil policy, can mean nothing more, than that, in order to put an end to hostilities, a compact is either expressly or tacitly made between the conqueror and the conquered, that if they will acknowledge the victor for their master, he will treat them for the future as subjects, and not as enemies⁽ⁿ⁾.

But this state of dependence being almost forgotten, and ready to be disputed by the Irish nation, it became necessary some years ago to declare how that matter really stood: and therefore by stat. 6 Geo. 1, c. 5, it is declared, that the kingdom of Ireland is and ought to be *subordinate to, and dependent [*115] upon, the imperial crown of Great Britain, as being inseparably united thereto; and that the king's majesty, with the consent of the lords and commons of Great Britain in parliament, has power to make laws to bind the people of Ireland.

By two statutes, the 39 & 40 Geo. 3, c. 67, and the Irish Act, 40 Geo. 3, c. 38, the legislative union of England and Ireland was effected, the fundamental articles upon which it is based being as under:—

1. That the kingdoms of Great Britain and Ireland shall on the first day of January, 1801, and for ever after, be united into one kingdom, by the name of the United Kingdom of Great Britain and Ireland.

2. That the succession to the imperial crown of the United Kingdom shall continue limited and settled in the same manner as the succession to the crown of Great Britain and Ireland stood before limited.

3. That the said United Kingdom shall be represented in one and the same parliament, to be styled, "The Parliament of the United Kingdom of Great Britain and Ireland."

4. That four lords spiritual of Ireland, by rotation of sessions, and twenty-eight lords temporal of Ireland, elected for life by the peers of Ireland, shall sit in the House of Lords; and certain commoners (the number of whom is now such as hereinafter specified) shall sit and vote in the House of Commons on the part of Ireland.

5. That the churches of England and Ireland be united into one protestant episcopal church, to be called, "the United Church of England and Ireland," that the doctrine, worship, discipline, and government of this united church shall be and remain the same as already established in England; that the continuance and preservation of the united church so established shall be deemed an essential and fundamental part of the union; and that in like manner the church of Scotland shall remain the *same as established by law, and [*116] by the acts of union of England and Scotland.

6. That the subjects of Great Britain and Ireland shall be entitled to the same rights and privileges in trade and navigation, and also all treaties with foreign powers. That all prohibitions and bounties upon the importation of merchandise from one country to the other shall cease: but that the importation of certain articles therein enumerated shall be subject to the duties specified in the act.

7. That the sinking funds, and the interest of the national debt of each country shall be defrayed by each separately; and that Great Britain and Ire-

(n) Puff. L. of N. viii. 6, 24.

land shall contribute according to a certain proportion towards the public expenditure, subject to future regulation.

8. That all the laws and courts of each kingdom shall remain as by law then established, subject to alterations by the united parliament; but that all writs of error and appeals shall be decided by the House of Lords of the United Kingdom, except appeals from the Court of Admiralty in Ireland; and that all existing laws contrary to these articles be repealed.

Thus was the union between England and Ireland effected, a union which may be pronounced indispensable to the well-being of these adjacent islands, and which, though sometimes jeopardized by rebellion, has hitherto endured.

With regard to some other adjacent islands which are subject to the crown of Great Britain, little need be said; the Isles of Portland and of Thanet are comprised respectively within the neighbouring counties of Dorset and of Kent, whilst the Isle of Wight is (except for purposes of parliamentary representation(*o*)) a portion of the county of Hants, all such are to be looked upon as annexed to the mother island, and as [*117] part of the kingdom of *England(*p*). But there are others which require a more particular consideration.

And, first, the Isle of Man is a distinct territory from England, and is not governed by our laws: neither does any act of parliament extend to it, unless it be particularly named therein; and then an act of parliament is binding there(*q*). It was formerly a subordinate feudatory kingdom, subject to the kings of Norway; then to king John and Henry III. of England; afterwards to the kings of Scotland; and then again to the crown of England: and at length we find king Henry IV. claiming the island by right of conquest, and disposing of it to the earl of Northumberland; upon whose attainder it was granted (by the name of the lordship of Man) to Sir John de Stanley by letters patent 7 Hen. 4 (*r*). In his lineal descendants it continued for eight generations, till the death of Fernando earl of Derby, A. D. 1594: when a controversy arose concerning the inheritance thereof, between his daughters and William his surviving brother; upon which, and a doubt that was started concerning the validity of the original patent(*s*), the island was seized into the queen's hands, and afterwards various grants were made of it by king James I.: all which being expired or surrendered, it was granted afresh in 7 Jac. 1 to William earl of Derby, and the heirs male of his body, with remainder to his heirs general; which grant was the next year confirmed by act of parliament, with a restraint of the power of alienation by the said earl and his issue male. On the death of James earl of Derby, A. D. 1735, the male line of earl William failing, the duke of Atholl succeeded to the island as heir general by a female branch. In the mean time, though the title of king had long been disused, the earls of Derby, as lords of Man, had maintained a sort of royal authority therein; by assenting to or [*118] *dissenting from laws, and by exercising an appellate jurisdiction from which an appeal lay to the king of Great Britain in council(*t*). The separate existence, however, of this little subordinate royalty having been found inconvenient for the purposes of public justice, and for the revenue (the island of Man afford-

(*o*) 2 & 3 Wm. 4, c. 45, s. 16.

(*p*) 4 Inst. 287; Com. Dig. Navigation F. 5.

(*q*) 4 Inst. 284; 2 And. 116.

(*r*) Selden, Tit. Hon. 1. 8.

(*s*) Camden, Eliz. A. D. 1594.

(*t*) 1 P. Wms. 329.

ing a commodious asylum for debtors, outlaws, and smugglers), authority was given to the treasury by statute 12 Geo. 1, c. 28, to purchase the interest of its then proprietors for the use of the crown: which purchase was at length completed in the year 1765, and confirmed by statutes 5 Geo. 3, c. 26 and c. 39(*u*), whereby the whole island and all its dependencies so granted as aforesaid(*x*) became inalienably vested in the crown(*y*).

The channel islands—Jersey, Guernsey, Sark, Alderney, and their appendages—having been parcel of the duchy of Normandy, were united to the crown of England by the first princes of the Norman line. They are governed by their own laws, which are for the most part the ducal customs of Normandy, collected in an ancient book of very great authority, entitled *le grand coutumier*. They are not bound by acts of our parliaments, unless particularly named(*z*).(*52*) All causes are originally determined by their own officers, the bailiffs and jurats of the islands; but an appeal lies from them to the king and council, in the last resort(*a*). The jurisdiction of our courts in regard to these islands will hereafter be considered(*b*).

*The claim to our distant colonies and territorial dependencies is by right of occupancy, (where, for instance, an island found desert [**119*] and uncultivated has been occupied and peopled by the mother-country,) of conquest, or of cession(*c*); such right being founded upon the law of nature or of nations. But there is a difference between colonies, as regards the laws by which they are or were originally bound, resulting from the mode in which they were acquired(*d*).

Generally speaking, if an uninhabited country be discovered and occupied by English subjects, all English laws then in being, which are the birthright

(*u*) Chap. 26 is called the vesting act, and chap. 39 the regulating act. And see 43 Geo. 3, c. 128.

(*x*) Except the landed property, &c., of the Atholl family, which, however, likewise eventually became vested in the crown. 6 Geo. 4, c. 34.

(*y*) As to the customs duties of the Isle of Man, see 29 & 30 Vict. c. 23; 18 & 19 Vict. c. 96; 16 & 17 Vict. c. 107.

(*z*) 4 Inst. 286.

(*a*) See Report on the Laws of Jersey, 1861; Report on the Criminal Law of the Channel Islands, 1846; Le Quesne, *Constit. Hist. Jersey*, p. 455; *In the matter of the Jersey Jurats*, 1 L. R. Pr. C. 94.

(*b*) *Vide Post*, under the titles Habeas Corpus, Writ of Summons.

(*c*) Compare, however, the preamble of stat. 6 & 7 Vict. c. 94, cited *post*, p. 125.

(*d*) Memorandum, 2 P. Wms. 75.

(52) The Isle of Man, though no part of the realm of England, is a dominion and not a foreign dominion of the crown, within the 25th Vict. ch. 20, and a writ of *habeas corpus ad subjiciendum* will, therefore, run to the island from the English courts. *Brown, In re*, 10 Jur. N. S. 945; 33 L. J. Q. B. 193; 12 W. R. 821; 10 L. T. N. S. 458; *Crawford, Ex parte*, 18 Q. B. 618; 18 Jur. 955; 18 L. J. Q. B. 225. So this writ runs into Jersey. *Carus Wilson, In re*, 7 Q. B. 984; 9 Jur. 393; 14 L. J. Q. B. 105, 201; *Belson, In re*, 7 Moore's P. C. C. 114; 14 Jur. 631; *Dodd's Case*, 2 DeG. & J. 510; 4 Jur. N. S. 291; *Brenan and Galen's Case*, 10 Q. B. 492.

At common law the superior courts in England had a right to issue a *habeas corpus* into the colonies, to bring up persons illegally imprisoned; and the Queen's Bench issued a *habeas corpus* to Canada, requiring an imprisoned party to be produced before it. *Anderson, Ex parte*, 3 Ell. & Ell. 487; 7 Jur. N. S. 123; 30 L. J. Q. B. 129; 9 W. R. 255; 8 L. T. N. S. 622. But this case caused the enactment of the statute 25 Vict. c. 20, which provides, that no writ of *habeas corpus* shall issue out of England, by authority of any judge or court of justice therein, into any colony or foreign dominion of the crown, where her majesty has a lawfully established court or courts of justice, having authority to grant and issue the said writ, and to insure the due execution thereof throughout such colony or dominion.

of every subject, are immediately there in force^(e). (53) But this must be understood with many and great restrictions. Such colonists carry with them only so much of the English law, as is applicable to their own situation and the condition of an infant colony; such, for instance, as the general rules of inheritance, and of protection from personal injuries. The artificial refinements and distinctions incident to the property of a great and commercial

(e) Broom, Const. L., p. 56; Howard, Col. L. Intro. 10, 11.

(53) The common law of England consisted of those maxims of freedom, order, enterprise and thrift which had prevailed in the conduct of public affairs, the management of private business, the regulation of the domestic institutions, and the acquisition, control and transfer of property from time immemorial. It was the outgrowth of the habits of thought and action of the people, and was modified gradually and insensibly from time to time as those habits became modified, and as civilization advanced, and new inventions introduced new wants and conveniences, and new modes of business. Springing from the very nature of the people themselves, and developed in their own experience, it was obviously the body of laws best adapted to their needs, and as they took with them their nature, so also they would take with them these laws whenever they should transfer their domicile from one country to another. Cool. on Const. Law, 21.

From the earliest settlement of this country, the colonists claimed the benefit and the protection of the common law. But there were some portions of the English common law which were not adapted to the condition and circumstances of the colonists, and those portions were not followed here.

"The common law of England is not to be taken, in all respects, to be that of America. Our ancestors brought with them its general principles, and claimed it as their birthright; but they brought with them and adopted only that portion which was applicable to their condition. Story, J., in *Van Nest v. Pacard*, 2 Pet. 144. "The settlers of colonies in America did not carry with them the laws of the land as being bound by them wherever they should settle. They left the realm to avoid the inconveniences and hardships they were under, where some of these laws were in force; particularly ecclesiastical laws, those for payment of tithes and others. Had it been understood that they were to carry these laws with them, they had better have stayed at home among their friends, unexposed to the risks and toils of a new settlement. They carried with them a right to such parts of laws of the land as they should judge advantageous or useful to them; a right to be free from those they thought hurtful, and a right to make such others as they should think necessary, not infringing the general rights of Englishmen; and such new laws they were to form as agreeable as might be to the laws of England." Franklin, Works by Sparks, vol. iv, p. 221. See, also, *Chisholm v. Georgia*, 2 Dall. 435; *Commonwealth v. Hunt*, 4 Metc. 122; *State v. Rollins*, 8 N. H. 550; *State v. Buchanan*, 5 H. & J. 356; *Bloom v. Richards*, 2 Ohio St. 390; *Lyle v. Richards*, 9 S. & R. 330; *Dawson v. Coffman*, 28 Ind. 220; *Lansing v. Stone*, 37 Barb. 15; *Simpson v. State*, 5 Yerg. 356; *Lorman v. Benson*, 8 Mich. 18; *Norris v. Harris*, 15 Cal. 226; *Hamilton v. Kneeland*, 1 Nev. 40.

The colonists also claimed the benefits of such statutes as were enacted from time to time in England in modification of the common law. But such statutes when passed after the settlement of a colony were not in force therein, unless made so by express words, or by adoption by the colonists. *Commonwealth v. Lodge*, 2 Gratt. 579; *Pemble v. Clifford*, 2 McCord, 31; *Swift v. Tousey*, 5 Ind. 196; *Cathcart v. Robinson*, 5 Pet. 280.

"The colonists also had legislatures of their own, by which laws had been passed which were in force at the time of the separation, and which remained unaffected thereby. When, therefore, they emerged from the colonial condition into that of independence, the laws which governed them consisted, *first*, of the common law of England, so far as they had tacitly adopted it as suited to their condition; *second*, of the statutes of England, or of Great Britain, amendatory of the common law, which they had in like manner adopted; and *third*, of the colonial statutes. The first and second constituted the American common law, and by this in great part are rights adjudged and wrongs redressed to this day." Cool. on Const. Law, 25.

people, the laws of mortmain (*f*), the laws of police and revenue (such especially as are enforced by penalties), the mode of maintenance for the clergy, the jurisdiction of spiritual courts, and a multitude of other provisions, are neither necessary nor convenient for the newly-settled region, and consequently are not there in force. What shall be deemed to have been admitted in virtue of the general rule, and what rejected, at what times, and under what restrictions, has usually, in case of dispute, been decided in the first instance by the provincial judicature when established, subject to revision and control by the sovereign in council: the entire constitution of the dependent territory being also liable to *be new-modelled and reformed by the general superintending power of the legislature in the mother-country. The laws, [*120] accordingly, which govern colonies thus acquired, are, in the earlier stages of their existence, partly local and partly those of England, whether such as subsisted at the date of their occupation, or such as have subsequently been made applicable to them. And during the last few years, statutes regulating the constitutions, laws, and territorial limits of our principal dependencies (including Australia(*g*), which was acquired by occupancy for the purpose of a penal settlement(*h*)), have been enacted by the imperial parliament.

In a conquered or ceded country, which prior to conquest or cession had already laws of its own, the sovereign may alter and change those laws; but till he does actually change them, the ancient laws of the country remain in force(*i*), for the laws of England, existing at the time of cession or conquest, do not become applicable to the new dependency(*k*). Should the sovereign, however, delegate to a local legislature, erected in the conquered country, the power which he thus possessed of altering its laws, he will be precluded from afterwards exercising that power as he might otherwise have done(*l*), the paramount right of legislation vested in parliament remaining of course unaffected.

Our American provinces were obtained in the seventeenth century, partly by right of conquest and driving out the natives, partly by treaties.(54). And therefore the *common law of England, as such, had no allowance or authority there; they being no part of the mother country, but dis- [*121] tinct, though dependent, dominions. They were subject to the control of parliament; albeit not bound by any acts of parliament, unless particularly named

(*f*) *Att. Gen. v. Stewart*, 2 Moo. 143.

(*g*) As to which see 29 & 30 Vict. c. 74; 25 & 26 Vict. c. 11; 24 & 25 Vict. c. 44; 18 & 19 Vict. c. 56; 13 & 14 Vict. c. 59.

(*h*) *Mills*, Col. Const. 292.

(*i*) *Calvin's Case*, 7 Rep. 17; *Broom's Const.* L. 54.

(*k*) Hence, when Jamaica, having become an English colony, claimed the English law

as its consequential right, the crown not only denied such right, but disallowed an act passed in the island declaring such law to be in force there. *Howard*, Col. L. Introd. 11. As to the present constitution and government of Jamaica, see 29 & 30 Vict. c. 12.

(*l*) *Campbell v. Hall*, Cowp. 204; S. C. 20 St. Tr. 239.

(54) The American courts do not sanction the doctrine of the text that the provinces were obtained by conquest, or by treaty, or by both, but by the right of discovery. And that the principle which governed the nations of the old world, was, that discovery gave title to the government, by whose subjects or by whose authority it was made, against all other European governments, which title might be consummated by possession. *Johnson v. McIntosh*, 8 Wheat, 543, 578; *Worcester v. Georgia*, 6 Pet. 515, 548; *Mitchel v. United States*, 15 id. 52, 89; *Martin v. Waddell*, 16 id. 367, 409; *United States v. Fernandez*, 10 id. 803, 804; *Mitchel v. United States*, 9 id. 711, 746.

therein. It had indeed been declared by statute 7 & 8 Will. 3, c. 22, s. 9(*m*), that all laws, bye-laws, usages, or customs, which shall be in practice in any of the plantations, repugnant to any law hereafter to be made in this kingdom relative to the said plantation, shall be illegal, null and void. And, because several of the colonies had claimed a sole and exclusive right of imposing taxes upon themselves, the statute 6 Geo. 3, c. 12, expressly declared that all his majesty's colonies and plantations in America had been, were, and of right ought to be subordinate to and dependent upon the imperial crown and parliament of Great Britain; who had full power and authority to make laws and statutes of sufficient force and validity to bind the colonies and people of America, subjects of the crown of Great Britain, in all cases whatsoever. And this authority was afterwards forcibly exemplified, and carried out, by the statute 7 Geo. 3, c. 59, for suspending the legislation of New York; and has been exercised on more recent occasions.

The statutes specified gave rise, as is well known, to the first American war. The celebrated Declaratory Act(*n*), in which the parliament of the mother country declared that they would not impose internal taxes for the purposes of revenue, having come too late to appease or retain the colonies, who were eventually, by the treaty of Paris (A. D. 1783), acknowledged to be "free, sovereign, and independent"(*o*).

[*122] *The policy now generally adopted by the mother country in regard to our colonies is of this kind — to abstain from legislation concerning matters of purely internal interest(*p*).

Our colonial dependencies, regard being had to the mode in which they were originally acquired and governed, have been variously classified; for our present purpose they may be divided into three sorts:—I. Colonies which, in the first stages of their existence, were under the direct authority of the crown and parliament; II. Proprietary Governments; and III. Charter Governments; to the first-mentioned of which our remarks will principally refer.

I. Colonies included in the first of the above classes may, in accordance with what has been already said, be arranged under two heads: 1. those which, having been originally acquired by conquest or cession, retain their own laws, except as altered by the crown; 2. those which, having been originally acquired by occupancy, are subject to the laws of England in force at the time of occupancy, except as altered by subsequent legislation.

Of the above-mentioned two classes, the former may be again subdivided so as to include, (1.) colonies which have received constitutions from the crown, whereby the royal prerogative of legislation has been abandoned to representative assemblies; and (2.) colonies which have not received such constitutions. Almost all our colonial possessions are now included in the former subdivision, and enjoy constitutions more or less modelled on our own(*q*). The legislative power is in these dependencies vested in a governor, representing the sovereign, commissioned and instructed by the crown, a council corresponding with the British cabinet and house of peers, and an assembly chosen by the people cor-

(*m*) Repealed by 6 Geo. 4, c. 105, but substantively re-enacted by 8 & 4 Will. 4, c. 59, s. 56, which applies to "the British possessions in America."

(*n*) 18 Geo. 3, c. 12.

(*o*) See 23 Geo. 3, c. 46; 23 Geo. 3, c. 89; and the preamble of 31 Geo. 3, c. 81, s. 46.

(*p*) Mills, Col. Const. Introd. 1.

(*q*) Clark, Col. L. 27—67.

responding with our house of commons; these constituent departments, having **sub modo* the same powers of legislation as their prototypes in Eng- [*123] land, subject, however, to the final negative of the sovereign, and to the supreme control of the imperial parliament. The executive power is vested in the governor, with or without the assent of the council(*r*).

Some few colonies which have received no constitution creating a local legislature, are still subject to the legislation of the king in council(*s*). These retain the laws in force at the time of their cession to this country(*t*), unless where modified by the imperial government, or perhaps when clearly repugnant to natural justice and the spirit of our constitution(*u*).

Colonies included in the second of the above-named classes, having been acquired by discovery or occupancy, are governed by the general law of England, as it existed when the colony was first established, together with such regulations as have been since specially provided for them by the British legislature(*x*).

*II. Proprietary governments(*z*), were granted out by the crown to [*124] individuals, in the nature of feudatory principalities, with all the inferior regalities, and subordinate powers of legislation, which formerly belonged to the owners of counties palatine: yet with these express conditions, that the ends for which the grant was made should be substantially pursued, and that nothing should be attempted which might derogate from the sovereignty of the mother country.

III. A Charter government(*a*) was in the nature of a civil corporation, with the power of making bye-laws for its own interior regulation, not contrary to the laws of England; and with such rights and authorities as were specially given in its charter of incorporation(*b*).

(*r*) Howard, Col. L. Introd. 1.

(*s*) Clark, Col. L. 18. As to Trinidad and Tobago, see 11 & 12 Vict. c. 23.

(*t*) Thus St. Lucia retains the code de la Martinique, or the ordinances promulgated by the French monarchs to their West Indian colonies; the Roman Dutch law obtains in British Guiana, Ceylon, and the Cape of Good Hope (now united with Caffraria by stat. 28 & 29 Vict. c. 5). The operation of the criminal laws at the Cape is extended to some adjacent territories by 26 & 27 Vict. c. 35. In the Mauritius are received four of the codes of Napoleon; the fifth or penal code not having been promulgated at the time of its conquest. The old Sicilian laws prevail in Malta; and some of the feudal laws of France affecting land in Lower Canada. Mills, Col. Const. 20.

(*u*) Stokes, Col. 11; arg. *R. v. Pictou*, 80 St. Tr. 741, 900; *Blanchard v. Galdy*, Salk. 411, 412. See stat. 9 & 10 Vict. c. 103, s. 10, which expressly excludes from operation the native usages of New Zealand when repugnant to the principles of humanity.

(*x*) Clark, Col. L. 21. Our title to New Zealand in strictness depends partly upon discovery and occupancy, partly upon conquest of the natives. This dependency is now regulated by various statutes, of which see particularly 26 & 27 Vict. c. 23; 25 & 26 Vict. c. 48; 24 & 25 Vict. c. 30; 20 & 21

Vict. c. 53; 15 & 16 Vict. c. 73; 14 & 15 Vict. c. 86; 9 & 10 Vict. c. 103; and 3 & 4 Vict. c. 63.

(*z*) Such were Pennsylvania, Delaware, and Maryland; Barbadoes, which was granted to the Earl of Carlisle, and St. Lucia to the Duke of Montague, might formerly have been included in this class.

In 1668 Canada, which had till that period been a proprietary government, was raised to the dignity of a royal government, and from that time its governors were appointed by a regular commission from the crown. In 1759 it was conquered by General Wolfe, and by the Treaty of Paris 1763 ceded to his Britannic Majesty. Clark, Col. L. 398.

Prince Edward's Island "is chiefly remarkable as exhibiting the last remnant of the old proprietary system." Merivale, Col. i. 107. As to this dependency, see further Mills, Col. Const. 214, 215.

(*a*) Such were Virginia and the New England States. Sierra Leone was till recently referable to this class. See now 24 & 25 Vict. c. 81.

(*b*) Mr. Merivale describes a charter government as one in which the sovereign has parted with his rights wholly or partially to the colonist; in which both houses are elective, and sometimes the governor also; in short, as a democracy. Col. i. 89.

Our colonies having thus in various ways been acquired by the mother country, and though alike brought under her control, having been originally governed by laws essentially diverse; those laws, moreover, having from time to time been changed or modified by the sovereign in council, by the imperial parliament, or by the local legislatures, it may well be that doubts have ere [*125] now arisen in regard to the existing state of our colonial law, *and in regard to the legality of the mode in which supreme powers of law-making have been exercised. To settle, and, so far as may be, allay such doubts, three important statutes have been passed during the present reign. One of these statutes applies to acts done by the crown, presumably in virtue of its prerogative, the legality of which may be questionable; whilst the two other statutes apply to acts of the colonial legislatures.

The statute 6 & 7 Vict. c. 94, in its preamble sets forth that, "by treaty, capitulation, grant, usage, sufferance, and other lawful means, her Majesty hath power and jurisdiction within divers countries and places out of her Majesty's dominions," and that "doubts have arisen how far the exercise of such power and jurisdiction is controlled by and dependent on the laws and customs of this realm, and it is expedient that such doubts should be removed," and enacts (s. 1.) that, "it is and shall be lawful for her Majesty to hold, exercise, and enjoy any power or jurisdiction which her Majesty now hath, or may at any time hereafter have within any country or place out of her Majesty's dominions, in the same and as ample a manner as if her Majesty had acquired such power or jurisdiction by the cession or conquest of territory," and further (s. 2) that, "every act, matter, and thing which may at any time be done in pursuance of any such power or jurisdiction of her Majesty, in any country or place out of her Majesty's dominions, shall in all courts ecclesiastical and temporal, and elsewhere within her Majesty's dominions, be and be deemed and adjudged to be in all cases and to all intents and purposes whatsoever, as valid and effectual as though the same had been done according to the local law then in force within such country or place."

With regard to the acts of colonial legislatures, and the validity of colonial laws:—

The statute 26 & 27 Vict. c. 84, enacts (s. 2) as follows: that, "All laws [*126] heretofore passed or purporting to have *been passed by any colonial legislature with the object of declaring or altering the constitution of such legislature or of any branch thereof, or the mode of appointing or electing the members of the same, shall have and be deemed to have had from the date at which the same shall have received the assent of her Majesty, or of the governor of the colony on behalf of her Majesty, the same force and effect for all purposes whatever, as if the said legislature had possessed full powers of enacting laws for the objects aforesaid, and as if all formalities and conditions by act of parliament or otherwise prescribed in respect of the passing of such laws had been duly observed."

The 28 & 29 Vict. c. 63, entitled, "An Act to remove doubts as to the validity of colonial laws," applies to all her Majesty's possessions abroad in which there exists a local legislature competent to make laws (except the Channel Islands, the Isle of Man, and territories vested in the crown by virtue of any act for the government of India). This statute enacts as follows: (s. 2) That any colonial law in any respect repugnant to the provisions of any act of parliament

extending to the colony to which such law may relate, or repugnant to any order or regulation made under authority of such act, or having in the colony the force and effect of such act, shall be read subject to such act, order, or regulation, and shall to the extent of such repugnancy, but not otherwise, be and remain absolutely void and inoperative. (s. 3) That no colonial law shall be or be deemed to have been void or inoperative on the ground of repugnancy to the law of England, unless the same shall be repugnant to the provisions of some such act of parliament, order, or regulation as aforesaid. (s. 4) That no colonial law, passed with the concurrence of or assented to by the governor of any colony or to be hereafter so passed or assented to shall be or be deemed to have been void or inoperative by reason only of any instructions with reference to such law or the subject thereof which may have been given to such governor *by or on behalf of her Majesty by any instrument other than the [*127] letters patent or instrument authorizing such governor to concur in passing or to assent to laws for the peace, order, and good government of such colony, even though such instructions may be referred to in such letters patent or last mentioned instrument. (s. 5) That every colonial legislature shall have and be deemed at all times to have had full power within its jurisdiction to establish courts of judicature, and to abolish and reconstitute the same, and to alter the constitution thereof, and to make provision for the administration of justice therein, and every representative legislature shall in respect to the colony under its jurisdiction have and be deemed at all times to have had full power to make laws respecting the constitution, powers, and procedure of such legislature; provided that such laws shall have been passed in such manner and form as may from time to time be required by any act of parliament, letters patent, order in council, or colonial law for the time being in force in the said colony. And (s. 6), That the certified copy of any colonial law shall be *prima facie* evidence that the document so certified is a true copy of such law, and that such law has been duly and properly passed and assented to.

The dependencies latterly referred to are under the control and administration of the Secretary for the Colonial department(c), and the vast territories belonging to us in India, originally occupied for trading purposes

India.

by a chartered company(d), have by a series of enactments been gradually withdrawn from their management, have been vested in the British crown, and are now likewise placed under the control of a principal secretary of state. The *changes which have thus, during rather more than [*128] two and a half centuries, been effected in our Eastern Empire may be more fitly discussed by the historian than by the legal commentator. Of such changes the most important were made by the following statutes(e):—13 Geo. 3, c. 63 (explained and amended by 21 Geo. 3, c. 70), which first made provision for the government of British India by the appointment for that purpose of a governor-general and council; the 24 Geo. 3, c. 25, under which the board of control was established; the 33 Geo. 3, c. 52, and 53 Geo. 3, c. 155, which confirmed and continued to the East India Company for certain terms their

(c) An appeal lies from a colonial judicature to the Privy Council, *post*, vol. iii.

(d) The trade to the East was, till 1708, carried on by two rival companies, which were consolidated by stat. 6 Ann. c. 17, s. 13.

The validity of letters patent from the crown for exclusive trading had been established in *The East India Co. v. Sandys*, 10 St. Tr. 371.

(e) See Mills, Col. Const. pp. 105, *et seq.*

territory and revenues together with commercial privileges; the 3 & 4 Will. 4, c. 85, which further continued the territories of the company under their government, with all their powers, rights, and immunities until the year 1854, extinguished the privilege of trading exclusively in tea which had previously been enjoyed by the company, remodelled the board of commissioners for the affairs of India, vested in the court of directors the appointment of the governor-general, subject to the royal approval, and transferred the island of St. Helena, which had been held by the East India Company, to the crown; the 16 & 17 Vict. c. 95, which (confirming the provisions of former acts not inconsistent therewith) further continued to the company the possession of their territories until parliament should otherwise provide, and which likewise reconstituted the court of directors and the legislative council; the 21 & 22 Vict. c. 106 (entitled "an act for the better government of India") enacting that all territories in the possession, or under the government of the East India Company, and all rights vested in the said company in relation thereto should become vested in her Majesty, and be exercised in her name(*f*); that India [*129] should be governed by and in the name of her Majesty(*g*) by a *secretary of state(*h*); that a council should be established consisting of fifteen members, styled the council of India(*i*), in contradistinction to the council of the governor-general in India. By this statute also were regulated the duties and procedure of the council(*k*), the mode of making appointments and bestowing patronage(*l*), the transfer to her Majesty of the property previously vested in the company(*m*), the expenditure of the revenues of India(*n*), also the conditions of service of the military and naval forces(*o*), and of persons holding offices, employments, or commissions under the company(*p*). The statute further enacted that all treaties made by the said company should be binding on her Majesty, and that all contracts and engagements of the company should be enforceable by or against the secretary of state for India, as they might have been by or against the company(*q*); and lastly the 24 & 25 Vict. c. 67 (the provisions of which are amended and enlarged by the 28 & 29 Vict. c. 17), whereby are regulated the composition of the council of the governor-general, the mode in which business is to be conducted, and laws (subject to disallowance on the part of the Crown) are to be made by it, the extent of the power of the governor of a presidency to legislate, and the power of the governor-general in council (subject likewise to disallowance by the Crown) to alter the territorial boundaries of any presidency or province.

The result of legislation in regard to India, therefore, is that the vast region formerly administered by or in the name of the East India Company, is now brought directly under the government of the Queen, such government being conducted through the secretary of state and the council of India, the supreme [*130] local government being *administered by the governor-general in council, who exercises authority civil and military over the presidencies and the straits settlements, and has a direct control over all those territories which are not included in any of the subordinate governments. His authority

- (*f*) S. 1.
- (*g*) S. 2.
- (*h*) Ss. 8—6.
- (*i*) Ss. 7—18.
- (*k*) Ss. 19—28.
- (*l*) Ss. 29—38.

- (*m*) Ss. 39, 40.
- (*n*) Ss. 41—55.
- (*o*) Ss. 56, 57.
- (*p*) S. 58.
- (*q*) S. 67.

extends also to the territories of all native princes with whom we have contracted subsidiary or protective relations, and he exercises such influence as Great Britain may possess by treaty over those independent states which have accepted of our mediation(*r*). From the principal local courts of justice in India an appeal lies, as we shall hereafter see(*s*), to the judicial committee of the privy council.

With respect to foreign possessions which may become vested in the sovereign, a remark may not be inappropriate. Before the kingdom of Hanover had been severed from the crown of Great Britain, the English legislature had remarked the inconveniences which resulted from dominions on the continent of Europe being annexed to it; from the Norman territory which William the Conqueror brought with him, and held in conjunction with the English throne; and from Anjou, and its appendages, which fell to Henry II. by hereditary descent. They had seen the nation engaged for near four hundred years together in ruinous wars for defence of these foreign dominions; till, happily for this country, they were lost under the reign of Henry VI., Calais only excepted, which remained in our possession until A. D. 1558. The legislature observed that, from that time, the maritime interests of England had been better understood and more closely pursued: that, in consequence of this attention, the nation, as soon as she had rested from her civil wars, began to flourish all at once; and became much more considerable in Europe than when her princes were possessed of a larger territory, and her councils were distracted by foreign interests. This experience and these considerations gave *birth to a conditional clause in the act of settlement(*t*), which vested the crown in her present Majesty's illustrious house,—that in case the crown and imperial dignity of this realm shall hereafter come to any person not being a native of this kingdom of England, this nation shall not be obliged to engage in any war for the defence of any dominions or territories which do not belong to the crown of England, without consent of parliament. [*131]

We come now to consider the kingdom of England in particular, the direct and immediate subject of those laws, concerning which we are to treat in the ensuing Commentaries. And this comprehends not only Wales and Berwick, of which enough has been already said, but also part of the sea. The main or high seas are part of the realm of England, for thereon our courts of admiralty have jurisdiction, as will be shown hereafter: but they are not subject to the common law(*u*). This main sea begins at the low-water-mark. But between the high-water-mark and the low-water-mark, where the sea ebbs and flows, the common law and the admiralty have *divisum imperium*, and alternate jurisdiction; one upon the water, when it is full-sea; and the other upon land, when it is an ebb(*x*). To this subject reference will hereinafter be made as occasion may require.

The two modes of division. The territory of England is liable to two divisions: the one ecclesiastical, the other civil.

1. The ecclesiastical division is, primarily, into two provinces, those of Canterbury and York. A province is the circuit of an archbishop's jurisdiction.

(*r*) Mills, Col. Const. 118.

(*s*) Post, vol. iii.

(*t*) Stat. 12 & 13 Wm. 3, c. 2.

(*u*) Co. Litt. 260.

(*x*) Finch, L. 78.

Each province contains divers dioceses, or sees of suffragan(y) bishops;

1. Ecclesiastical division into provinces, dioceses, archdeaconries, rural deaneries, and parishes. [*132] *whereof Canterbury includes twenty, and York six(z). Every diocese is divided into archdeaconries; each archdeaconry into rural deaneries, which are the circuits of the archdeacons' and rural deans' jurisdictions, of whom hereafter; and every such deanery is divided into parishes(a).

A parish is that circuit of ground which is committed to the charge of one parson, vicar, or minister having cure of souls therein. How ancient the division of parishes is, may at present be difficult to ascertain; for it seems to be agreed on all hands, that in the early ages of Christianity in this island, parishes were unknown, or at least a parish signified the same as a diocese does now. There was then no appropriation of ecclesiastical dues to any particular church; but every man was at liberty to contribute his tithes to whatever priest or church he pleased, provided only that he did it to some; or if he made no special appointment or appropriation thereof, tithes were paid into the hands of the bishop, whose duty it was to distribute them among the clergy, and for other pious purposes, according to his own discretion(b).

Mr. Camden(c) says, England was divided into parishes by-archbishop Honorius about the year 636. Sir Henry Hobart(d) lays it down that parishes were first erected by the council of Lateran, which was held A. D. 1179. These speculations, widely differing from each other, differ perhaps as widely from the truth; which may be found in the medium between the two extremes. For [*133] Mr. Selden has clearly shown(e), that the clergy lived in *common without any division of parishes, long after the time mentioned by Camden. And it appears from the Saxon laws, that parishes were in being long before the date of that council of Lateran, to which they are ascribed by Hobart.

We find the distinction of parishes, nay even of mother-churches, so early as in the laws of king Edgar, about the year 970. Before that time the consecration of tithes was in general arbitrary; that is, every man paid his own (as was before observed) to what church or parish he pleased(f). But this being liable to be attended with fraud, or at least caprice, in the persons paying; and with jealousies or mean compliances in such as were competitors for receiving them; it was ordered by a law of king Edgar(g) that "every tithe be rendered to the old minister to which the district belongs;" and by a law of king Ethelred(h), it was further ordered that "*omnis consuetudo reddatur super amicitiam Dei ad matrem nostram ecclesiam cui adjacet.*" However, if any thane, or great lord, had a church within his own demesnes, distinct from the mother-church, in the nature of a private chapel; then, provided such church

(y) The word "suffragan" is here used in respect of a bishop's relation to the archbishop of his province. The word, however, is sometimes used in another sense. Formerly each archbishop and bishop had his suffragan to assist him in the performance of certain spiritual duties (see 26 Hen. 8, c. 14). The co-adjutor of a bishop, appointed in case of his bodily infirmity, is not to be confounded with a suffragan. Steer. Par. L. 3rd ed. 2.

(z) The bishopric of the Isle of Man was an-

nexed to the province of York by king Henry VIII. See 33 Hen. 8, c. 31.

(a) Co. Litt. 94.

(b) Seld. of Tith. c. 9, 4; 2 Inst. 646; *Slade v. Drake*, Hob. 296.

(c) In his *Britannia*, p. clxxxix.

(d) *Slade v. Drake*, Hob. 296.

(e) Of Tithes, c. 9.

(f) *Bishop of Winchester's case*, 2 Rep. 44 b.

(g) Anc. Laws & Inst. Eng. 111; Seld. of Tith. c. 1.

(h) Anc. Laws & Inst. Eng. 144.

had a cemetery or consecrated place of burial belonging to it, he might allot one-third of his tithes for the maintenance of the officiating minister: but, if it had no cemetery, the thane must himself have maintained his chaplain by some other means; for in such case all his tithes were ordained to be paid to the mother-church (i).

This proves that the kingdom was then generally divided into parishes; which division happened probably not all at once, but by degrees. For it seems tolerably certain, that the boundaries of parishes (k) were originally *ascertained by those of a manor or manors: since it very seldom [*134] happens that a manor extends itself over more parishes than one, though there are often many manors in one parish. The lords, as Christianity spread itself, began to build churches upon their own demesnes, or wastes, to accommodate their tenants in one or two adjoining lordships: and, in order to have divine services regularly performed therein, obliged all their tenants to appropriate their tithes to the maintenance of the one officiating minister, instead of leaving them at liberty to distribute the tithes among the clergy of the diocese in general: and this tract of land, the tithes whereof were so appropriated, formed a distinct parish. Which will well enough account for the frequent intermixture of parishes one with another. For if a lord had a parcel of land detached from the main of his estate, but not sufficient to form a parish of itself, it was natural for him to endow his newly erected church with the tithes of those disjointed lands; especially if no church was then built in any lordship adjoining to those outlying parcels.

Thus parishes were gradually formed, and parish churches endowed with the tithes that arose within the circuits assigned. But some lands, either because they were in the hands of careless owners, or were situate in forests and desert places, or for other now unsearchable reasons, were never united to any parish, and therefore continue to this day extra-parochial, unless constituted parishes by or in virtue of an act of parliament (l), and their tithes are now by immemorial custom payable to the king instead of the bishop, in trust and confidence that he will distribute them for the general good of the *church (m): yet extra-parochial wastes and marshlands, when improved and drained, are by the statute 17 Geo. 2, c. 37, to be assessed to all parochial rates [*135] in the parish next adjoining.

The arrangements which the ecclesiastical commissioners have by various statutes (n) been authorized to make for erecting portions of pre-existing parishes into separate districts, and again for converting the districts thus constituted into parishes, have already been so far carried out as to affect in no inconsiderable degree the ecclesiastical division of this kingdom.

2. The civil division of the territory of England is into counties, of those counties into hundreds, of those hundreds into tithings or towns. Which division, as it now stands, has been, perhaps erroneously (o), ascribed to king Alfred: who, to prevent the rapines and disorders

(i) Seld of Tith. c. 2. See also the laws of king Edgar, c. 2, and of king Canute, c. 11.

(k) "The boundaries of parishes usually depend upon ancient and immemorial custom, having been originally established according to the particular circumstances of the times or districts." Steer. Par. L. 3rd ed. 5.

(l) Many extra-parochial places appear to

have been the sites of religious houses, and others of royal palaces. *Vide* Pop. Abst. (1881), vol. i. p. xxii.

(m) 2 Inst. 647; *Bishop of Winchester's case*, 2 Rep. 44.

(n) Collected in Steer. Par. L. c. 1, s. 8.

(o) Hall. Mid. Ag. ii. 401.

which formerly prevailed in the realm, is said to have instituted tithings; so called from the Saxon, because ten freeholders with their families composed one. These all dwelt together, and were sureties or free pledges to the king for the good behaviour of each other; and, if any offence was committed in their district, they were bound to have the offender forthcoming (*p*). And therefore anciently no man was suffered to abide in England above forty days, unless he were enrolled in some tithing or decennary (*q*). One of the principal inhabitants of the tithing was annually appointed to preside over the rest, being called the tithing-man, the headborough (words which speak their own etymology), and in some counties the borsholder, or borough's-caldre, [*136] being supposed the discreetest man in the borough, town, or tithing(*r*).

Tithings, towns, or vills are of the same signification in law; and are said to have had, each of them, originally a church and celebration of divine service, Tithings, towns, sacraments, and burials (*s*): though that seems to be rather an ecclesiastical than a civil distinction. The word "town" (*t*) or or vills. "vill" is indeed, by the alteration of times and language, now become a generic term, comprehending under it the several species of cities, Cities. boroughs, and common towns. A city is a town incorporated, Boroughs. which usually (*u*) is or has been the see of a bishop. A borough is now understood to be a town, either corporate or not, sending Towns. burgesses to parliament (*x*). Other towns there are, computed by sir E. Coke(*y*) to number about 8,800 in his day, which are neither cities nor boroughs; some of which have the privilege of holding markets, and others not; though both are equally towns in law. To several of these towns there are small appendages belonging, called hamlets; which are taken Hamlets. notice of in the statute of Exeter (*z*), which makes frequent mention of entire vills, demi-vills, and hamlets. Entire vills sir Henry Spelman(*a*) [*137] conjectures to have consisted of ten freemen or frank-pledges, demi-vills of five, and hamlets of less than five. These little collections of houses are sometimes under the same administration as the town itself, sometimes governed by separate officers; in which last case they are, to some purposes in law, looked upon as distinct townships. These towns, as was before hinted, contained each originally but one parish, and one tithing; though many of them now, by the increase of inhabitants, are divided into several parishes and tithings; and, sometimes, where there is but one parish there are two or more vills or tithings.

(*p*) Flet. 1, 47. In the laws of king Edward the Confessor, c. 20, we read "*alia pax maxima est, per quam omnes firmiori statu sustentantur: scilicet fidejussionis stabilitate. Et hoc est quod de omnibus villis totius regni sub decennali fidejussione debeant omnes esse ita quod si unus ex decem forisfecerit novem reum habere ad rectum,*" &c.

(*q*) Mirr. c. 1, s. 3.

(*r*) Finch. L. 8.

(*s*) 1 Inst. 115.

(*t*) According to the strict legal meaning of the word "town," it is a place having a church or a constable. See *Elliot v. South Devon Railway Company*, 2 Exch. 729.

(*u*) At the great council, assembled A. D. 1072, to settle the claim of precedence between the archbishops of Canterbury and York, it was decreed that all bishops' sees should be

transferred from towns to cities (Woodd. Lect. i. 302; Co. Litt. 109, n. 8); consequently there was no original connection between sees and cities. Westminster is still a city, though the bishopric has ceased to exist (see Co. Litt. 109). The bishopric of Ripon has been restored without elevating that town to the rank of a city. Leicester, Shrewsbury, and other places in which no episcopal jurisdiction ever existed, are styled cities in Domesday. Hence we infer that there is now no necessary connection between sees and cities.

(*x*) Litt. s. 164. The word "borough" had originally a wider signification. Toml. I. Dict. *ad verb.*

(*y*) 1 Inst. 116.

(*z*) 14 Edw. 1.

(*a*) Gloss. 274.

As ten families of freeholders made up a town or tithing, so ten tithings composed a superior division, called a hundred, as consisting of ten times ten families. The hundred is governed by a high constable or bailiff, and formerly there was regularly held in it the hundred court for the trial of causes, though now fallen into disuse. In some of the more northern counties these hundreds are called wapentakes(*b*).

Territorial subdivisions, analogous to our hundreds, seem to have existed in Denmark(*c*): and we find that in France a regulation of this sort was made about two hundred years before; set on foot by Clotharius and Childebert, with a view of obliging each district to answer for the robberies committed in its own division. These divisions were, in that country, as well military as civil: and each contained a hundred freemen, who were subject to an officer called the *centenarius*; a number of which *centenarii* were themselves subject to a superior officer called the count or *comes*(*d*). And indeed something like this institution of hundreds may be traced back as far as the ancient Germans, from whom were derived both the Franks who became masters of Gaul, and the Saxons who settled in England: for both the thing and the name, as *a territorial assemblage of persons, from which afterwards the territory itself might probably receive its denomination, were well known [*138] to that warlike people. "*Centeni ex singulis pagis sunt idque ipsum inter suos vocantur; et quod primo numerus fuit, jam nomen et honor est*"(*e*).

An indefinite number of these hundreds make up a county or shire. Shire is a Saxon word signifying a division; but a county, *comitatus*, is plainly derived from *comes*, the count of the Franks; that is, the earl, or alderman (as the Saxons call him) of the shire, to whom the government of it was entrusted. This he usually exercised by his deputy, still called in Latin *vice-comes*, and in English, the sheriff, shrieve, or shire-reeve, signifying the officer of the shire; upon whom, by process of time, the civil administration of it is now totally devolved. In some counties there is an intermediate division, between the shire and the hundreds, as lathes in Kent, and rapes in Sussex, each of them containing about three or four hundreds apiece. These had formerly their lathe-reeves and rape-reeves, acting in subordination to the shire-reeve. Where a county is divided into three of these intermediate jurisdictions, they are called trithings(*f*), which were anciently governed by a trithing-reeve. These trithings still subsist in the large county of York, where by an easy corruption they are denominated ridings; the north, the east, and the west-riding. The number of counties in England and Wales has been different at different times: at present there are forty in England, and twelve in Wales.

Three of these counties, Chester, Durham, and Lancaster, are called counties palatine. The two former are such by prescription, *i. e.*, custom immemorial; or, at least, as old as the Norman conquest(*g*): the latter was created by king Edward III. in favour of Henry Plantagenet, first earl and then duke of Lancaster(*h*); whose *heiress being married to John of Gaunt the king's son, the franchise was greatly enlarged and [*139]

(*b*) Seld. in Fortesc. c. 24.

(*c*) Seld. Tit. of Hon., 2. 5. 8.

(*d*) Montesq. Sp. L. 30. 17.

(*e*) Tacit. de mor. Germ. 6.

(*f*) Spelm. Gov. Eng. 52.

(*g*) Seld. tit. Honour, 2. 5. 8.

(*h*) Pat. 25 Edw. 3, p. 1, m. 18; Seld. *ubi supra*; Sandford's Gen. Hist. 112; 4 Inst. 204.

confirmed in parliament(*i*), to honour John of Gaunt himself, whom, on the death of his father-in-law, the king had also created duke of Lancaster(*k*). Counties palatine are so called a *palatio*; because the owners thereof (the earl of Chester, the bishop of Durham, and the duke of Lancaster,) had in those counties *jura regalia*, as fully as the king hath it in his palace: *regalem potestatem in omnibus*, as Bracton expresses it(*l*). They might pardon treasons, murders, and felonies; they appointed all judges and justices of the peace(*m*); all writs and indictments ran in their names, as in other counties in the king's; and all offences were said to be done against their peace, and not, as in other places, *contra pacem domini regis*(*n*). And indeed by the ancient law, in all peculiar jurisdictions, offences were said to be done against his peace in whose court they were tried: in a courtleet, *contra pacem domini*; in the court of a corporation, *contra pacem ballivorum*; in the sheriff's court or tourn, *contra pacem vicecomitis*(*o*). These palatine privileges (so similar to the regal independent jurisdictions usurped by the great barons on the continent, during the weak and infant state of the first feudal kingdoms in Europe(*p*)) were in all probability originally granted to the counties of Chester and Durham, because they bordered upon inimical countries, Wales and Scotland: in order that the inhabitants, having justice administered at home, might not be obliged to go out of the country, and leave it open to the enemy's incursions; and [*140] that the owners, being encouraged by so large an *authority, might be the more watchful in its defence. And upon this account also there were formerly two other counties palatine, Pembrokeshire and Hexhamshire; the latter now united with Northumberland: but these were abolished by parliament, the former in 27 Hen. 8, the latter in 14 Eliz. And in 27 Hen. 8, likewise, the powers before mentioned of owners of counties palatine were abridged; the reason for their continuance in a manner ceasing: though still all writs were witnessed in their names, and all forfeitures for treason by the common law accrued to them(*q*).

The earldom of Chester, as Camden testifies, was united to the crown by Henry III., and has ever since given a title to the king's eldest son. And the county palatine, or duchy, of Lancaster, was the property of Henry Bolingbroke, the son of John of Gaunt, at the time when he wrested the crown from king Richard II., and assumed the title of king Henry IV. But he was too prudent to suffer this to be united to the crown; lest, if he lost one, he should lose the other also. For, as Plowden(*r*) and sir Edward Coke(*s*) observe, he knew he had the duchy of Lancaster by sure and indefeasible title, but that his title to the crown was not so assured: for that after the decease of Richard II., the right of the crown was in the heir of Lionel duke of Clarence, second son of Edward III.; John of Gaunt, father to this Henry IV., being but the fourth son. And therefore he procured an act of parliament, in the first year of his reign, ordaining that the duchy of Lancaster, and all other his hereditary

(*i*) Cart. 36 Edw. 3, n. 9.

(*k*) Pat. 51 Edw. 3, m. 33; Plowd. 215; 7 Rym. 138.

(*l*) L. 3, c. 8, s. 4.

(*m*) The right of the Duke of Lancaster to appoint coroners under the charter creating the duchy of Lancaster, and other points in the construction of this charter, were considered in *Jewison v. Dyson*, 9 M. & W. 540.

(*n*) 4 Inst. 204.

(*o*) Seld. in Heng. Magn. c. 2.

(*p*) Robertson, Charles V. i. 60.

(*q*) 27 Hen. 8, c. 24; 4 Reeves' Hist. Eng. L. 197, 198; 4 Inst. 205.

(*r*) Com. 215.

(*s*) 4 Inst. 205.

estates, with all their royalties, and franchises, should remain to him and his heirs for ever; and should remain, descend, be administered, and governed, in like manner as if he never had attained the regal dignity; and thus they descended to his son and grandson, Henry V. and Henry *VI., many [*141] new territories and privileges being annexed to the duchy by the former(s). Henry VI. being attainted in 1 Edward 4, this duchy was declared in parliament to have become forfeited to the crown(u), and at the same time an act was made to incorporate the duchy of Lancaster, to continue the county palatine (which might otherwise have determined by the attainder(z)) and to make the same parcel of the duchy: and, farther, to vest the whole in king Edward IV. and his heirs, kings of England, for ever; but under a separate guiding and governance from the other inheritances of the crown. And in 1 Hen. 7 another act was made, to resume such part of the duchy lands as had been dismembered from it in the reign of Edward IV., and to vest the inheritance of the whole in the king and his heirs for ever, as amply and largely, and in like manner, form and condition, separate from the crown of England and possession of the same, as the three Henries and Edward IV., or any of them, had and held the same(y).

*The distinctive characteristics of the counties palatine thus partially reviewed, have by various recent enactments been almost wholly [*142] obliterated; for by the statute 11 Geo. 4 & 1 Will. 4, c. 70(z), the jurisdiction of the courts at Westminster was extended to the county palatine of Chester. By the statute 6 & 7 Will. 4, c. 19 (amended by 21 & 22 Vict. c. 45), the palatine jurisdiction of Durham was separated from the bishopric and vested in the crown; and by the 2 & 3 Vict. c. 16, and the 4 & 5 Will. 4, c. 62, the proceedings and practice of the courts of Durham and of Lancaster respectively, were in general assimilated to those of the courts of Westminster(a).

The isle of Ely is not a county palatine, though it has sometimes been erroneously called so; it was only a royal franchise: the bishop having by grant of king Henry the First, *jura regalia* within the isle of Ely, whereby he exercised a jurisdiction over all causes, as well criminal as civil(b). However, by 6 & 7 Will. 4, c. 87, the jurisdiction has been entirely taken from the bishop, and is now vested in the crown.

(f) Rot. Parl. 2 Hen. 5, n. 30; 3 Hen. 5, n. 15.

(u) *Fisher v. Batten*, 1 Ventr. 155.

(z) 1 Ventr. 157.

(y) Some have entertained an opinion (Plowd. 220, 1, 2; Lamb. Archelon 283; 4 Inst. 206), that by this act the right of the duchy vested only in the natural, and not in the political person of king Henry VII., as formerly in that of Henry IV.; and was descendible to his natural heirs, independent of the succession to the crown. And if this notion were well founded, it might have become a very curious question at the time of the Revolution in 1688 in whom the right of the duchy remained after king James's abdication, and previous to the attainder of the pretended Prince of Wales. But it is observable that in the same act the duchy of Cornwall is also vested in king Henry VII. and his heirs; which could never be intended in any event to be separated from the inheritance of the crown. And, indeed, it seems to have been understood very early after the

statute of Henry VII. that the duchy of Lancaster was by no means thereby made a separate inheritance from the rest of the royal patrimony; since it descended with the crown to the half-blood in the instances of queen Mary and queen Elizabeth: which it could not have done as the estate of a mere duke of Lancaster, in the common course of legal descent. The better opinion, therefore, seems to be that of those judges, who held (Plowd. 221) that, notwithstanding the statute of Hen. VII. (which was only an act of resumption), the duchy still remained as established by the act of Edw. IV.; separate from the other possessions of the crown in order and government, but united in point of inheritance.

(s) Ss. 13, 14.

(a) See also the following statutes:—25 & 26 Vict. c. 42; 23 & 24 Vict. c. 88, and c. 126; 21 & 22 Vict. c. 27, s. 10; 18 & 19 Vict. cc. 15, 45, 67; 17 & 18 Vict. cc. 82, 125; 15 & 16 Vict. c. 76; and 13 & 14 Vict. c. 43; 32 & 33 Vict. c. 87.

(b) 4 Inst. 220; *Grant v. Bagge*, 3 East, 126.

There are also counties corporate: which are certain cities and towns, some with more, some with less territory annexed to them; to which out of special Counties corporate. grace and favour the kings of England have granted the privilege to be counties of themselves, and not to be comprised in any other county; but to be governed by their own sheriffs(c) and other magistrates, [*143] so that no officers of *the county at large have any power to intermeddle therein. Such are London, York, Bristol(d), Norwich, Coventry, and many others(e). And thus much of the countries subject to the laws of England.

(c) See 5 & 6 Wm. 4, c. 76, s. 61.

(d) In *R. v. Goodere*, 17 St. Tr. 1075, tried at Bristol, Sir M. Foster (Recorder) observed that no evidence is so proper to prove the boundaries of any county as the constant ex-

ercise of jurisdiction in the place in question where that sort of evidence can be had.

(e) Which are enumerated in 3 Geo. 1, c. 15; but see 5 & 6 Wm. 4, c. 76, ss. 61, 109.

BOOK THE FIRST.

THE RIGHTS OF PERSONS.

CHAPTER I.

THE ABSOLUTE RIGHTS OF INDIVIDUALS.

THE laws of England are so numerous and diverse, that in order to consider them with perspicuity, they must be distributed by the Commentator methodically, under proper and distinct heads; avoiding as much as possible divisions too large and comprehensive on the one hand, and too trifling and minute on the other; which might be equally productive of confusion.

Now, as municipal law is "a rule of civil conduct, commanding what is right, prohibiting what is wrong, and regulating matters in themselves indifferent"(a); or as Cicero(b), and after him our Bracton(c), has expressed it *sanctio justa, iubens, honesta et prohibens contraria*(d); it follows, that the primary and principal objects of the law are RIGHTS and WRONGS. In the prosecution therefore of these Commentaries, I shall follow this very simple and obvious division; and shall in the *first place consider the rights that are commanded, and secondly the wrongs that are forbidden by the laws of England. [146]

Rights are however liable to another subdivision; being either, first, those which concern and are annexed to the persons of men, and are then called Rights; respect *jura personarum* or the rights of persons; or, secondly, such as 1. persons or 2. things. a man may acquire over external objects or things unconnected with his person, which are styled *jura rerum* or the rights of things(e). Wrongs also are divisible into, first, private wrongs, which, infringing merely particular Wrongs are 1. private or 2. public. rights, concern individuals only, and are called civil injuries; and secondly, public wrongs, which being in breach of general and public rights, affect the whole community, and are called crimes and misdemeanors.

Regard being had to the above fourfold division, the present Commentaries will consist of the following parts: 1. The rights of persons; with the means

(a) *Ante*, p. 37.

(b) 11 Philipp. 12.

(c) L. 1, c. 8.

(d) *Norma recti* (3 Bulstr. 313), *iubens honesta et prohibens contraria* (2 Inst. 587).

(e) This classification was adopted by Lord C. J. Hale (see Hale's Analysis of the Law), who introduced it into our system from the Institutes. It has also been adopted in the code civil of France.

whereby such rights may be either acquired or lost. 2. The rights of things; with the means also of acquiring and losing them. 3. Private wrongs, or civil injuries, including breaches of contract; with the means of redressing them by law. 4. Public wrongs or crimes; with the means of preventing and punishing them.

First we are to consider the rights of persons; with the means of acquiring and losing them.

Now the rights of persons that are commanded to be observed by the municipal law are of two sorts: first, such as are due from every citizen, which are

usually called civil duties; and, secondly, such as belong to him, which is the more popular acceptance of rights or *jura*. Both may indeed be comprised in this latter division; for, as all social

duties are of a relative nature, at the same time that they are due from one man, or set of men, they must *also be due to another. But I apprehend it will be more clear and easy, to consider many of them as

duties required from, rather than as rights belonging to, particular persons. Thus, allegiance is usually, and therefore most easily, considered as the duty of the people, and protection as the duty of the magistrate; and yet they are, reciprocally, the rights as well as duties of each other. Allegiance is the right of the magistrate, and protection the right of the people.

Persons also are divided by the law into either natural persons or artificial. Natural persons are such as the God of nature formed us; artificial are such

as are created and devised by human laws for the purposes of society and government, *ex. gr.*, corporations, partnerships, &c.

The rights of persons considered in their natural capacities are also of two sorts, absolute and relative. Absolute, which are such as appertain and belong

to particular men, merely as individuals: relative, which are incident to them as members of society, and as standing in various relations to each other. The first, that is, absolute rights,

will be the subject of the present chapter.

By the absolute rights of individuals we mean those which are so in their primary and strictest sense; such as would belong to their persons merely in a

state of nature, and which every man is entitled to enjoy, whether out of society or in it. But with regard to the absolute

duties, which man is bound to perform, considered as a mere individual, it is not to be expected that any human municipal law should at all explain or enforce them. For the end and intent of such laws being only to regulate the behaviour of mankind, as they are members of society, and stand in various relations to each other, they have consequently no concern with any other than social or relative duties. Let a man therefore be ever so abandoned in his principles, or vicious in his practice, provided he *keeps his wickedness to

himself, and does not offend against the public peace or against the rules of public decency and decorum, he is out of the reach of human laws. But if he makes his vices public, though they be such as seem principally to affect himself, they may then become, by the bad example they set, of pernicious effect to society; and therefore it may then be the business of human laws to correct them. Here the circumstance of publicity is what alters the nature of the case. Public sobriety is a relative duty, the breach of which may expose to punishment; private sobriety is an absolute duty, whether it be

performed or not, human tribunals cannot know, and therefore they cannot enforce it by any civil sanction. But with respect to rights, the case is different. Human laws define and enforce as well those rights which belong to a man considered as an individual, as those which belong to him considered as related to others.

For the principal aim of society is to protect individuals in the enjoyment of those absolute rights, which were vested in them by the immutable laws of nature; but which could not be preserved in peace without that mutual assistance and intercourse which is gained by the institution of friendly and social communities. Hence it follows, that the first and primary end of human laws is to maintain and regulate these absolute rights of individuals. Such rights as are social and relative result from, and are posterior to, the formation of states and societies: so that to maintain and regulate these, is clearly a subsequent consideration. And therefore the principal view of human law is, or ought to be, to explain, protect, and enforce such rights as are absolute, which in themselves are few and simple; and then such rights as are relative, which, arising from a variety of connexions, will be far more numerous and more complicated. These latter will take up a greater space in any code of laws, and hence may appear to be more attended to, though in reality they are *not, than rights of the former kind. Let us therefore proceed to examine how far all laws ought to, and how far the laws of England [*149] actually do, take notice of absolute rights, and provide for their lasting security. (55)

The absolute rights of man, considered as a free agent, endowed with discernment to know good from evil, and with power of choosing those measures which appear to him to be most desirable, are usually summed up in one general appellation, and denominated the natural liberty of mankind. This natural liberty consists properly in a power of acting as one thinks fit, without any restraint or control, unless by the law of nature; being a right inherent in us by birth, and one of the gifts of God to man at his creation, when he was endued with the faculty of free-will. But every man, when he enters into society, gives up a part of his natural liberty as the price of so valuable a purchase; and, in consideration of receiving the advantages of intercourse with his fellowmen, obliges himself to conform to those laws, which the community has thought proper to establish. This species of legal obedience and conformity is infinitely more desirable than that wild and savage liberty which is sacrificed to obtain it. For no man who considers a moment would wish to retain the absolute and uncontrolled power of doing whatever he pleases: conceding to every other man the same power: for then there would be no security to individuals in any of the enjoyments of life. Political therefore, or
 Political or civil liberty, civil liberty, which is that of a member of society, is no other than natural liberty so far only restrained by human laws as is necessary and expedient

(55) Under a government like that of the people of this country, the liberties and rights of the citizen are declared and secured by written constitutions, which are the paramount law of the land, binding upon individuals, courts or legislators. The student who desires to make himself familiar with the constitution of the United States, and also those of the different states of the Union, will carefully read the two volumes by Franklin B. Hough, and recently published by Messrs. Weed, Parsons & Co., and the valuable work of Judge Cooley on Constitutional Limitations. Both of these works possess the highest value for the American lawyer or statesman.

for the general advantage of the public(*f*). Hence we may collect that the
 [*150] *law, which restrains a man from doing mischief to his fellow-citizens, though it diminishes the natural, increases the civil liberty of mankind; but that every wanton and causeless restraint of the will of the subject, whether practised by a monarch, a nobility or a popular assembly, is in a degree tyranny: nay, that even laws themselves, whether made with or without our consent, if they regulate and constrain our conduct in matters of mere indifference, without any good end in view, are regulations destructive of liberty: whereas, if any public advantage can arise from observing such precepts, the control of our private inclinations, in one or two particular points, will conduce to preserve our general freedom in others of more importance; by supporting that state of society, which alone can secure our independence. Thus the statute of king Edward IV.(*g*), which forbade the fine gentlemen of those times (under the degree of a lord) to wear pikes upon their shoes or boots of more than two inches in length, was a law that savoured of oppression; because, however ridiculous the fashion then in use might appear, the restraining it by pecuniary penalties could serve no purpose of common utility. But the statute of king Charles II.(*h*), which prescribed a thing seemingly as
 [*151] *indifferent (a dress for the dead, who were ordered to be buried in woollen), was a law consistent with public liberty; for it encouraged the staple trade, on which in great measure depended the universal good of the nation. So that laws, when prudently framed, are by no means subversive but rather introductive of liberty; for (as Mr. Locke has well observed(*i*)) where there is no law there is no freedom. But then, on the other hand, that constitution or frame of government, that system of laws, is alone calculated to maintain civil liberty, which leaves the subject entire master of his own conduct, except in those points wherein the public good requires some direction or restraint of it.

The idea and practice of this political or civil liberty flourish in their highest vigour in these kingdoms, where the freedom accorded to each individual member of the community, falls little short of perfection, and
 On the English liberties. can only be lost or destroyed by the folly or demerits of its owner: the legislature, and of course the laws of England, being peculiarly adapted to the preservation of this inestimable blessing even in the meanest subject. And this spirit of liberty is so deeply implanted in our constitution, and rooted even in our very soil, that a slave, the moment he lands in England,

(*f*) *Facultas ejus, quod cuiusque facere libet, nisi si quid vi aut jure prohibetur.* Inst. i. 3, 1.

"Liberty," says Mr. Burke (Works, iii. 49, 185), "must be limited in order to be possessed. The degree of restraint it is impossible in any case to settle precisely. But it ought to be the constant aim of every wise public council to find out, by cautious experiments and rational cool endeavours, with how little, not how much, of this restraint, the community can subsist. For liberty is a good to be improved, and not an evil to be lessened. It is not only a private blessing of the first order, but the vital spring or energy of the state itself, which has just so much life and vigour as there is liberty in it."

"The liberty of man in society is to be

under no other legislative power, but that established by consent in the commonwealth; nor under the dominion of any will, or restraint of any law, but what that legislature shall enact, according to the trust put in it. Freedom of men under government is to have a standing rule to live by, common to every one of that society, and made by the legislative power erected in it; a liberty to follow my own will in all things, where the rule prescribes not; and not to be subject to the inconstant, uncertain, unknown, arbitrary will of another man." Locke, Gov. ii. c. 4.

(*g*) 3 Edw. 4, c. 5.

(*h*) 80 Car. 2, st. 1, c. 8; repealed by 54 Geo. 3, c. 108.

(*i*) On Gov. p. 2, s. 57.

falls under the protection of the laws, and may successfully assert his freedom(*k*).

The absolute rights of every Englishman (which, taken in a political and extensive sense, are usually called his liberties), as they are founded on nature and reason, so are they coeval with our form of government; though subject at times to fluctuate and change: their establishment (excellent as it is) being still human. At some periods they have been depressed by overbearing and tyrannical princes; at others they have grown so luxuriant as even to tend to anarchy, a worse state than tyranny itself, as any government is better than none at all. But *the vigour of our free constitution has always delivered the nation from these embarrassments: and, as soon as the convulsions consequent on the struggle have been over, the balance of our rights and liberties has again settled, more or less nearly, to its proper level; and the fundamental articles, on which those rights and liberties are based, have been from time to time asserted in parliament, as often as they were thought to be in danger. [*152]

First, by the great charter of liberties, which was obtained, sword in hand, from king John, and afterwards, with some alterations, confirmed in parliament by king Henry III., his son(*l*). Which charter contained very few new grants; but, as sir Edward Coke(*m*) observes, was for the most part declaratory of the principal grounds of the fundamental laws of England. Afterwards by the statute called *confirmatio cartarum*(*n*), whereby the great charter is directed to be allowed as the common law; all judgments contrary to it are declared void; copies of it are ordered to be sent to all cathedral churches, and read twice a year to the people; and sentence of excommunication is directed to be as constantly denounced against those who by word, deed, or counsel, should act contrary thereto, or in any degree infringe it. Next, by a multitude of subsequent corroborating statutes (sir Edward Coke reckons thirty-two(*o*)), from the first Edward to Henry IV. Then, after a long interval, by the petition of right(*p*); which was a parliamentary declaration of the liberties of the people, assented to by king Charles I. in the beginning of his reign. This was closely followed by the still more ample concessions made by that unhappy prince to his parliament, before the fatal rupture between them; and by the many salutary laws, particularly the *habeas corpus* act(*q*), passed *under Charles II. To these succeeded the bill of rights, or declaration delivered by the lords and commons to the prince and princess of Orange, 13 February, 1688; and afterwards enacted in parliament(*r*) when they became king and queen: which declaration concludes in these remarkable words; "and they do claim, demand, and insist upon, all and singular the premises, as their undoubted rights and liberties." And the act of parliament itself recognizes "all and singular the rights and liberties asserted and claimed in the said declaration to be the true, ancient, and indubitable rights of the people of this kingdom." Lastly, these liberties were again asserted at the commencement of the present century, in the act of settlement(*s*), whereby the crown was limited to her present Majesty's illustrious house; and some new provisions were added, at the same fortunate era, for better securing our

(*k*) See *Sommersett's case*, and Note thereto, Broom's Const. Law, 65, 105, *et seq.*

(*l*) 9 Hen. 3.

(*m*) 2 Inst. proöm.

(*n*) 25 Edw. 1.

(*o*) 2 Inst. proöm.

(*p*) 3 Car. 1, c. 1.

(*q*) 31 Car. 2, c. 1.

(*r*) 1 Will. & M. st. 2, c. 2.

(*s*) 12 & 13 Will. 3, c. 2.

religion, laws, and liberties; which the statute declares to be "the birthright of the people of England," according to the ancient doctrine of the common law(*t*).

Thus much for the declaration of our rights and liberties. The rights themselves, thus broadly defined by these several statutes, consist in a number of private immunities; which may be reduced to three principal or primary articles; I., the right of personal security; II., the right of personal liberty; and, III., the right of private property: because, as there is no other known method of compulsion, or of abridging man's natural free-will, but by an infringement or diminution of one or other of these important rights, the preservation of them, inviolate, may justly be said to include the preservation of our civil immunities in their largest and widest sense.

I. The right of personal security consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation.
I. Right of personal security.

*1. Life is the immediate gift of God, a right inherent by nature in every individual. Even an infant in *ventre sa mere*, or in the mother's womb, is, for many purposes which will be specified in the course of these Commentaries, treated in law as if actually born.(56)

2. A man's limbs (by which for the present we understand those members which may be useful to him in fight, and the loss of which alone amounts to "mayhem" (*u*) by the common law) are also the gift of the wise Creator, to enable him to protect himself from external injuries in a state of nature. To these therefore he has a natural inherent right; and they cannot be wantonly destroyed or disabled without a manifest breach of civil liberty.

Both the life and limbs of a man are of such high value, in the estimation of the law of England, that even homicide if committed *se defendendo*, or in order to preserve them, is punishable(*x*). For whatever is done by a man, to save either life or member, is looked upon as done upon the highest necessity and compulsion. Therefore if a man through fear of death or mayhem is prevailed upon to execute a deed, or do any other legal act; such act, though accompanied with all other requisite solemnities, may be afterwards avoided, if forced upon him by a well-grounded apprehension of losing life, or even limb, in case of his non-compliance(*y*). The constraint a man is under in these circumstances is called in law duress, from the Latin *durities*, of which there are two sorts; duress of imprisonment, where a man actually loses his liberty, of which we shall presently speak; and duress *per minas*, where the hardship is only threatened and impending, which is that we are now discoursing of. Duress *per minas* is either for fear of loss of life, or else for fear of mayhem, or loss of limb. And this fear must be upon sufficient reason; "*non*," as Bracton(*z*)

(*t*) Plowd. 55.

(*u*) As to the technical significance of which word, see vol. iv.

(*x*) 24 & 25 Vict. c. 100, s. 7.

(*y*) 2 Inst. 483.

(*z*) L. 2, c. 5.

(56) In this country, an infant *in ventre sa mere* is considered as *in esse*, or in being, for all beneficial purposes relating to property, as by taking a remainder, or any other estate or interest, whether by descent, devise or under the statute of distribution. *Hone v. Van Schaick*, 8 Barb. Ch. 488, 509; *Mason v. Jones*, 2 Barb. 231, 251; *Marsellis v. Thalheimer*, 2 Paige, 35, 40; *Swift v. Duffield*, 5 Serg. & Rawle, 38; *Harper v. Archer*, 4 Smedes & Marsh. 99; *Hall v. Hancock*, 15 Pick. 255; *Stedfast v. Nicoll*, 3 Johns. Cas. 18; *Jenkins v. Freyer*, 4 Paige, 47, 53.

expresses it, "*suspicio cujuslibet vani et meticulosi hominis, sed talis qui possit cadere in virum constantem; talis enim debet esse metus, qui in se contineat vitæ periculum, aut corporis cruciatum.*" [*155] The mere fear of having one's goods taken away or injured would not justify homicide, though it might perhaps afford ground for recovering money paid to save them(a). Should the threat be performed, a man may have satisfaction by recovering equivalent damages(b): but no suitable atonement can be made for the loss of life, or limb. And the indulgence shown to a man under this, the principal, sort of duress, the fear of losing his life or limbs, agrees also with a maxim of the civil law; *ignoscendum censuerunt ei, qui sanguinem suum qualiter qualiter redemptum voluit(c).*(57)

The law not only regards life and member, and protects every man in the enjoyment of them, but also furnishes him with everything necessary for his support. For there is no man so indigent or wretched, but he may obtain a supply sufficient for the necessities of life from the more opulent part of the community, by means of the several statutes enacted for the relief of the poor, of which in their proper places. A humane provision; yet, though dictated by the principles of society, discountenanced by the Roman laws. For the edicts of the emperor Constantine commanding the public to maintain the children of those who were unable to provide for them, in order to prevent the murder and exposure of infants, an institution founded on the same principle as our foundling hospitals, though comprised in the Theodosian code(d), were rejected in Justinian's collection.

These rights, of life and member, can only be determined by the death of the person; which was formerly accounted to be either a civil or a natural death. Civil death commenced, if any man was banished or abjured *the [*156] realm(e) by the process of the common law, or entered into religion; that is, went into a monastery, and became there a monk professed: in any of which cases he was absolutely dead in law, and his next heir became entitled to his estate. For such banished man was entirely cut off from society; and such a monk, upon his profession, renounced solemnly all secular concerns: and besides, as the popish clergy claimed exemption from the duties of civil

(a) Per cur. *Glynn v. Thomas*, 11 Exch. 878-9; Note to *Marriot v. Hampton*, 2 Smith L. C. 6th ed. 388.

(b) 2 Inst. 488.

(c) Dig. 48. 21. 1.

(d) L. 11, t. 27.

(e) To abjure the realm is a civil death, be-

cause it is to leave the realm for ever; and so if a man be attainted of treason or felony, and saving his life, is banished for ever, this also is a civil death. But if a man, by act of parliament, be exiled but for a time, which some call a relegation, that is no civil death. Co. Litt. 138 a.

(57) An arrest for improper purposes, without a just cause: or, an arrest for a just cause, but without lawful authority; or an arrest for a just cause under a lawful authority, but for an unlawful purpose, will be construed to be duress. *Strong v. Grannis* 26 Barb. 122, 126; *Osborn v. Robbins*, 86 N. Y. (9 Tiff.) 865, 871; 2 Trans. App. 819, 825; *Watkins v. Baird*, 6 Mass. 506, 511; *Soverance v. Kimball*, 8 N. H. 386; *Bane v. Detrick*, 52. Ill. 19; *Belote v. Henderson*, 5 Cold. (Tenn.) 471.

But, a threat of imprisonment or even imprisonment for a just cause, and upon lawful process, is not duress. *Nealley v. Greenough*, 25 N. H. 325; *Eddy v. Herrin*, 17 Me. 338. In this country the courts hold that there may be a duress of property, as well as of the person; and that such duress will avoid contracts, or sustain a recovery of money unjustly taken by it. *Harmony v. Bingham*, 1 Duer 210; 13 N. Y. (2 Kern.) 99; *Sasportas v. Jennings*, 1 Bay, 470; *Collins v. Westbury*, 2 id. 211; *Nelson v. Suddarth*, 1 Hen. & Munt. 850; *Foshay v. Ferguson*, 5 Hill, 153. See the cases cited, 1 Wait's Law and Pract. 1073 to 1076.

life and the commands of the temporal magistrate, the genius of the English laws would not suffer those persons to enjoy the benefits of society, who secluded themselves from it, and refused to submit to its regulations(*f*). A monk was therefore accounted *civiliter mortuus*, and when he entered into religion might, like other dying men. make his testament and executors; or, if he made none, the ordinary might grant administration to his next of kin, as if he were actually dead intestate. And such executors and administrators had the same power, and might bring the same actions for debts, due to the religious, and were liable to the same actions for debts due from him, as if he were naturally deceased(*g*). Nay, so far has this principle been carried, that when one was bound in a bond to an abbot and his successors, and afterwards made his executors, and professed himself a monk of the same abbey, and in process of time was himself made abbot thereof; here the law gave him, in the capacity of abbot, an action of debt against his own executors to recover the money due(*h*).

[*157] In short, a monk or religious was so effectually dead in *law, that a lease made even to a third person, during the life, generally, of one who afterwards became a monk, determined by such his entry into religion: for which reason leases, and other conveyances for life, were usually made to have and to hold for the term of one's natural life(*i*). But even in the times of popery, the law of England took no cognizance of "profession" in any foreign country, because the fact could not be tried in our courts(*k*); and, since the Reformation, this disability has been held to be abolished(*l*): so also has been the disability of banishment, consequent upon abjuration, by statute 21 Jac. 1, c. 28.(58)

This natural life being, as was before observed, the immediate donation of the Creator, cannot legally be disposed of or destroyed by the person himself, nor by a fellow-creature, merely upon his own authority. Yet nevertheless it may, under certain circumstances, be forfeited for the breach of social laws, as to which, we may hereafter more conveniently inquire in the concluding book of these Commentaries. At present, I shall only observe, that whenever the constitution of a state vests in any man, or body of men, a power of destroying at pleasure, without the direction of laws, the lives or members of the subjects, such constitution is in the highest degree tyrannical: and that whenever any laws direct such destruction for light and trivial causes, such laws are likewise tyrannical, though in an inferior degree: because here each subject is aware of the danger he is exposed to, and may by prudent caution provide against it. The law of England therefore never inflicts any punishment extending to life unless upon the highest necessity: and the constitution is an utter stranger to any arbitrary power of killing or maiming the subject without the express war-

(*f*) This was also a rule in the feudal law, (Cons. Feud. l. 2, t. 21,) *desit esse miles seculi, qui factus est miles Christi, nec beneficium pertinet ad eum qui non debet gerere officium.*
(*g*) Litt. s. 200.

(*h*) Co. Litt. 188.

(*i*) *Archbishop of Canterbury's case*, 2 Rep. 48 b; Co. Litt. 132.

(*k*) Co. Litt. 132.

(*l*) *R. v. Lady Portington*, 1 Salk. 162.

(58) Civil death is the state of a person who, though possessing natural life, has lost all his civil rights, and as to them, is considered as dead. In New York, a person sentenced to imprisonment in a State prison for life, is thereafter deemed civilly dead. 2 R. S. 701 (724), § 20. But such imprisonment does not prevent creditors from bringing actions against the prisoner. *Davis v. Duffie*, 4 Abb. N. S. 478; 8 Trans. App. 54; 8 Keyes, 606.

rant of law. "*Nullus liber homo*," says the *great charter(m), "*aliquo modo destruat, nisi per legale iudicium parium suorum, aut per legem terras*." Which words, "*aliquo modo destruat*," according to sir Edward Coke(n), include a prohibition not only of killing and maiming, but also of torturing (to which our laws are strangers(o)), and of every oppression by colour of an illegal authority. And it is enacted by the statute 5 Ed. 3, c. 9, that no man shall be forejudged of life or limb, contrary to the great charter and the law of the land: and again, by statute 28 Ed. 3, c. 3, that no man shall be put to death, without being brought to answer by due process of law. [*158]

Besides those limbs and members that may be necessary to a man, in order to defend himself or annoy his enemy, he is also entitled, by natural right, to

3. Security from the corporal insults of menaces, assaults, beating, and wounding; though such insults amount not to destruction of life or member.

4. Preservation of health from such practices as may prejudice or annoy it, and,

5. Security of his reputation or good name from the arts of detraction and slander.

These are rights to which every man is entitled, by reason and natural justice; since without these it is impossible to have the perfect enjoyment of any other advantage or right. But the three last articles (being of much less importance than those which have gone before, and those which are yet to come) it will suffice to have barely mentioned among the rights of persons: referring to more minute discussion of their several branches, to those parts of our Commentaries which treat of the infringement of these rights, under the head of personal wrongs(p).

II. Next to personal security, the law of England regards, asserts, and preserves the personal liberty of *individuals. This personal liberty consists in the power of loco-motion, of changing situation, or removing one's person to whatsoever place one's own inclination may direct; without imprisonment or restraint, unless by due course of law. Concerning which we may make the same observations as upon the preceding article; that it is a right strictly natural; that the laws of England do not assume to abridge it without sufficient cause; and, that in this kingdom it cannot ever be abridged without the explicit permission of the laws. Here again the language of the great charter(g), is, that no freeman shall be taken or imprisoned, but by the law of the land.(59) And subsequent old statutes(r) [*159]

(m) C. 29.

(n) 2 Inst. 48.

(o) Broom's Const. L. 147, 148.

(p) Vide vol. iii.

(g) C. 29.

(r) See, for instance, 5 Edw. 3, c. 8; 25 Edw. 3, st. 5, c. 4; 28 Edw. 3, c. 8.

(59) The phrases "due process of law," "due course of the law," and "the law of the land," are used interchangeably or indifferently in statutes or constitutions; and the same meaning is usually attached to either mode of expression. *Murray's Lessee v. Hoboken Land Co.*, 18 How. (U. S.) 276; *Greene v. Briggs*, 1 Curt. 811; *Matter of John and Cherry streets*, 19 Wend. 659; *Parsons v. Russell*, 11 Mich. 129; *Banning v. Taylor*, 24 Penn. St. 292; *State v. Simons*, 2 Speers, 767; *Vanzant v. Waddell*, 2 Yerg. 260. "By the law of the land is most clearly intended the general law; a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society. Every thing which may pass under the form of an enactment is not therefore to be considered the law of the land." Webster in *Dartmouth College v.*

expressly direct, that no man shall be taken or imprisoned by suggestion or petition to the king or his council, unless it be by legal indictment, or by the process of the common law. By the petition of right, 3 Car. 1, it is enacted, that no freeman shall be imprisoned or detained without cause shown, to which he may make answer according to law. By 16 Car. I., c. 10, if any person be restrained of his liberty by order or decree of any illegal court or by command of the king's majesty in person, or by warrant of the council board, or of any of the privy council; he shall, upon demand of his counsel, have a writ of *habeas corpus*, to bring his body before the court of king's bench or common pleas; who shall determine whether the cause of his commitment be just, and thereupon do as to justice shall appertain. And by 31 Car. 2, c. 2, commonly called the *habeas corpus* act, the methods of obtaining this writ are so plainly pointed out and enforced, that, so long as this statute remains unimpeached, no subject of England can be long detained in prison, except in those cases in which the law requires and justifies such detainer.(60) And, lest this act

Woodward, 4 Wheat. 519; *Works of Webster*, vol. v, p. 487; See *Taylor v. Porter*, 4 Hill, 140, 145, 146; *Rockwell v. Nearing*, 35 N. Y. (8 Tiff.) 802, 806; *Cook v. Gregg*, 46 N. Y. (1 Sick.) 439, 442; *Campbell v. Evans*, 45 N. Y. (6 Hand) 356, 358. The words "due process of law," in the New York constitution, cannot mean less than a prosecution or suit instituted and conducted according to the prescribed forms and solemnities for ascertaining guilt, or determining the title to property. *Taylor v. Porter*, 4 Hill, 140, 147; *Burah v. Newbury*, 10 N. Y. (6 Seld.) 374, 397; *Westervelt v. Gregg*, 12 N. Y. (2 Kern.) 202, 209, 212; *Wynehamer v. People*, 13 N. Y. (3 Kern.) 378, 417; *People v. Draper*, 15 N. Y. (1 Smith) 532, 563; *Rockwell v. Nearing*, 35 N. Y. (8 Tiff.) 802, 806; *Cook v. Gregg*, 46 N. Y. (1 Sick.) 439, 442; *Campbell v. Evans*, 45 N. Y. (6 Hand) 356, 358; *Reed v. Wright*, 2 Greene (Iowa), 15; *Lans v. Dorman*, 8 Scam. 288; *Arrowsmith v. Burlingim*, 4 McLean, 499; *Jones v. Perry*, 10 Yerg. 59; *Brine's Appeal*, 16 Penn. St. 256; *Kinney v. Beverly*, 2 H. & M. 313, 536; *Hoke v. Henderson*, 4 Dev. 15; *James v. Reynolds*, 2 Tex. 251.

(60) No person can be unlawfully restrained in the exercise of his liberties; and whenever such liberty is abridged or taken from him, he may be relieved upon *habeas corpus*. The cases in which there may be an illegal restraint of one's liberty are so numerous and so varied in circumstances, that an enumeration will not be attempted. See Cooley's Const. Lim. 339 to 348.

The United States courts and judges have power to issue the writ of *habeas corpus* in certain specified cases. 1 U. S. Statutes at Large, 81; 4 id. 634; 14 id. 835. But neither the supreme court nor any other court of the United States, nor any judge thereof, can issue a *habeas corpus* to bring up a prisoner who is in custody under a sentence of execution of a state court, for any other purpose than to be used as a witness. *Ex parte Dorr*, 3 How (U. S.) 103; 1 U. S. Stat. at Large, 81.

Persons imprisoned by authority of a state, for acts done or omitted, in pursuance of a law of the United States, may be discharged on a *habeas corpus* issued by a judge of the United States courts. 4 U. S. Stat. at Large, 634; *Ex parte Robinson*, 6 McLean, 355.

So persons imprisoned for acts done or omitted under the order or sanction of any foreign state or sovereignty, and where the validity or the effect whereof depends upon the law of nations, or under color thereof, may be discharged by the courts or judges of the United States. 5 Stat. at Large, 539. See *McLeod's case*, 25 Wend. 483; 26 id. 663; 3 Hill, 635. So the same courts or judges may issue the writ in all cases where any person is restrained of his or her liberty in violation of the constitution or of any treaty or law of the United States. 14 U. S. Stat. at Large, 835. But in most cases the remedy is sought in the courts of the several states. *Ex parte Dorr*, 3 How. (U. S.) 103; *Barry v. Mercein*, 5 id. 103; *De Kraft v. Barney*, 2 Black. (U. S.) 704.

In relation to the state courts and judges, it may be said, that there is scarcely a case in which they may not issue a writ of *habeas corpus*, and in a proper case, where the restraint is illegal, grant full relief by setting the injured party at liberty.

should be evaded by demanding unreasonable bail, or sureties for *the prisoner's appearance, it is declared by 1 Will. & M. st. 2, c. 2, that [*160] excessive bail ought not to be required.

The statute 56 Geo. 3, c. 100, "An act for more effectually securing the liberty of the subject," extends to the case where a person is restrained of his liberty for some matter otherwise than criminal provisions for ensuring due enquiry into the grounds of detention by writ of *habeas corpus*. And the right of personal liberty has been further protected by the abolition of arrest for debt on mesne process(s), except in certain cases; and on final process, where the judgment debt does not, exclusive of costs, exceed the sum of 20*l.*(*t.*) The policy of the recent bankrupt acts had tended in the same direction.

Of great importance to the public is the preservation of personal liberty: for if once it were left in the power of any, the highest, magistrate to imprison

(a) 1 & 2 Vict. c. 110, s. 1. As from Janu- ished, except in certain cases, by 32 & 33 ary 1, 1870, imprisonment for debt is abol- Vict. c. 62.

(t) 7 & 8 Vict. c. 96, s. 57.

There has been much discussion in relation to the authority of a state court in a case where the imprisoned party was claimed to be held under the authority of the United States; and it has been frequently held that a state court or judge may issue the writ, and decide upon the legality or the illegality of the imprisonment, in any case in which a United States court or judge could do so. *Matter of Reynolds*, 6 Park. Crim. Cas. 276, U. S. Dist. Court, 1867, and *McConloughe's Case*, 107 Mass. 154, in which the cases are fully and carefully reviewed. Such a rule does not interfere with the full authority of the United States, since the state court or judge would be bound to remand the prisoner in all cases in which it appeared that he was held by legal authority. The duty of a state court or judge would be precisely that of a court or judge of the United States, because either of them ought to discharge or remand the prisoner as the facts and the law require. Such a rule observes and submits to the due authority of the federal government or courts, while at the same time it secures the prompt and efficient relief of the citizen in case of his illegal imprisonment. But, in a recent case, the supreme court of the United States held, that a state judge has no jurisdiction to issue a writ of *habeas corpus*, or to continue proceedings under the writ when issued, for the discharge of a person held under the authority, or claim and color of the authority, of the United States by an officer of that government. If, upon the application for the writ, it appears that the party alleged to be illegally restrained of his liberty, is held under the authority, or claim and color of authority, of the United States, by an officer of that government, the writ should be refused. If this fact do not thus appear, the state judge has the right to inquire into the cause of imprisonment, and ascertain by what authority the person is held within the limits of the state; and it is the duty of the marshal, or other officer having the custody of the prisoner, to give, by a proper return, information in this respect. But after he is fully apprised by the return that the party is held by an officer of the United States, under the authority, or claim and color of the authority, of the United States, he can proceed no further. *Turbie's Case*, 18 Wall. 397. See *Ableman v. Booth*, 21 How. (U. S.) 506. Where a person is in custody on a criminal charge under state authority, the circuit court of the United States has no power to take the accused from such custody, nor has a state court power to remove by *habeas corpus* a defendant from the custody of a court of the United States. *United States v. Rector*, 5 McLean, 174.

By section 9, article I, of the constitution of the United States, it is declared, that "The privilege of the writ of *habeas corpus* shall not be suspended unless when, in cases of rebellion or invasion, the public safety may require it."

Congress is the only power which can authorize such suspension; and neither the president of the United States, nor any of the military officers thereof, can do so. *Ex parte Merryman*, Taney, 246; *McCall v. McDowell*, 1 Abb. (U. S.) 212.

In 1863 congress passed a law authorizing the president to suspend the writ in certain cases. 12 U. S. Stat. at Large, 755. See also *Ex parte Milligan*, 4 Wall. (U. S.) 2.

arbitrarily whomever he or his officers thought proper, there would soon be an end of all other rights and immunities. Unjust attacks, even upon life, or property, at the arbitrary will of the magistrate, are less dangerous to the commonwealth than such as are made upon the personal liberty of the subject. To bereave a man of life, or by violence to confiscate his estate, without accusation or trial, would be so gross and notorious an act of despotism, as must at once convey the alarm of tyranny throughout the whole kingdom; but confinement of the person, by secretly hurrying a man to a gaol, where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore a more dangerous engine of arbitrary government. And yet sometimes, when the state is in real danger, even this may be a necessary measure. But the happiness of our constitution is, that it is not left to the executive power to determine when the danger of the state is so great, as to render this measure expedient: for it is the [*161] parliament only, or legislative power, that whenever it sees proper, *can authorize the crown, by suspending the *habeas corpus* act for a short and limited time, to imprison suspected persons, and to cause them to be detained in prison without bail or trial during the time of its suspension(*u*); as the senate of Rome was wont to have recourse to a dictator, a magistrate of absolute authority, when they judged the republic in any imminent danger. The decree of the senate, which usually preceded the nomination of this magistrate, "*dent operam consules, ne quid respublica detrimenti capiat*," was called the *senatus consultum ultimæ necessitatis*. In like manner this experiment ought only to be tried in cases of extreme emergency; and in these the nation parts with its liberty for a while, in order to preserve it for ever.

The confinement of the person, in any wise, is an imprisonment. So that the keeping a man against his will in a private house, putting him in the stocks, arresting or forcibly detaining him in the street, is an imprisonment(*x*). And the law so much discourages unlawful confinement, that if a man is under duress of imprisonment, which was before explained to mean compulsion by an illegal restraint of liberty, until he seals a bond or the like; he may allege this duress, and avoid the extorted bond. But if a man be lawfully imprisoned, and either to procure his discharge, or on any other fair account, seals a bond or a deed, this is not by duress of imprisonment, and he is not at liberty to avoid it(*y*). To make imprisonment lawful, it must be, subject to some peculiar [*162] exceptions(*z*), either by process from the *courts of judicature, or by warrant from some legal officer having authority to commit to prison; which warrant must be in writing, under the hand and seal of the magistrate, and express the cause of the commitment in order to be examined into (if necessary) upon a *habeas corpus*. If there be no cause expressed, the gaoler is not bound to detain the prisoner(*a*). For the law judges in this respect, says sir Edward Coke, like Festus the Roman governor, that it is unreasonable to send a person prisoner, and not to signify withal the crimes alleged against him.

A natural and regular consequence of this personal liberty is, that every

(*u*) Acts of indemnity may subsequently be passed, for the protection of those who either could not defend themselves in an action for false imprisonment without making improper disclosures of the information on which they had acted, or who have done acts not strictly defensible at law, though justified by the necessity of the moment. (See

29 & 30 Vict. c. 1, and c. 119; 57 Geo. 3, c. 8, and c. 55, for instances of suspending acts; and 58 Geo. 3, c. 6, as an instance of an indemnifying act.)

(*x*) 2 Inst. 589.

(*y*) 2 Inst. 482.

(*z*) *Vide post*, c. 9.

(*a*) 2 Inst. 52, 53.

Englishman may claim a right to abide in his own country so long as he pleases; and not to be driven from it unless by the sentence of the law. The king indeed, by his royal prerogative, may issue out his writ *ne exeat regno*(b), and prohibit any of his subjects from going into foreign parts without licence(c). This was formerly deemed necessary for the public service and safeguard of the commonwealth, though now the writ in question issues only under special circumstances from the Court of Chancery. But no power on earth, except the authority of parliament, can send any subject of England out of the land against his will; no, not even a criminal. For exile, and transportation, are punishments at present unknown to the customary law; and whenever the latter is now inflicted, it is either by the choice of the criminal himself to escape a capital punishment, or else by the express direction of some modern act of parliament.(61) To this purpose the great charter(d) declares that no freeman shall be banished, unless by the judgment of his peers, or by the law of the land. And by the *habeas corpus* act 31 Car. 2, c. 2, it is enacted, that no subject of this realm, who is an *inhabitant of England, Wales, [*163] or Berwick, shall be sent prisoner into Scotland, Ireland, Jersey, Guernsey, or places beyond the seas (where he cannot have the full benefit and protection of the common law); but that all such imprisonment shall be illegal; that the person who shall dare to commit another contrary to this law, shall be disabled from bearing any office, shall incur the penalty of a *præmunire*, and be incapable of receiving the king's pardon: and the party suffering shall also have his private action against the person committing, and all his aiders, advisers, and abettors, and shall recover treble costs; besides his damages, which no jury shall assess at less than 500*l*.

The law is in this respect so benignly and liberally construed for the benefit of the subject, that, though within the realm the king may command the attendance and service of all his liegemen, yet he cannot send any man out of the realm, even upon the public service; excepting sailors and soldiers, the nature of whose employment necessarily implies an exception: he cannot even constitute a man lord lieutenant of Ireland against his will, nor make him a foreign ambassador(e). For this might in reality be no more than an honourable exile.

(b) As to this writ, *vide post*, chap. 7.
(c) F. N. B. 85.

(d) C. 29.
(e) 2 Inst. 47.

(61) In this country, banishment is no part of the sentence or judgment. But a party who has been convicted of a felony may be pardoned upon condition that he leave the country, and such condition will be valid. *People v. Potter*, 1 Park. C. C. 47; 4 N. Y. Leg. Obs. 177; 1 Edm. 235; *People v. James*, 2 Caines, 57; *Pease's Case*, 3 Johns. Cas. 333; *State v. Smith*, 1 Bailey (S. C.), 283; *Flavell's Case*, 8 Watts & Serg. 197; *State v. Addington*, 2 Bailey (S. C.), 516; *State v. Fuller*, 1 McCord, 178; *State v. Twitty*, 4 Hawks (N. C.), 198; *United States v. Wilson*, 7 Pet. 150, 161.

If the party so pardoned upon condition does not leave the state, or afterward returns to it, he may be arrested and remanded to suffer the original sentence. *Ib.* A pardon may be upon condition that the convict shall pay, or secure the payment of a specified sum of money. *Rood v. Winslow*, 2 Doug. (Mich.) 68. As to the return of a convict, who was pardoned upon condition of leaving the state, see *Hunt, Ex parte*, 5 Eng. (Ark.) 284. In an early case in Virginia, the power to grant a pardon upon a condition was denied. *Commonwealth v. Fowler*, 4 Call. 85: and see *Commonwealth v. Hatafield*, 1 Pa. Law Jour. Rep. 177. When a pardon has once been tendered and accepted, no subsequent action of the executive, or of the legislature can revoke it. *State v. Nichols*, 26 Ark. 74.

III. The third absolute right, inherent in every Englishman, is that of property; which consists in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land. The origin of private property is probably found in nature, as will be more fully explained in the second book of the ensuing Commentaries: but certainly the modifications under which we at present find it, the method of conserving it in the present owner, and of translating it from man to man, are entirely derived from society: and are some of those civil advantages, in exchange for which every individual has resigned a part of his natural liberty. The laws of England are therefore, *in point of [*164] honour and justice, extremely watchful in ascertaining and protecting this right. Upon this principle the great charter(*f*) has declared that no freeman shall be disseised, or divested, of his freehold or of his liberties, or free customs, but by the judgment of his peers, or by the law of the land. And by a variety of ancient statutes(*g*) it is enacted, that no man's lands or goods shall be seized into the king's hands, against the great charter, and the law of the land; and that no man shall be disinherited, nor put out of his franchises or freehold, unless he be duly brought to answer, and be forejudged by course of law; and if any thing be done to the contrary, it shall be redressed, and holden for nought.

So great moreover is the regard of the law for private property, that it will not authorize the least violation of it. By the laws of England, said Lord Camden(*h*), every invasion of private property, be it ever so ^{Infringements of this right.} minute, is a trespass. No man can set his foot upon my ground without my licence, but he is liable to an action, though the damage be nothing, which is proved by every declaration in trespass, where the defendant is called upon to answer for bruising the grass, and even treading upon the soil. If he admits the fact he is bound to show by way of justification that some positive law has empowered or excused him. This justification is submitted to the judges, who are to enquire whether it can be maintained by the text of the statute or by the principles of the common law. If no such excuse can be found or produced, the silence of the books is an authority against the defendant, and the plaintiff will be entitled to judgment.

Even where the object proposed to be effected by the invasion or appropriation of private property is for the *general good of the community, it [*165] cannot, except on such conditions as the law deems equitable, be accomplished. If, for instance, a new road or line of railway were to be made through the grounds of a private person, it might be beneficial to the public, but yet the law allows no man or corporate body to make the road or line of railway in question without consent of the owner of the land, or at all events without compensation being in some way or other made to him for the infringement of his rights of property thus caused(*i*). In this and similar cases the legislature alone can, and frequently does, interpose, and compel the individual to acquiesce. But how does it interpose and compel? Not by absolutely stripping the subject of his property in an arbitrary manner; but by giving him an indemnification and equivalent for the injury thereby sustained. All

(*f*) C. 29.

(*g*) 5 Edw. 3, c. 9; 25 Edw. 3, t. 5, c. 4; 28 Edw. 3, c. 3.

(*h*) *Entick v. Carrington*, 19 St. Tr. 1066.

(*i*) *Judgm. Reg. v. Eastern Counties Railway Company*, 2 Q. B. 359; *Blakemore v. Glamorganshire Canal Company*, 1 My. & K. 162.

that the legislature does, is to oblige the owner to alienate his possessions for a reasonable price; and even this is an exertion of power, which the legislature indulges with caution, and which nothing but the legislature or some tribunal specially appointed by it for the purpose can perform.(62)

(62) The principle, that private property cannot be taken for public use, without just compensation to the owner, will be found incorporated in the constitution of the United States (Amendments, Art. V), as well as in the constitutions of the several states. The right to take private property for public use, and upon just compensation, is well established, and is one which is daily exercised. Before such property can be thus taken for public use, the legislature must provide by law upon what occasions, in what mode, upon what conditions, and by what agencies the appropriation is to be made.

In relation to the kind of property which may be taken, it may be said generally that every species of property which the public needs require may be appropriated under the right of eminent domain. *Russell v. Mayor, etc., of N. Y.*, 2 Denio, 461, 469; *Baker v. Johnson*, 2 Hill, 342; *Bliss v. Hooper*, 15 Ohio, 44; *Eldridge v. Smith*, 84 Vt. 484; *Wells v. Somerset, etc., R. R. Co.*, 47 Me. 345; *Gardner v. Newburg*, 2 Johns. Ch. 163; *Crosby v. Hancock*, 36 N. H. 420; *Central Bridge Corporation v. Lowell*, 4 Gray, 474; *Buckingham v. Smith*, 10 Ohio, 396; *Cooper v. Williams*, 5 id. 392.

The taking of private property by the public must be for public use, and not for a mere private purpose, for the government cannot take the property of one citizen and transfer it to another, even upon just compensation, unless the constitution of the particular state authorizes this to be done. *Taylor v. Porter*, 4 Hill, 140, 148 and cases cited; *Sadler v. Langham*, 84 Ala. 311; *Pittsburg v. Scott*, 1 Penn. St. 309; *Bankhead v. Brown*, 25 Iowa, 540; *Young v. McKenzie*, 8 Ga. 31, 44; *Bradley v. N. Y. & N. H. R. R. Co.*, 21 Conn. 305; *Reeves v. Treasurer of Wood Co.*, 8 Ohio St. 344; *Eldridge v. Smith*, 84 Vt. 484.

To define what constitutes a public use is a difficult task, since the authorities are not in entire harmony. It may be proper to mention some of the instances in which private property is taken: as for the purposes of railroads, of public highways, turnpike and plank-roads, canals, wharves, basins, ferries, draining swamps and marshes, sewers in cities, bringing water to cities and villages, public parks, and the like cases. *Rensselaer & Saratoga R. R. Co. v. Davis*, 43 N. Y. (4 Hand) 187, 142; *N. Y. & Harlem R. R. Co. v. Kip*, 46 N. Y. (1 Sick.) 546, 551; *Kane v. Baltimore*, 15 Md. 240; *Gardner v. Newburg*, 2 Johns. Ch. 163; *Ham v. Salem*, 100 Mass. 350; *Mithoff v. Carrollton*, 12 La. An. 185; *Anderson v. Kerns Draining Co.*, 14 Ind. 199; *Reeves v. Treasurer of Wood Co.*, 8 Ohio St. 344; *Matter of Central Park Extension*, 16 Abb. 56; *Matter of Commissioners of Central Park*, 35 How. 255; 51 Barb. 277; *Hildreth v. Lowell*, 11 Gray, 845. Whether lands can be taken for the purpose of private manufactories is not settled by the authorities. See Cooley on Const. Lim. 534 to 536, and notes.

The legislature is the proper body to determine as to the necessity of taking property; but it need not enact special laws for each particular case; it may by general laws provide for classes of cases; and may then delegate the power of deciding whether such necessity exists, and the exercise of such power by the courts in pursuance of the statute is constitutional. *Buffalo & N. Y. City R. R. Co. v. Brainard*, 9 N. Y. (5 Seld.) 100; *Rensselaer & Saratoga R. R. Co. v. Davis*, 43 N. Y. (4 Hand) 187, 142; *Matter of Townsend*, 39 N. Y. (12 Tiff.) 171; 6 Trans. App. 266; *People v. Smith*, 21 N. Y. (7 Smith) 595; *Ford v. Chicago & N. W. R. R. Co.*, 14 Wis. 617; *Hays v. Risher*, 32 Penn. St. 169; *North Missouri R. R. Co. v. Lackland*, 25 Mo. 515; *Bankhead v. Brown*, 25 Iowa, 540.

The quantity of property taken ought to be limited to the necessity of the case. If the exercise of the right to take property does not directly encroach upon the property of an individual, nor disturb him in its possession or enjoyment, he cannot claim compensation, nor maintain an action. *Davidson v. Boston & Maine R. R. Co.*, 3 Cush. 91; *Gould v. Hudson River R. R. Co.*, 6 N. Y. (2 Seld.) 522; *Hooker v. New Haven & Northampton Co.*, 14 Conn. 146; *Richardson v. Vermont Central R. R. Co.*, 25 Vt. 465; *Kennett's Petition*, 4 Fost. 139; *Tinicum Fishing Co. v. Carter*, 61 Penn. St. 21; *Eddings v. Spabrook*, 12 Rich. Law 504; *Murray v. Manifee*, 20 Ark. 561; *Murphy v. Chicago*, 29 Ill. 279; *Macy v. Indianapolis*, 17 Ind. 267.

As exemplifying the above remarks, the Lands Clauses Consolidation Act (8 & 9 Vict. c. 18), by its 68th section, indicates the mode to be adopted by the owners of land "taken for or injuriously affected by" the execution of works falling within the purview of the act for enforcing compensation as against the promoters of the undertaking, or as against the public company organised for carrying it out. What, then, is the test applicable for determining whether a claim for compensation can be upheld within the above or any similar statutory provision? Such test would seem to be supplied by this consideration(k):—

[*166] There are (as will hereafter appear(l)) cases in which *an act may be in law an injury and may produce damage to an individual, and yet in which the law affords no remedy, or at least no immediate remedy. These are cases in which the act done is a grievance to the entire community, no one of whom is injured by it more than another. In any such case the mode of punishing the wrong-doer is by indictment, and by indictment only. Still, if any person have sustained a particular damage therefrom beyond that of his fellow-citizens, he may maintain an action in respect of that particular damnification. Has then the claimant under a statutory provision such as above-mentioned sustained any particular damnification by the prosecution of the public undertaking?(m). This is the test to be applied for determining whether he is entitled to compensation(n).

"The great end for which men entered into society was to secure their property. That right is preserved sacred and incommunicable in all instances

(k) Note to *Ashby v. White*, 1 Smith L. C. 6th ed. 264.

(l) *Post*, vol. iii.

(m) *Vide*, per Erle, C. J., *Chamberlain v. West End of London and Crystal Palace Railway Company*, 2 B. & S. 636 (acc. *Senior v. Metropolitan Railway Company*, 2 H. & C. 258). Per Buller, J., 4 T. R. 797.

(n) The plaintiff was held to be so where he appeared to have suffered loss of custom

in his trade in consequence of the traffic past his house having been diminished by the stoppage of the thoroughfare by a railway company during the prosecution of their works, authorised by Act of Parliament. *Cameron v. Charing Cross Railway Company*, 83 L. J. C. P. 818; S. C. reversed, 19 C. B. N. S. 764. See also *Ricket v. Metropolitan Railway Company*, L. R. 2 H. L. 175.

If the taking, however, is such as to deprive the owner of the ordinary use of his property, and is equivalent to taking it from him, he will be entitled to compensation. *Hooker v. New Haven & Northampton Co.*, 14 Conn. 146; *Varick v. Smith*, 9 Paige, 547; *Murray v. Sharp*, 1 Bosw. 539; *Lackland v. North Missouri R. R. Co.*, 81 Mo. 180; *Glover v. Powell*, 2 Stockt. 211.

In appropriating lands for public use, it is indispensable that proper and just compensation shall be made to the owner. And this compensation ought to be pecuniary in its character, because it is in the nature of a payment for a compulsory purchase. *Fletcher v. Peck*, 6 Cranch, 145; *People v. Mayor, etc., of Brooklyn*, 4 N. Y. (4 Comst.) 419; *Carson v. Coleman*, 3 Stockt. 106; *State v. Graves*, 19 Md. 851; *Curran v. Shattuck*, 24 Cal. 427; *United States v. Minnesota, etc., R. R. Co.*, 1 Minn. 127; *Buffalo Bayou, etc., Railroad Co. v. Ferris*, 26 Tex. 588.

In the absence of a constitutional provision that payment shall precede the taking of the land, it is not essential to the validity of a law that compensation shall be first made. *Bloodgood v. Mohawk & Hudson River R. R. Co.*, 18 Wend. 9; *Taylor v. Marcy*, 25 Ill. 518; *Callison v. Hedrick*, 15 Grat. 244; *Jackson v. Winn's Heirs*, 4 Litt. 823; *People v. Michigan Southern R. R. Co.*, 3 Mich. 496; *Charlestown Branch R. R. Co. v. Middlesex*, 7 Metc. 78; *Harper v. Richardson*, 22 Cal. 251.

What is requisite is, that the law shall provide a prompt, secure, and available mode of obtaining a just compensation. *Bloodgood v. Mohawk & Hudson River R. R. Co.*, 18 Wend. 9; *Taylor v. Marcy*, 25 Ill. 518; *People v. Michigan Southern R. R. Co.*, 3 Mich. 496; *Charlestown Branch R. R. Co. v. Middlesex*, 7 Metc. 78; *Callison v. Hedrick*, 15 Grat. 244; *Harper v. Richardson*, 22 Cal. 251.

where it has not been taken away or abridged by some public law for the good of the whole. The cases where this right of property is set aside by positive law are various. Distresses, executions, forfeitures, taxes, &c., are all of this description; wherein every man by common consent gives up that right for the sake of justice and the general good"(o). The law of the land has, however, postponed even public necessity to the sacred and inviolable rights of private property. For no subject of England can be constrained to pay any aids or taxes, even for the defence of the realm, *or the support of govern- [*167] ment, but such as are imposed by parliament. By the statute 25 Edw. 1, c. 5 and c. 6, it is provided, that the king shall not take any aids or tasks, but by the common assent of the realm. And what that common assent is, is more fully explained by 34 Edw. 1, st. 4, c. 1, which enacts, that no tallage or aid shall be taken without the assent of the archbishops, bishops, earls, barons, knights, burgesses, and other freemen of the land: and again, by 14 Edw. 3, st. 2, c. 1, the prelates, earls, barons, and commons, citizens, burgesses, and merchants shall not be charged to make any aid, if it be not by the common assent of the great men and commons in parliament. And as this fundamental law had been shamefully evaded under many succeeding princes, by compulsive loans, and benevolences extorted without a real and voluntary consent, it was made an article in the petition of right 3 Car. 1, that no man shall be compelled to yield any gift, loan, or benevolence, tax, or such like charge, without common consent by act of parliament. And, lastly, by the statute 1 Will. and M. st. 2, c. 2, it is declared, that levying money for or to the use of the crown, by pretence of prerogative, without grant of parliament; or for longer time, or in other manner, than the same is or shall be granted; is illegal.

In the three preceding articles we have taken a short view of the principal absolute rights which appertain to every Englishman. But in vain would these rights be declared, ascertained, and protected by the dead letter of the laws, if the constitution had provided no other method to secure their actual enjoyment. It has therefore established certain other auxiliary subordinate rights of the subject, which serve principally as outworks or barriers, to protect and maintain inviolate the three great and primary rights, of personal security, personal liberty, and private property. These are,

1. The constitution, powers, and privileges of parliament, of which I shall treat at large in the ensuing chapter.

*2. The limitation of the king's prerogative, by bounds, so certain and notorious, that it is impossible he should either mistake or exceed [*168] them without the consent of the people. Of this also I shall treat in its proper place.

The constitution of parliament keeps the legislative power in due health and vigour, so as to make it improbable that laws should be enacted destructive of general liberty: the limitation of the prerogative is a guard upon the executive power, by restraining it from acting either beyond or in contradiction to the laws, that are framed and established by the parliament.

3. A third subordinate right of every Englishman is that of applying to the courts of justice for redress of injuries. Since the law is in England the supreme arbiter of every man's life, liberty, and property, courts of justice must

at all prescribed times be open and available to the subject, and the law must be duly administered therein. The emphatical words of *magna carta*(*p*), spoken in the person of the king, who in judgment of law (says sir Edward Coke(*q*)) is ever present and repeating them in his courts, are these; *nulli vendemus, nulli negabimus, aut differemus rectum vel justitiam*: and therefore every subject, continues the same learned author, for injury done to him *in bonis, terris, vel personâ*, by any other subject, be he ecclesiastical or temporal, without any exception, "may take his remedy by the course of the law, and have justice and right for the injury done to him, freely without sale, fully without any denial, and speedily without delay." It were endless to enumerate all the affirmative acts of parliament, wherein justice is directed to be done according to the law of the land: and what that law is, every subject knows, or may know if he pleases; for it depends not upon the arbitrary will of any judge, but is permanent, fixed, and unchangeable, unless by authority of parliament. I shall however just mention a few negative statutes, whereby abuses, perversions, or delays of *justice, especially by the prerogative, are restrained.

[*169] It is ordained by *magna carta*(*r*), that no freeman shall be outlawed, that is put out of the protection and benefit of the laws, but according to the law of the land. By 2 Edw. 3, c. 8, and 11 Ric. 2, c. 10, it is enacted, that no commands or letters shall be sent under the great seal, little seal, signet, or privy seal, in disturbance of the law; or to disturb or delay common right: and, though such commandments should come, the judges shall not cease to do right; which is also made a part of their oath by statute 18 Edw. 3, st. 4. And by 1 Will. and M. st. 2, c. 2, it is declared, that the pretended power of suspending, or dispensing with laws, or the execution of laws, by regal authority, without consent of parliament, is illegal(*s*).

Not only the substantial part, or judicial decisions, of the law, but also the formal part or method of proceeding, cannot be altered but by or with the sanction of parliament: for, if once those outworks were demolished, there would be an inlet to all manner of innovation in the body of the law itself. The king, it is true, may erect new courts of justice; but then they must proceed according to the old-established forms of the common law. For which reason it was declared in the statute 16 Car. 1, c. 10, upon the dissolution of the court of star-chamber, that neither his majesty, nor his privy council, have any jurisdiction, power, or authority by English bill, petition, articles, libel (which were the course of proceeding in the star-chamber, borrowed from the civil law), or by any other arbitrary way whatsoever, to examine, or draw into question, determine, or dispose of the lands or goods of any subjects of this kingdom; but that the same ought to be tried and determined in the ordinary courts of justice, and by course of law.

[*170] 4. If there should happen any uncommon injury, or *infringement of the rights before mentioned, which the ordinary course of law is too defective to reach, there still remains a fourth subordinate right, appertaining to every individual, namely the right of petitioning the king, or either house of parliament, for the redress of grievances.(63) In Russia we are told(*t*) that the

(*p*) C. 29.

(*q*) 2 Inst. 55.

(*r*) C. 29.

(*s*) See *The Case of the Seven Bishops*, and Note thereto, Broom's Const. L. 408, 498.

(*t*) Montesq. Sp. L. xii. 28.

(63) The first (third) amendment of the constitution of the United States expressly guarantees this right. See Cooley on Const. Lim. 249.

Czar Peter established a law, that no subject might petition the throne, till he had first petitioned two different ministers of state. In case he obtained justice from neither, he might then present a third petition to the prince; but upon pain of death if found to be in the wrong. The consequence of which was, that no one dared to offer such third petition: and, grievances seldom falling under the notice of the sovereign, he had little opportunity to redress them. The restrictions, for some there are, which are laid upon petitioning in England, are of a nature extremely different; and while they promote the spirit of peace, they are no check upon that of liberty. Care only must be taken, lest, under the pretence of petitioning, the subject be guilty of any riot or tumult; as happened in the opening of the memorable parliament in 1640; and, to prevent this, it is provided by the statute 13 Car. 2, st. 1, c. 5, that no petition to the king, or either house of parliament, for any alteration in church or state, shall be signed by above twenty persons, unless the matter thereof be approved by three justices of the peace, or by the major part of the grand jury, in the country(u); and in London by the lord mayor, aldermen, and common council: nor shall any petition be presented by more than ten persons at a time. But it is declared by the stat. 1 Will. & M. st. 2, c. 2, that the subject has a right to petition; and that all commitments and prosecutions for such petitioning are illegal. This latter enactment does not indeed repeal the *earlier [*171] statute(x), the provisions of which, though recognized as operative, are not ordinarily enforced. Lastly, we may add that meetings of more than fifty persons for the purpose of petitioning the parliament, held within one mile of Westminster Hall, are illegal(y).

5. The fifth and last auxiliary right of the subject which I shall at present mention, is that of having arms for defence, suitable to his condition and degree, and such as are allowed by law.(64) Which is also declared by the same statute 1 Will. & M. st. 2, c. 2, and it is indeed a public allowance, under due restrictions, of the natural right of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression.

In these several articles consist the rights, or, as they are frequently termed, the liberties of Englishmen: liberties, more generally talked of than thoroughly understood; and yet highly necessary to be perfectly known and considered by every man of rank or property, lest his ignorance of the points whereon they

(u) This approval of the grand jury may be given either at the assizes or at the sessions. The punishment for an offence against the act, is a fine to any amount not exceeding 100*l.*, and imprisonment for three months.

(x) At the trial of Lord George Gordon, the whole court, including Lord Mansfield, declared that this statute was not affected by the Bill of Rights, 1 Will. & M. st. 2, c. 2 (see Dougl. 593; 21 St. Tr. 646). Mr. Dunning, however, in the House of Commons, contended, "that it was a clear and fundamental

point in the constitution of this country that the people had a right to petition their representatives in parliament, and that it was by no means true that the number of names signed to any such petition was limited. To argue that the act of Charles was now in force would be as absurd as to pretend that the prerogative of the Crown still remained in its full extent notwithstanding the declaration in the Bill of Rights." See New An. Reg. vol. ii. A. D. 1781.

(y) 57 Geo. 3, c. 19, s. 23.

(64) "A well-regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed." U. S. Const., Amendments, art. 2 (4). The constitutions of several of the states contain a similar clause. The right of carrying arms for self-protection was discussed in *Bliss v. Commonwealth*, 2 Lit. 90; *Nunn v. State*, 1 Kelly, 243; and *Ely v. Thompson*, 3 A. K. Marsh. 73.

are founded should hurry him into faction and licentiousness on the one hand, or a pusillanimous indifference and criminal submission on the other. And we have seen that these rights consist, primarily, in the free enjoyment of personal security, of personal liberty, and of private property. So long as these remain inviolate, the subject is perfectly free; for every species of compulsive [*172] tyranny and oppression must *act in opposition to one or other of these rights, having no other object upon which it can possibly be employed. To preserve these from violation, it is necessary that the constitution of parliament be supported in its full vigour; and that limits, certainly known, be set to the royal prerogative. And lastly, to vindicate these rights, when actually violated or attacked, the subjects of England are entitled, in the first place, to the regular administration and free course of justice in the courts of law; next, to the right of petitioning the king and parliament for redress of grievances; and, lastly, to the right of having and using arms for self-preservation and defence. And these rights and liberties it is our birthright to enjoy entire; unless where the laws of our country have laid them under necessary restraints — restraints in themselves so gentle and moderate, as will appear upon further inquiry, that no man of sense or probity would wish to see them slackened. For all of us have it in our choice to do everything that a good man would desire to do; and are restrained from nothing, but what would be pernicious either to ourselves or to our fellow-citizens. So that this review of our situation may justify the observation of a learned French author(z), who generally both thought and wrote in the spirit of genuine freedom; that the English is the only nation in the world where political or civil liberty is the direct end of its constitution. Recommending therefore to the student of our laws a further and more accurate search into this extensive and important title, I shall close my remarks upon it with the expiring wish of the famous father Paul(a) to his country, “ESTO PERPETUA!”

[*173]

*CHAPTER II.

THE PARLIAMENT.

WE are next to treat of the rights and duties of persons, as they are members of society, and stand in various relations to each other. These relations are either public or private: and we will first consider those that are public.

The most universal public relation, by which men are connected together, is that of government; namely, as governors and governed, or, in other words, as magistrates and people. Of magistrates one, according to our constitution, is supreme, in whom the sovereign power of the state resides; others are subordinate, deriving their authority from the supreme magistrate, accountable to him for their conduct, and acting in an inferior secondary sphere.

In all tyrannical governments the supreme magistracy, or the right both of making and of enforcing the laws, is vested in one and the same man, or in

(s) Montesq. Sp. L. xi. 5.

(a) Pietro Sarpi (commonly called Father Paul) flourished A. D. 1552—1623.

one and the same body of men; and wherever these two powers are united together, there can be no public liberty. The magistrate may enact tyrannical laws, and execute them in a tyrannical manner, since he possesses, in quality of dispenser of justice, all the power which he as legislator thinks proper to give himself. But, where the legislative and the executive authority are in distinct hands, the former will take care not to intrust the latter with so large a power as may tend to the subversion of its own independence, and therewith of the liberty of the subject. With us *therefore in England this supreme [*174] power is divided into two branches; the one legislative, to wit, the parliament, consisting of king, lords, spiritual and temporal, and commons; the other executive, consisting of the king alone. It will be the business of this chapter to consider the British parliament; in which the legislative power, and (of course) the supreme and absolute authority of the state, is vested by our constitution.(65)

The origin or first institution of parliament is one of those matters which lie so far hidden in the dark ages of antiquity, that the tracing of it out is a thing equally difficult and uncertain. The word "parliament" itself, *(parlement or colloquium, as some of our historians translate it)*, is comparatively of modern date(a); derived from the French, and signifying an assembly that met and conferred together. It is certain that, long before the introduction of the Norman language into England, all matters of importance were debated and settled in the great councils of the realm. A practice, which seems to have been universal among the northern nations, particularly the Germans(b); and carried by them into the countries of Europe, which they overran at the dissolution of the Roman empire. Relics of which constitution, under various modifications and changes, were formerly to be met with in the diets of Poland, Germany, and Sweden, and the assembly of the estates in France: but what was there called the parliament was only the supreme court of justice, consisting of the peers, certain dignified ecclesiastics, and judges; which neither was in practice, nor was supposed to be in theory, a general council of the realm.

*With us in England this general council has been held immemorially, under the several names of *micel-synoth*, or great council, [*175] *micel-gemote* or great meeting, and more frequently *witena-gemot* or the meeting of wise men(c). It was variously styled in Latin, *commune concilium regni*,

(a) Mr. Millar (Eng. Gov. ii., 85, *et seq.*) considers that the great assembly of the realm which succeeded the Witenagemot was first called "the parliament," *temp.* William I.; *post*, p. 176, n. (k). The first mention of Parliament in our statute law is in the preamble to the statute of West. 1, 8 Edw. 1, A.D. 1275.

(b) *De minoribus rebus principes consultant, de majoribus omnes.* Tac. Germ. c. 11.

(c) "As the freemen or allodial proprietors of a tything, of a hundred, and of a shire, determined the common affairs of their several districts, and were convened for that purpose by the tything-man, the hundreder, and the alderman; so the union of people

belonging to different shires produced a greater assembly, consisting of all the allodial proprietors of a kingdom, and summoned by the king, the great military leader and chief magistrate of the community. This national council received the appellation of the mickle-mote or Wittenagemote." Millar, Eng. Gov. i., 200.

To Turner's Ang. Sax., b. 8, c. 4 & c. 5, Hallam's Mid. Ag. ch. viii., and Palgrave's Rise and Progress of the Eng. Commonw. vol. 2, pp. 225, 385, the student is referred for information respecting the constitution and powers of this assembly.

(65) In this country the legislative power of the United States is vested in congress; while that of the several states is lodged in the state legislatures. And while the supreme power of legislation is to be exercised by these bodies, they do not possess an absolute, unlimited

magnum concilium regis, curia magna, conventus magnatum vel procerum, assisa generalis, and sometimes *communitas regni Angliæ*(*d*). We have instances of its meeting to order the affairs of the kingdom, to make new laws, and to amend the old, or, as Fleta(*e*) expresses it, "*novis injuriis emersis nova constituere remedia*," so early as the reign of Ina king of the West Saxons, Offa king of the Mercians, and Ethelbert king of Kent, in the several realms of the heptarchy. And, after their union, the Mirror(*f*) informs us, that king Alfred ordained for a perpetual usage, that these councils should meet twice in the year, or oftener, if need be, to treat of the government of God's people; how they should keep themselves from sin, should live in quiet, and should receive right. Our succeeding Saxon and Danish monarchs held frequent councils of this sort, as appears from their respective codes of laws; the titles whereof usually speak them to be enacted, either by the king with the advice [**176*] of his witen-gemôt or wise men, as, "This is the ordinance *that king Edgar with the counsel of his witan ordained"(*g*); or to be enacted by those sages with the advice of the king, "*hæc sunt judicia, quæ sapientes Exonia consilio Æthelstani regis instituerunt*"(*h*); or lastly, to be enacted by them both together, as, "*hæc est institutio, quæm Edmundus rex et episcopi sui cum sapientibus suis instituerunt*"(*i*).

There is also no doubt but similar great councils were occasionally held under the first princes of the Norman line(*k*). Glanvil, who wrote in the reign of Henry the Second, speaking of the particular amount of an amercement in the sheriff's court, says, it had never been yet ascertained by the general assize, or assembly, but was left to the custom of particular counties(*l*). Here the general assize is spoken of as a meeting well known, and its statutes or decisions are put in manifest contradistinction to custom, or the common law. In Edward III.'s time an act of parliament, made in the reign of William the Conqueror, was pleaded in the case of the abbey of St. Edmund's-bury, and judicially allowed by the court(*m*).

Hence, it appears, that general councils are coeval with the kingdom itself. How those councils were constituted and composed, is another question, which has been matter of dispute among our learned antiquaries; and particularly whether the commons were at all summoned to attend them; or, if summoned, [**177*] at what period they began to *form a distinct assembly(*n*). But it is not my intention here to enter into controversies of this sort. It is generally agreed, that in the main the constitution of parliament, as it now

(*d*) Glanvil, l. 18; c. 82; l. 9, c. 10; Pref. 9 Rep.; 2 Inst. 526.

(*e*) L. 2. c. 2.

(*f*) C. 1, s. 3.

(*g*) Anc. Laws and Inst. Eng. 111.

(*h*) Id. 92.

(*i*) Id. 107.

(*k*) In the Saxon Chronicle it is mentioned (A.D. 1067), that William the Conqueror three times in every year met his "witan" or "*commune concilium*;" — (A.D. 1102), that Henry I. used to summon assemblies of all the "heafodemen" or magnates of the land,

both lay and clerical; — (A.D. 1123), that all the bishops, abbots, and thanes came to the king's "gewitene-mot;" — (A.D. 1125), to the king's "concilie;" — (A.D. 1127), and elsewhere, to his "hird" or court.

(*l*) *Quanta esse debeat per nullam assisam generalem determinatum est, sed pro consuetudine singulorum comitatum debetur.* L. 9, c. 10.

(*m*) Year-book, 21 Edw. 3, 60.

(*n*) For further information upon this subject, see Hallam's Mid. Ag. iii. 40; Millar's Eng. Gov. ii. 217, et seq.

authority. The national and state constitutions are the supreme law of the land, and every legislative act which violates such constitutions will be held void by the courts. Where there is no constitutional limitation of power, the authority of congress or of the legislatures is nearly unlimited. See *ante*, 38 (*44), Note 10; *ante*, 69 (*95), Note 34.

stands, was marked out so long ago as the seventeenth year of king John, A.D. 1215, in the great charter granted by that prince: wherein he promises to summon all archbishops, bishops, abbots, earls, and greater barons, personally; and all other tenants in chief under the crown, by the sheriff and bailiffs; to meet at a certain place, with forty days' notice, to assess aids and scutages when necessary. And, although the above remarkable provision does not appear in the charter of Henry III., this constitution has subsisted in fact at least from the year 1266 (49 Hen. 3), there being still extant writs of that date, to summon knights, citizens, and burgesses, to parliament. I proceed therefore to inquire wherein consists this constitution of parliament, as it now stands, and has stood for the space of six hundred years. And in the prosecution of this inquiry, I shall consider, first, the manner and time of its assembling: secondly, its constituent parts: thirdly, the laws and customs relating to parliament, considered as one aggregate body: fourthly and fifthly, the laws and customs relating to each house: sixthly, the method of proceeding, and of making statutes, in both houses: and lastly, the manner of the parliament's adjournment, prorogation, and dissolution. The various heads specified being treated in a purely elementary manner, such as would alone be consistent with the design of these Commentaries(o).

I. As to the manner and time of assembling. A new *parliament was regularly to be summoned by the king's writ or letter, issued out [*178] of chancery by advice of the privy council, and according to the *L. Manner and time of assembling.* *magna carta* of king John, it was summoned at least forty days before it began to sit(p); a period which after the union with Scotland(q) was extended to fifty days, and has recently(r) been reduced to thirty-five days from the date of the proclamation appointing a time for the first meeting of the parliament. It is a branch of the royal prerogative, that no parliament can be convened by its own authority, or by the authority of any, except the sovereign alone. And this prerogative is founded upon very good reason. For, supposing it had a right to meet spontaneously, without being called together, it is impossible to conceive that all the members, and each of the houses, would agree unanimously upon the proper time and place of meeting; and if half of the members met, and half absented themselves, who shall determine which is really the legislative body, the part assembled, or that which stays away? It is therefore necessary that the parliament should be called together at a determinate time and place: and highly becoming its dignity and independence, that it should be called together by none but one of its own constituent parts: and, of the three constituent parts, this office can only appertain to the king or queen; who is a single person, and whose will may be uniform and steady; the first person in the nation, being superior to both houses in dignity; and the only branch of the legislature that has a separate existence, and is capable of performing any act at a time when no parliament is in being. Nor is it an exception to this rule that, by a *modern statute, on the demise of a king or queen, if there be then no parliament in being, the last par- [*179]

(o) For details concerning "the Law, Privileges, Proceedings, and Usage of Parliament," the reader is referred to the admirable work so entitled, by Sir Thomas Erskine May.

(p) Cap. 17; 7 & 8 Will. 3, c. 35, s. 1.

(q) The 22nd article of the Treaty of Union with Scotland, on account of the distance of

some parts of that country from London, required that the time between the teste and the return of the writ of summons for the assembling of the first parliament of Great Britain should not be less than fifty days.

(r) 15 Vict. c. 23.

liament shall immediately convene and sit again for six months, unless sooner prorogued or dissolved by his or her successor; for the parliament thus reassembling must have been originally summoned by the crown^(s).

It is true, that by a statute, 16 Car. 1, c. 1, it was enacted that, if the king neglected to call a parliament for three years, the peers might assemble and issue out writs for choosing one; and, in case of neglect of the peers, the constituents might meet and elect one of themselves. But this, if ever put in practice, would have been liable to all the inconveniences I have just now stated: and the act itself was esteemed so highly detrimental and injurious to the royal prerogative, that it was repealed by statute 16 Car. 2, c. 1. From thence therefore no precedent can be drawn.

It is also true that the convention-parliament, which restored king Charles the Second, met above a month before his return; the lords by their own authority, and the commons in pursuance of writs issued in the name of the keepers of the liberty of England by authority of parliament: and that the said parliament sat till the twenty-ninth of December, full seven months after the Restoration; and enacted many laws, several of which are still in force. But this was for the necessity of the thing, which supersedes all law; for if they had not so met, it was morally impossible that the kingdom should have been settled in peace. And the first thing done after the king's return was to pass an act declaring this to be a good parliament, notwithstanding the defect of the king's writs^(t). So that, as the royal prerogative was chiefly wounded by their so meeting, and as the king himself, who alone had a right to object, consented to waive the objection, this cannot be drawn into an example in prejudice of [*180] the rights of the crown. Besides, we should *remember, that it was at that time a great doubt among lawyers^(u), whether even this healing act made it a good parliament; and held by very many in the negative: though it seems to have been too nice a scruple. And yet, out of abundant caution, it was thought necessary to confirm its acts in the next parliament, by statutes 13 Car. 2, c. 7, and c. 14.

It is likewise true, that at the time of the Revolution, A.D. 1688, the lords and commons, by their own authority, and upon the summons of the prince of Orange (afterwards king William), met in a convention, and therein disposed of the crown and kingdom. But it must be remembered, that this assembling was upon a like principle of necessity as at the restoration; that is, upon a full conviction that king James the Second had abdicated the government, and that the throne was thereby vacant: which supposition of the individual members was confirmed by their concurrent resolution, when they actually came together. And, in such a case as the palpable vacancy of a throne, it follows *ex necessitate rei*, that the form of the royal writs must be laid aside, otherwise no parliament can ever meet again. For, let us put another possible case, and suppose, for the sake of argument, that the whole royal line should at any time fail and become extinct, which would indisputably vacate the throne: in this situation it seems reasonable to presume, that the body of the nation, consisting of lords and commons, would have a right to meet and settle the government; otherwise there must be no government at all. And upon this and no other principle did the convention in 1688 assemble. The vacancy of the throne was precedent to their meeting without any royal summons, not a consequence of it. They did

(s) 87 Geo. 3, c. 127, *post*.

(t) Stat. 13 Car. 2, c. 1.

(u) Memorandum, 1 Sid. 1.

not assemble without writ, and then make the throne vacant; but, the throne being previously vacant by the king's abdication, they assembled without writ, as they must do if they *assembled at all. Had the throne been full, [*181] their meeting would not have been regular; but, as it was empty, such meeting became absolutely necessary. And accordingly it is declared by statute 1 Wm. & M. st. 1, c. 1, that this convention was really the two houses of parliament, notwithstanding the want of writs or other defects of form. So that, notwithstanding these two capital exceptions which were justifiable only on a principle of necessity (and each of which, by the way, induced a revolution in the government), the rule laid down is in general certain, that the sovereign, only, can convoke a parliament.

And this by certain ancient statutes of the realm(x) he was bound to do every year, or oftener, "if need be." Not that he was obliged by these statutes to call a new parliament every year; he was obliged only to permit a parliament to sit annually for the redress of grievances, and dispatch of business, or oftener, "if need be." These last words are so loose and vague, that such of our monarchs as were inclined to govern without parliaments, neglected the convoking them sometimes for a very considerable period, under pretence that there was no need of them. The preamble, however, of the statute 16 Car. 1, c. 1, affirmed that "by the laws and statutes of this realm parliaments ought to be holden at least once every year for the redress of grievances;" and although this act was repealed by the statute 16 Car. 2, c. 1, it was therein enacted, that the sitting and holding of parliaments shall not be intermitted above three years at the most. And by the statute 1 Wm. & M. st. 2, c. 2, it is declared to be one of the rights of the people, that for redress of all grievances, and for the amending, strengthening and preserving the laws, parliaments ought to be held "frequently." And this indefinite "frequently" is again reduced to a certainty, by statute 6 Wm. & M. c. 2, which enacts as the statute of Charles the Second had done before, that a new parliament shall be called within *three years after the determination of the former. By reason [*182] moreover of the supplies being voted only for one year at a time, and the Marine Forces and Mutiny Acts being likewise passed for one year only, the necessity for an annual session of parliament is now established, and parliament is never prorogued to a period beyond a year from the operative commencement of these acts.(66)

II. The constituent parts of a parliament are the next objects of our inquiry. And these are, the king or queen, sitting there in a royal political capacity, II. Constituent and the three estates of the realm; the lords spiritual(y), the parts of par-
liament. lords temporal (who sit, together with the king, in one house), and the commons, who sit by themselves in another. And the king and these three estates, together, form the great corporation or body politic of the kingdom(z), of which the sovereign is said to be *caput, principium, et finis*. For upon their coming together the sovereign meets them, either in person or by

(x) 4 Edw. 3, c. 14; 36 Edw. 3, c. 10.

(s) 4 Inst. 1, 2; 1 Eliz. c. 3; Hale, Parl. 1.

(y) *Post*, p. 184.

(66) By article 1, section 4 of the constitution of the United States, congress is required to assemble at least once in every year, and such meeting shall be on the first Monday in December, unless they shall by law appoint a different day. By the same constitution (art. 2, § 3) the president is authorized to convene congress on extraordinary occasions.

representation; without which there can be no beginning of a parliament(a): and he alone has the power of dissolving them.

It is highly necessary for preserving the balance of the constitution, that the executive power should be a branch, though not the whole, of the legislative. The total union of these powers, we have seen(b), would be productive of tyranny; the total disjunction of them would in the end produce the same effect, by causing that union against which it seems to provide. The legislative would soon become tyrannical, by making continual encroachments upon, and gradually assuming to itself the rights of, the executive power. Thus the long parliament of Charles the First, while it acted in a constitutional manner with the royal concurrence, redressed many heavy grievances, and established many salutary laws. But when the two houses assumed the power of legislation, in [*183] exclusion of *the royal authority, they soon after assumed likewise the reins of administration; and the republican form of government was speedily transformed into a protectorate or dictatorship, opposed alike in name and spirit to our constitution. To hinder, therefore, any such encroachments, the king is himself a part of the parliament: and, as this is the reason of his being so, very properly therefore the share of legislation, which the constitution has placed in the crown, consists in a power of rejecting rather than of resolving; this being sufficient to answer the end proposed. For we may apply to the royal negative in this instance, what Cicero observes of the negative of the Roman tribunes, that the crown has not any power of doing wrong, but merely of preventing wrong from being done(c). The crown cannot of itself initiate any alterations in the present established law; but it may approve or disapprove of the alterations suggested and consented to by the two houses. The legislative therefore cannot abridge the executive power of any rights which it now has by law, without its own consent; since the law must perpetually stand as it now does, unless all the powers will agree to alter it. And herein consists one special excellence of the English government, that the parts of it mutually check one another. In the legislature, the people are a check upon the nobility, and the nobility a check upon the people; by the mutual privilege of rejecting or amending what the other has resolved: whilst the sovereign is a check upon both, and may preserve the executive power from encroachments. But this executive power is again checked and kept within due bounds by the two houses, through the privilege they have of inquiring into, impeaching, and punishing the conduct (not indeed of the sovereign(d)), which would destroy his constitutional independence; but, [*184] (which is more *beneficial to the public) of his evil and pernicious counsellors. Thus every branch of our civil polity supports and is supported by, regulates and is regulated by the rest: for the two houses naturally drawing in two directions of opposite interest, and the prerogative in another still different, they mutually keep each other from exceeding their proper limits; while the whole is prevented from separation, and artificially connected together by the mixed nature of the crown, which forms a part of the legislative machine, and is the sole executive magistrate. Acting like three distinct powers in mechanics, they jointly impel the government in a

(a) 4 Inst. 6.

(b) *Ante*, p. 173.

(c) *Sulla*—tribunus plebis sua lege injuria

facienda potestatem ademit, auxilii ferendi reliquit. De Leg. 3, 9.

(d) Stat. 12 Car. 2, c. 30; *post*, chap. 7.

direction different from what either, acting by itself, would have done; but at the same time in a direction partaking of each, and formed out of all; a direction which constitutes, as nearly as may be, the true line of liberty and political well-being of the community.

Let us now consider these constituent parts of the sovereign power, or parliament, each separately. The sovereign, his title, duties, prerogatives, and revenue will form the subject-matter of the next and some subsequent chapters, to which we must at present merely refer.

The next in order are the spiritual lords. These consist of two archbishops, and twenty-four bishops for England(e). To the lords spiritual were added four bishops *on the part of Ireland upon the union of [*185] that country with Great Britain, and of these spiritual peers, who sit by rotation of sessions, an archbishop of the church in Ireland is always one(f).

The right by which the spiritual lords have since the conquest held their seats in parliament is uncertain. During Saxon times it seems agreed that they sat there in virtue of their ecclesiastical office(g), but some learned writers have affirmed that they sit there as holding certain ancient baronies under the crown: for it is said that William the Conqueror thought proper to change the spiritual tenure of frank-almoign or free alms, under which the bishops held their lands during the Saxon government, into the feudal or Norman tenure by barony; which subjected their estates to civil charges and assessments, from which they were before exempt(h): and that in right of succession to those baronies, which were unalienable from their respective dignities, the bishops and abbots were allowed their seats in the house of lords(i). Let this be as it may, the archbishops and bishops sitting in the upper house solely in that capacity, although "lords of parliament," are not in strictness "peers"(k).

Though the lords spiritual are in the eye of the law a distinct estate from the lords temporal, and are so distinguished in most of our acts of parliament, yet in practice they are usually blended together under the one name of "the lords;" they intermix in their votes; and a majority of votes so intermixed decides the specific question before the house. From this want of a separate *assembly and separate negative of the prelates, some writers have [*186] argued(l) very cogently, that the lords spiritual and temporal are now in reality only one estate(m): which is unquestionably true in every effectual sense, though the ancient distinction between them still nominally continues.

(e) The Bishop of Sodor and Man has no seat in parliament. Also, by the statute 10 & 11 Vict. c. 108, it is enacted that the number of lords spiritual shall not be increased by the creation of the bishopric of Manchester, and whenever there shall be a vacancy by the avoidance of any one of the sees of Canterbury, York, London, Durham, or Winchester, or of any other see filled by the translation of a bishop already sitting, such vacancy shall be supplied by the issue of a writ of summons to the bishop elected to the same see; but if the vacancy be caused by the avoidance of any other see, such vacancy shall be supplied by the issue of a writ of summons to that bishop who shall not have previously become entitled to such writ; and no bishop elected to any see, not being

one of the five sees above named, shall be entitled to a writ of summons unless in the order and according to the conditions above prescribed.

(f) See 39 & 40 Geo. 3, c. 67, art. 4; 40 Geo. 3, c. 29; 3 & 4 Will. 4, c. 37, ss. 51, 52.

(g) May, Parl. Pract. 5th ed. 7.

(h) Gilb. Hist. Exch. 55; Spelm. Parl. 68.

(i) Glanv. 7, 1; Co. Litt. 97; Seld. tit. Hon. 2, 5, 19. Mr. Hallam says (Const. Hist. vol. 1, pp. 96, 99), that the mitred abbots and priors, before the act for abolishing monasteries (80 Hen. 8, c. 13), "composed more than a third part of the House of Lords."

(k) May, Parl. Pract. 5th ed. 26.

(l) Whitelocke on Parl. c. 73; Warburt. Alliance, b. 2, c. 8.

(m) Deyer, 60.

For if a bill should pass their house, there is no doubt of its validity, though every lord spiritual should vote against it; of which Selden(*n*), and sir Edward Coke(*o*) give instances: as, on the other hand, I presume it would be equally good, if the lords temporal present were inferior to the bishops in number, and every one of those temporal lords gave his vote to reject the bill(*p*).

The lords temporal consist of all the peers of the realm (the bishops not being in strictness held to be such, but merely lords of parliament(*q*)) by whatever title of nobility distinguished; dukes, marquesses, earls, viscounts, or barons; of which dignities we shall speak more hereafter. Some of these sit by descent, as do all ancient peers; some by creation, as do all new made ones; others by election, as do the sixteen peers, who represent the body of the Scottish nobility, and are elected for one parliament only, and the twenty-eight representative Irish peers, who are elected for life.

The number of the peers of the United Kingdom is indefinite, may be increased [*187] at will by the power of the *crown, and is by new creations gradually increasing. In the reign of queen Anne, there was an instance of creating no less than twelve peers together; in contemplation of which, in the reign of king George the First, a bill passed the house of lords, and was countenanced by the then ministry, for limiting the number of the peerage. This was thought by some to promise a great acquisition to the constitution, by restraining the prerogative from gaining the ascendant in that august assembly, by pouring in at pleasure an unlimited number of new created lords. But the bill was ill relished and miscarried in the house of commons, whose leading members were then desirous to keep the avenues to the other house as open and easy as possible.

So far as regards the Irish peerage the prerogative of the crown was by the 4th article of the Act of Union restrained, for that article allows the creation of one Irish peerage only in lieu of every three of such peerages which become extinct(*r*). Should however the number of Irish peers, exclusive of such as are peers of the United Kingdom, be reduced to one hundred, then one new Irish peerage may be created by the crown whensoever one of such hundred peerages becomes extinct or whensoever an Irish peer becomes entitled to an hereditary seat in parliament(*s*).

The distinction of rank and honour is necessary in every well-governed state: in order to reward such as are eminent for their services to the public, in a manner the most desirable to individuals, and yet without burden to the community(*t*); exciting thereby ambition and emulation in others. Emulation is [*188] a spring of action, which, *however dangerous or invidious in a mere republic or under a despotic sway, will certainly be attended with good

(*n*) Baronage, p. 1, c. 6. The act of uniformity, 1 Eliz. c. 2, was passed with the dissent of all the bishops: (Gibbs. Codex, 286), and therefore the style of "lords spiritual" is omitted throughout it.

(*o*) Sir E. Coke, indeed, seems to doubt whether this would not have been an ordinance rather than an act of parliament. 2 Inst. 585, 6, 7. See Kellw. 184, where it was holden by the judges, 7 Hen. 8, that the king may hold a parliament without any spiritual lords. This was also exemplified in fact in the two first parliaments of Charles II.; wherein no bishops were summoned till after

the repeal of the statute 16 Car. 1, c. 27, by statute 13 Car. 2, st. 1, c. 2.

(*p*) 4 Inst. 25.

(*q*) Staunford, P. C. 153; *Bishop of St. David v. Lucy*, Salk. 135.

(*r*) *The Fermoy Peerage*, 5 H. L. Cas. 716.

(*s*) May, Parl. Pract. 5th ed., p. 4.

(*t*) It is on this ground especially to be lamented that the prerogative does not extend to the creation of peerages for life, conferring the right to sit and vote in parliament. See the Debates on the Wensleydale Peerage, Hansard. cxi. 1121.

effects under a free monarchy; where its excesses may be restrained by that superior power from which all honour is derived. Such a spirit, when nationally diffused, gives life and vigour to the community; it sets all the wheels of government in motion, which, under a wise regulator, may be directed to any beneficial purpose; and thereby every individual, whilst principally meaning to promote his own ends, may be made subservient to the public good. A body of nobility is, in our mixed and compounded constitution, efficacious to support the rights of both the crown and the people, by forming a barrier to withstand the encroachments of either. It creates and preserves that gradual scale of dignity which proceeds from the peasant to the prince; rising like a pyramid from a broad foundation, and diminishing to a point as it rises. It is this ascending and contracting proportion that adds stability to a government; for when the departure is sudden from one extreme to another, we may pronounce that condition of society to be precarious. The nobility therefore are the pillars, which are reared from among the people, more immediately to support the throne; and, if that falls, they must be buried under its ruins. Accordingly, when in the seventeenth century the commons had determined to extirpate monarchy, they also voted the house of lords to be useless and dangerous. Since, therefore, titles of nobility are expedient in the state, it is also expedient that their owners should form an independent and separate branch of the legislature. If they were confounded with the mass of the people, and like them could only vote in electing representatives, their privileges would soon be borne down and overwhelmed by the popular torrent, which would effectually level all distinctions. It is highly necessary that the body of nobles should form a distinct assembly, hold distinct *deliberations, and exercise distinct powers from the commons(u). [*189]

The commonalty in this country are divisible into two classes, those who have and those who have not the elective franchise. In a free state every man, who is supposed a free agent, ought to be in some measure his own governor; and therefore, theoretically, a branch at least of the legislative power should reside in the whole body of the people. And this power, when the territories of the state are small and its citizens easily known, should be exercised by the people in their aggregate or collective capacity, as was wisely ordained in the petty republics of Greece, and the first rudiments of the Roman state. But this will be highly inconvenient, when the public territory is extended to any considerable degree, and the number of citizens is increased. Thus when, after the social war, all the burghers of Italy were admitted free citizens of Rome, and each had a vote in the public assemblies, it became impossible to distinguish the spurious from the real voter, and from that time all elections and popular deliberations grew tumultuous and disorderly; which paved the way for Marius and Sylla, Pompey and Cæsar, to trample on the liberties of their country, and at last to dissolve the commonwealth. In so populous a state as ours it is therefore very wisely contrived, that the people should do that by their representatives, which it is impracticable to perform in person; representatives, chosen by a number of separate districts, wherein all the voters are, or may be, distinguished. The counties, therefore, have been represented by knights, elected principally by the proprietors of land and by tenants considerably interested in it: the cities and boroughs have been

(u) Much valuable information on the original constitution of the British peerage is collected in the four Reports on the dignity of a peer of the realm, A.D. 1826.

represented by citizens and burgesses, chosen for the most part by owners and occupiers of tenements, or by *persons having a property qualification(x); the franchise enjoyed *sub modo* by graduates of our principal Universities resting however upon another basis.

Each member of the house of commons, though chosen by one particular district, when elected and returned serves for the whole realm and for both classes of the commonalty, for those who have not as well as for those who have the franchise. For the end of his coming to parliament is not particular, but general: not barely to advantage his constituents, but to promote the interests of the commonwealth; to advise his sovereign (as appears from the writ of summons(y)) "*de communi consilio super negotiis quibusdam arduis et urgentibus, regem, statum, et defensionem regni Angliæ et ecclesiæ Anglicanæ concernentibus.*" And therefore a member is not bound to consult with, or take the advice of, his constituents upon any particular point, unless he himself thinks it proper or prudent so to do.

These are the constituent parts of a parliament; the sovereign, the lords spiritual and temporal, and the commons.(67) Parts, of which each is so necessary, that the consent of all three is required to make any new law that shall bind the subject. Whatever is enacted for law by one, or by two only, of the three is no statute; and to it, unless in matters concerning privilege, or where a royal proclamation has been issued(z), no regard is due. For though, in times of madness and anarchy, the commons once passed a vote(a), "that whatever is enacted or declared for law by the commons in parliament assembled hath the force of law; and as such the people of this nation are concluded thereby, although the consent and concurrence of the king or house of peers be not had thereto:" yet, when the constitution was restored, it was

[*191] *enacted by statute 13 Car. 2, c. 1, that if any person shall maliciously or advisedly affirm, that both or either of the houses of parliament have any legislative authority without the king, such person shall incur the penalties of a *præmunire*(b).

III. Laws and cus- III. We are next to examine the laws and customs relating toms of parlia- parliament, united together and considered as one aggregate body. ment collectively.

The power and jurisdiction of parliament, says sir Edward Coke(c), is so transcendent and absolute, that it cannot be confined, either for causes or persons within any bounds. And of this high court, he adds, it may be truly said, "*si antiquitatem spectes, est vetustissima; si dignitatem, est honoratissima; si jurisdictionem, est capacissima.*" It has sovereign and uncontrollable powers in the making, confirming, enlarging, restraining, abrogating, repealing, reviving,

(x) The existing state of the franchise is set forth in the Appendix, No. II.

(y) 4 Inst. 14.

(z) As to the authority of a royal proclamation, *post*, chap. 7.

(a) 4 Jan. 1648.

(b) As to which, *post*, vol. 4.

(c) 4 Inst. 36.

(67) The congress of the United States consists of a senate and a house of representatives. U. S. Const., art. 1, § 1.

The house of representatives is composed of members chosen every second year by the people of the several states. *Ib.*, § 2. Every representative must be twenty-five years of age, have been a citizen for seven years, and a resident of the state in which he is chosen. *Ib.*

The senate of the United States is composed of two senators from each state chosen by the legislature thereof for six years. *Ib.*, § 3.

and expounding of laws, concerning matters of all possible denominations, ecclesiastical or temporal, civil, military, maritime, or criminal: to parliament a supreme authority is intrusted by the constitution of these kingdoms. All mischiefs and grievances, operations and remedies, that transcend the ordinary course of the laws, are within the reach of this extraordinary tribunal(*d*). It can regulate or new model the succession to the crown; as was done in the reign of Henry VIII., and William III. It can alter the established religion of the land; as was done in a variety of instances, in the reigns of king Henry VIII., and his three children. It can change and create afresh even the constitution of the kingdom and of parliaments themselves; as was done by the acts of union, and the several statutes for triennial and septennial elections. It can, in short, do everything that is not naturally impossible; and therefore some have not scrupled to call its power, by *a figure rather too bold, the [*192] omnipotence of parliament. True it is, that what the parliament does, no authority upon earth can undo. So that it is a matter most essential to the liberties of the kingdom, that such members be delegated to this important trust, as are most eminent for their probity, their fortitude, and their knowledge; for it was a known apophthegm of the great lord treasurer Burleigh, "that England could never be ruined but by a parliament;" and, as sir Matthew Hale observes(*e*), this being the highest and greatest court, over which none other can have jurisdiction in the kingdom, if by any means a misgovernment should any way fall upon it, the subjects of this kingdom are left without all manner of remedy. To the same purpose the president Montesquieu, though I trust too hastily, presages(*f*), that as Rome, Sparta, and Carthage have lost their liberty and perished, so the constitution of England will in time lose its liberty, will perish: it will perish, he says, whenever the legislative power shall become more corrupt than the executive.

It must be owned that Mr. Locke(*g*), and other theoretical writers, have held, that "there remains still inherent in the people a supreme power to remove or alter the legislative, when they find the legislative act contrary to the trust reposed in them: for when such trust is abused, it is thereby forfeited, and devolves to those who gave it." Without anticipating what will hereafter be said upon this subject(*h*), we must observe that however just Mr. Locke's conclusion may be in theory, legal steps cannot be taken for carrying it into execution, for the devolution of power, to the people at large, if literally effected, would include in it a dissolution of the whole form of government established by that people; would reduce all the members of the community to their original *state of equality; and, by annihilating the sovereign power, [*193] would jeopardise the authority of all positive laws before enacted. No human laws therefore will suppose a case, which at once must destroy or shake the foundations of all law, and compel men to build afresh upon a new foundation; nor will they make provision for so desperate an event. So long therefore as the English constitution lasts, we may venture to affirm, that the power of parliament is absolute and without control.(68)

(*d*) Such also was anciently one important function of parliament. Palgrave, Orig. Auth. of King's Council, 21, *et seq.*
(*e*) Of parliaments, 49.

(*f*) Sp. L. 11, 6.

(*g*) On Gov. p. 2, s. 149, 227.

(*h*) Post, chap. 3.

(68) The limitations imposed upon legislative power have been noticed, *ante*, 83 (*43), note 10; *ante*, 69 (*94), note 84; and see Cooley on Const. Lim. 85 to 90.

In order to prevent the mischiefs that might arise, by placing this extensive authority in hands that are either incapable, or else improper to manage it, Qualification of certain qualifications are needed in the members of both houses. members of both houses. According to the law and custom of parliament(*i*), notwithstanding some contradictory adjudications and some deviations from an observance of it(*k*), no one can sit or vote in either house, unless he be twenty-one years of age. This is expressly declared by statute 7 & 8 Will. 3, c. 25, s. 8, with regard to the house of commons, and by resolution A.D. 1667 with regard to the house of lords(*l*). No member can vote or sit in either house till, if a Protestant, he has taken the oath prescribed by the 29 & 30 Vict. c. 19(*m*); or (if a Quaker or other person by law permitted to make a solemn affirmation or declaration instead of taking an oath) till he has made and subscribed a solemn affirmation as thereby appointed(*n*). An alien, although naturalized or made a denizen, unless he be born of English parents(*o*), is incapable to serve in parliament(*p*). There are not only these standing incapacities: but if any person is made a peer by the sovereign, or is elected to serve in the house of commons by the people, yet may the respective houses [*194] upon complaint of *any crime in such person, and proof thereof, adjudge him disabled and incapable to sit as a member(*q*), although expulsion from the house of commons does not create any disability to serve again in parliament(*r*). (69)

(*i*) Whitlocke, c. 50; 4 Inst. 47.

(*k*) Com. Journ. 10 Mar. 1623; 18 Feb. 1625.

(*l*) 12 Lords' Journ. 174.

(*m*) S. 1.

(*n*) S. 4. The parliamentary oath is now in the form prescribed by the Promissory Oaths Act, 1868, 31 & 32 Vict. c. 72. See § 8.

(*o*) 12 & 13 Will. 3, c. 2.

(*p*) 7 & 8 Vict. c. 66, s. 6.

(*q*) Whitlocke of Parl. c. 102. See Lords' Journ. 3 May, 1620; 13 May, 1624; 26 May, 1725. Com. Journ. 14 Feb. 1580; 21 June, 1628; 9 Nov. and 21 Jan. 1640; 6 Mar. 1676; 6 Mar. 1711; 7 Feb. 1769.

(*r*) In 1764, the House of Commons expelled Mr. Wilkes from their body, on the ground of his having been the author of a libel contained in No. 45 of the North Briton. In 1768 he became a candidate for the representation of Middlesex, and was duly returned to parliament, but the house again

expelled him, alleging and recording as their reason for so doing the libels he had published. The county again elected him their representative, and the house then resolved (17 Feb. 1769) that he was incapable of sitting in that parliament on the ground of having been expelled from the house. A third time he was elected by the county, and again his election was declared void by the House of Commons. Mr. Luttrell then became a candidate for Middlesex, in opposition to Mr. Wilkes; and though the votes for Mr. Wilkes were nearly four times the number of those for Mr. Luttrell, the house resolved that Mr. Wilkes was unduly returned, and Mr. Luttrell took his seat. However, in May, 1782, the resolution of 17th Feb. 1769 was ordered to be expunged from the journals as "subversive of the rights of the whole body of electors of this kingdom," expulsion from the house being not sufficient of itself to disqualify from sitting in parliament.

(69) In the United States each house of congress is the judge of the elections, returns and qualifications of its own members. U. S. Const., art. 1, § 5. Each house may determine the rule of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two-thirds, expel a member. *Ib.* The decisions of either house as to the election, return or qualification of a member are conclusive. *State v. Jarrett*, 17 Md. 309; *People v. Mahaney*, 18 Mich. 481; *Lamb v. Lynd*, 44 Penn. St. 386; see *Bowman v. Coffroth*, 59 id. 19.

Every legislative body has power to punish contempts which tend to obstruct legislation, whether committed by members or by third persons. *Anderson v. Dunn*, 6 Wheat. 204; *Hiss v. Bartlett*, 3 Gray, 468; *Burnham v. Morrissey*, 14 id. 226; *State v. Matthews*, 37 N. H. 450; see *Matter of Hon. Platt Potter*, Dwarries on Statutes, 578, Potter's ed.; 55 Barb. 625.

As every court of justice has laws and customs for its direction, some the civil or canon, some the common law, others their own peculiar laws and customs, so the high court of parliament has also its own peculiar law, called the *lex et consuetudo parliamenti*; a law which sir Edward Coke(s) observes is "*ab omnibus quærenda, a multis ignorata(t), a paucis cognita.*" It will not therefore be expected that we should enter into the examination of this law, with any degree of minuteness: since, as the *same learned author assures us(u), it is much better to be learned out of the rolls of parliament, and other records, and by precedents, [*195] and continual experience than expressed by any one man.

The privileges of parliament are large, and at one time were supposed to be indefinite, at least in this sense, it was maintained that parliament could assert new privileges. Accordingly, when, in 31 Henry 6, a question was propounded to the judges by the house of lords concerning their privileges, the chief justice, sir John Fortescue, in the name of his brethren, declared, "that they ought not to make answer to that question: for it hath not been used aforetime that the justices should in any way determine the privileges of the high court of parliament. For it is so high and mighty in its nature, that it may make law: and that which is law, it may make no law: and the determination and knowledge of that privilege belongs to the lords of parliament and not to the justices"(x).

The primary maxim insisted on by parliament has on some notable occasions been impugned. It may be thus stated: that whatever matter arises concerning either house of parliament, ought to be examined, discussed, and adjudged in that house to which it relates, and not elsewhere(y). For instance, the lords will not suffer the commons to interfere in settling the election of a peer of Scotland; the commons will not allow the lords to judge of the election of a burgess, and have more than once evinced remarkable jealousy of any interference by the upper house or by the superior courts of law with their *asserted privileges; for example, in the famous case of the Aylesbury [*196] election(z), and in that of *Stockdale v. Hansard(a)*.

(e) 1 Inst. 11.

(f) In *Ashby v. White*, 2 Ld. Raym. 1114, Lord Holt observed that, "as to what my Lord Coke says, that the '*lex parliamenti est a multis ignorata*,' this is only because they will not apply themselves to understand it." *Et vide* Hale's Treatise on the Jurisdiction of the House of Lords, and the Preface by Hargrave. Broom's Const. L. 837, *et seq.*

(u) 4 Inst. 50.

(x) Seld. Baronage, part 1, c. 4. Per North, C. J. (*Barnardiston v. Soame*, 6 St. Tr. 1101), who says that the judges "know not what is the course of parliament, nor the privilege of parliament. When the lords in parliament, whom they are bound to assist with their advice, ask the judges anything concerning the course or privilege of parliament, they have answered that they know them not, nor can advise concerning them."

(y) See 4 Inst. 15.

(z) *Ashby v. White*, 2 Ld. Raym. 1105. This was an action by a burgess of Aylesbury against the returning officers of the borough, for maliciously refusing to receive his vote for two candidates, who, however, were

elected. A majority of the Court of Queen's Bench (contrary to the opinion of Lord Holt) held that the action would not lie, on the ground, *inter alia*, that it was in breach of the privileges of the House of Commons. This judgment was reversed in the House of Lords. Consequent on these proceedings occurred a celebrated debate in the lower house, and the passing of resolutions in assertion of the exclusive privilege of the Commons "to examine and determine all matters relating to the right of election of their own members," and the qualification of electors, and declaring guilty of a breach of privilege any person who should presume to commence or prosecute any action which might bring the right of electors, or persons elected to serve in parliament, to the determination of any other jurisdiction than that of the House of Commons. Further legal proceedings having, in the face of the above resolutions, been taken, and a collision between the lords who took part with the Aylesbury men, and the lower house, being imminent, Queen Anne prorogued parliament. 14 St. Tr. 695—888.

(a) In *Stockdale v. Hansard*, 9 A. & E. 1; 11

[*197] *Privilege of parliament was principally established, in order to protect its members not only from being molested by their fellow subjects, but from being oppressed by the power of the crown; and it has been contended that if the privileges of parliament were ascertained the attainment of the objects specified could not be adequately assured, nay, further, that it is competent to either house to claim and assert by resolution a new privilege. Such a doctrine is fraught with danger to the community. No declaration of either house, said Lord Holt(b), can bind the subject or create any new privilege, for then it would have the force of an act of parliament, and bind the person and property of the subject, which are free, unless restrained or limited by the legislature of the kingdom. The lords and the commons respectively are judges of their own privileges, but they have not power to enlarge nor to create them.

Some of the more notorious privileges of the members of either house are, privilege of speech and of person.(70) As to the first, privilege of speech, it is declared by the statute 1 Will. & M. sess. 2, c. 2, as one of the liberties of the

Id. 258, the extent to which the courts of justice can take cognisance of, or even control, the privileges claimed by the House of Commons underwent much discussion. The circumstances of that case were briefly as follows: The House of Commons ordered a certain report to be printed, containing matter reflecting upon Stockdale, which, if printed by any private person, would have been a libel. For this publication, Stockdale brought an action against Messrs. Hansard, the printers to the House of Commons. They pleaded that the documents in question had been published by them under the direction of the House of Commons, and that the house had resolved that the power of publishing such of their reports, votes, and proceedings as they thought conducive to the public interest, was an essential incident to the constitutional functions of parliament, more especially to

the Commons' House of Parliament as the representative portion of it. Upon demurrer to this plea, the Court of Queen's Bench was called upon to decide whether a court of law is or is not excluded by the law of parliament from the consideration of a privilege claimed by a formal resolution of the House of Commons, and set up by their printer as a justification of an act otherwise unlawful. The court decided that they were not precluded from determining as to the validity of the privilege. In consequence of this decision, the statute 3 & 4 Vict. c. 9, was passed for the special protection of all persons publishing parliamentary reports, votes, or other proceedings by order of either house of parliament. See the note to *Stockdale v. Hansard*, Broom's Const. L. 966, *et seq.*

(b) Judgment in the *Case of Paty and others*, Ed. 1837, pp. 48, 50.

(70) The privileges of members of congress are secured by the constitution as follows: Senators and representatives "shall in all cases, except treason, felony and breach of the peace, be privileged from arrest during their attendance at the session of their respective houses, and in going to and returning from the same; and for any speech or debate in either house, they shall not be questioned in any other place." U. S. Const., art. 1, § 6. This principle is fully recognized as to members of the several state legislatures, without the aid of any constitutional provision, as a proper discharge of the duties of a legislator requires the utmost freedom of expression upon all subjects brought up for examination or discussion. *Coffin v. Coffin*, 4 Mass. 1. See, also, *Hosmer v. Loveland*, 19 Barb. 111; *State v. Burnham*, 9 N. H. 34.

But, while a legislator may speak boldly, and even cast imputations upon the characters of individuals, while discussing measures under consideration, he will not be protected if he afterward publishes speeches which reflect injuriously upon individuals. *Rex v. Ld. Abington*, 1 Esp. 226; *Rex v. Creevey*, 1 M. & S. 278.

A faithful report, in a newspaper, of a debate in a legislative body, containing matter disparaging to the character of an individual, which had been spoken in the course of the debate, is not actionable at the suit of the person whose character has been called in question. *Wason v. Walter*, L. R., 14 Q. B. 78. But the publication of defamatory matter concerning an individual is not privileged because the libel is contained in a fair report in a newspaper of what passed at a public meeting. *Davison v. Duncan*, 7 Ell. & Bl. 229; *Lewis v. Few*, 5 Johns. 1.

people, "that the freedom of speech, and debates, or proceedings in parliament, ought not to be impeached or questioned in any court or place out of parliament." And this freedom of speech is particularly demanded of the sovereign in person, by the speaker of the house of commons, at the opening of every new parliament. The privilege, so far as it involves immunity from legal liability, extends only to speeches uttered within the walls of parliament(c).

The privilege of person is an immunity referable to very early times, for we find in the laws of Edward the *Confessor(d) this precept, "*pax sit ad synodos euntibus, sive summoniti sint, sive per se ibi quid agendum*" [*198] *habeant;*" and so in the old Gothic constitutions, "*extenditur hæc pax et securitas ad quatuordecim dies, convocato regni senatu*"(e). This included formerly not only privilege from illegal violence, but also from legal arrests, and seizures by process from the courts of law. And still to assault by violence a member of either house is a high contempt of parliament, and there punished with the utmost severity. It had formerly peculiar penalties annexed to it in the courts of law, by the statutes 5 Hen. 4, c. 6, and 11 Hen. 6, c. 11. Neither can any member of either house be arrested and taken into custody, unless for treason, felony, or breach of the peace, *i.e.*, as now established, for an indictable offence(f), without infringing the privilege of parliament.

The person of a peer is by the privilege of peerage inviolable(g); and a commoner, by privilege of parliament resting upon usage and recognised by courts of law(h), is protected from arrest for forty days after every *prorogation, and forty days before the next appointed meeting: which is now [*199] in effect as long as the parliament subsists, it seldom being prorogued for more than four-score days at a time. A member of the lower house is also protected before the first meeting and after the final dissolution of parliament for a convenient time sufficient to allow of his coming from or returning to any part of the kingdom(i). As to other privileges, which obstruct the ordinary course of justice, they were restrained by the statutes 12 Will. 3, c. 3, 2 & 3 Ann. c. 18, and 11 Geo. 2, c. 24, and were abolished by statute 10 Geo. 3, c. 50, which enacts, that any suit may at any time be brought against any peer or member of parliament, or any other person entitled to privilege of parliament; which shall not be impeached or delayed by pretence of any such privilege; except that the person of a member of the house of commons shall not thereby be subjected to any arrest or imprisonment. Likewise by force of the statutes 52 Geo.

(c) *R. v. Lord Abingdon*, 1 Esp. 226; *R. v. Creevey*, 1 M. & S. 273.

(d) Cap. 2.

(e) *Stiernh. de jure Goth.* l. 3, c. 3.

(f) *May, Parl. Pract.* 5th ed., p. 143.

(g) At common law peers of the realm and peeresses, whether by birth, creation, or marriage, are privileged from arrest in civil suits, on account of their dignity, and because they are supposed to have sufficient property, by which they may be compelled to appear; and this privilege is extended by the act of union with Scotland (5 Anne, c. 8, art. 23) to Scotch peers and peeresses; and by the act of union with Ireland (39 & 40 Geo. 3, c. 67, art. 4), to Irish peers and peeresses. But this privilege does not extend to peeresses by marriage who

afterwards intermarry with commoners. *Co. Litt.* 16; 2 Inst. 50; *Acton's case*, 4 Rep. 118 b.

(h) *Goudy v. Duncombe*, 1 Exch. 430, where the court observed: "We think that the conclusion to be drawn from all that is to be found in the books on the subject is this: that, whether the rule was originally for a convenient time or for a time certain, the period of forty days before and after the meeting of parliament has for about two centuries at least been considered either a convenient time or the actual time to be allowed. Such has been the usage, the universally prevailing opinion, on the subject; and such, we think, is the law."

(i) See 10 Geo. 3, c. 50; *Fortes.* 159.

3, c. 144, and 12 & 13 Vict. c. 106, s. 77(*k*), a bankrupt is incapable of sitting in the house of commons.

The only way by which courts of justice could anciently take cognizance of privilege of parliament was by writ of privilege, in the nature of a *supersedeas*, to deliver the party out of custody when arrested in a civil suit(*l*). For when a letter was written by the speaker to the judges, to stay proceedings against a privileged person, they rejected it as contrary to their oath of office(*m*). But since the statute 12 Will. 3, c. 3, which enacts that no privileged person shall be subject to arrest or imprisonment, it has been held that such arrest is irregular *ab initio*, and that the party may be discharged upon motion(*n*) in the court out of which the process issued. It is to be observed, that there is

[*200] no precedent of any *such writ of privilege, save only in civil suits; and that the statute 1 Jac. 1, c. 13, and that of king William (which remedy some inconveniences arising from privilege of parliament) speak only of civil actions. And therefore the claim of privilege has been usually guarded with an exception as to the case of indictable crimes(*o*); or, as it has been frequently expressed, of treason, felony, and breach (or surety) of the peace(*p*). Whereby it seems to have been understood that no privilege was allowable to members of parliament in respect of any crime whatsoever: for all crimes are treated by the law as being *contra pacem domini regis*. And instances have not been wanting, wherein privileged persons have been convicted of misdemeanors, and committed, or prosecuted to outlawry, even in the middle of a session(*q*); which proceeding has afterwards received the sanction and approbation of parliament(*r*). To which may be added, that about a century ago, the case of writing and publishing seditious libels was resolved by both houses(*s*), not to be entitled to privilege (although the court of common pleas had otherwise decided(*t*)); and that the reasons upon which that case proceeded(*u*), extended equally to every indictable offence. So that the chief, if not the only, privilege of parliament, in such cases, seems to be the right of receiving immediate information of the imprisonment or detention of any member, with the reason for which he is detained: a practice which has been recognised by temporary statutes suspending the *habeas corpus* act(*x*); and providing that no member of either house shall be detained till the matter of which he stands suspected be first communicated to the house of *which

[*201] he is a member, and the consent of the said house be obtained for his commitment or detention.

If a member of either house be attached for contempt of court, it would be for the house to consider, regard being had to the circumstances of the case, whether the parliamentary privilege of freedom from arrest should be asserted or be waived(*y*).

These are the general heads of the laws and customs relating to parliament, considered as one aggregate body. We will next proceed to —

(*k*) And see s. 86. As to the effect of bankruptcy of a member of the House of Commons after Jan. 1, 1870, see the New Bankruptcy Act, 32 & 33 Vict. c. 71, ss 120–124.

(*l*) Dyer, 59; 4 Pryn. Brev. Parl. 757.

(*m*) *Hodges v. Moor, Latch.*, 48; S. C. Noy. 88.

(*n*) *Holiday v. Pitt*, Stra. 989.

(*o*) Com. Journ. 17 Aug. 1641.

(*p*) 4 Inst. 25; Com. Journ. 20 May, 1675.

(*q*) Mich. 16 Edw. 4, in Scacch.

(*r*) Com. Journ. 16 May, 1726.

(*s*) Com. Journ. 24 Nov.; Lords' Journ. 29 Nov. 1763.

(*t*) *Wilkes's case*, 2 Wils. 151.

(*u*) Lords' Protest, 29 Nov. 1763.

(*x*) 17 Geo. 2, c. 6; 45 Geo. 3, c. 4, s. 2; 57 Geo. 3, c. 3, s. 4, and c. 55, s. 4; 3 Geo. 4, c. 2, s. 4.

(*y*) May, Parl. Pract. 5th ed., p. 149.

IV. The laws and customs relating to the house of lords in particular.

IV. The laws and customs of the house of lords in particular.

These, if we exclude their judicial capacity, which will be more properly treated of in the third and fourth books of these Commentaries, will take up but little of our time.

One privilege, which by reason of its antiquity may be mentioned, is that declared by the charter of the forest(z), confirmed in parliament 9 Hen. 3; viz., that every lord spiritual or temporal summoned to parliament, and passing through the king's forests, may, both in going and returning, kill one or two of the king's deer without warrant; in view of the forester if he be present, or on blowing a horn if he be absent; that he may not seem to take the king's venison by stealth.

In the next place the lords in parliament assembled have a right to be, and constantly are, attended by the judges of the court of queen's bench and common pleas, and such of the barons of the exchequer as are of the degree of the coif, i.e., have been made serjeants at law; by the master of the rolls, the attorney-general, solicitor-general, as likewise by the queen's counsel, being serjeants; for their advice in point of law, and for the greater dignity of their proceedings. And the above-mentioned learned persons are still summoned by writs under the great seal *to attend the house(a) though the judges alone [*202] are consulted on points of law.

Another privilege is, that every peer, by licence from the crown(b), may make any other lord of parliament his proxy, to vote for him in his absence(c). A privilege which a member of the other house can by no means have, as he is himself but a proxy for a multitude of other people(d).

Each peer has also a right, by leave of the house, when a vote passes contrary to his sentiments, to enter his dissent on the journals of the house, with the reasons for such dissent; which is usually styled his protest.

All bills likewise, that may in their consequences any way affect the right of the peerage, are by the custom of parliament to have their first rise and beginning in the house of peers, and to suffer no changes or amendments in the house of commons, in whom nevertheless is vested the power of rejecting them altogether.

One statute peculiarly relative to the house of lords is the 6 Ann. c. 23, which regulates the election of the sixteen representative peers of North Britain, in consequence of the twenty-second and twenty-third articles of the union; and for that purpose prescribes the oaths, &c., to be taken by the electors; directs the mode of balloting; prohibits the peers electing from being attended in an unusual manner; and expressly provides, that no *other matter shall [*203] be treated of in that assembly, save only the election, on pain of incurring a *præmunire*(e).

The election of the Irish representative peers is regulated by the fourth article of the union(f).

(z) C. 11.

(a) Stat. 31 Hen. 8, c. 10; Smith's Commonw. b. 2, c. 3; *Egerton's case*, Moor. 551; 4 Inst. 4; Hale of Parl. 140.

(b) Hence arose a doubt in Nov. 1788, whether the proxies in that parliament were legal on account of the king's illness? (1 Ld. Mountb. 342.) Proxies cannot be used in a committee (*Id.* 106.) A proxy cannot sign a protest. If a peer after appointing a proxy appear personally in parliament, his proxy

is revoked and annulled (4 Inst. 13). By the orders of the house, no proxy shall vote upon a question of guilty or not guilty. A spiritual lord shall only be a proxy for spiritual lords, and a temporal lord for temporal lords.

(c) Seld. baronage, p. 1, c. 1.

(d) 4 Inst. 12.

(e) See also 2 & 3 Will. 4, c. 63.

(f) 39 & 40 Geo. 3, c. 67. See 20 & 21 Vict. c. 83.

V. The laws and customs of the house of commons in particular. V. The peculiar laws and customs of the house of commons relate principally to the raising of taxes, and the election of members to serve in parliament.

First, with regard to taxes: it is the ancient indisputable privilege and right of the house of commons, that all grants of subsidies or parliamentary aids begin in their house, and are first bestowed by them(*g*); although their grants are not effectual to all intents and purposes, until they have the assent of the other two branches of the legislature.(71) The general reason given for this exclusive privilege of the house of commons, is, that the supplies are raised upon the body of the people, and therefore it is proper that they alone should have the right of taxing themselves. This reason would be unanswerable if the commons taxed none but themselves: but it is notorious that a very large share of property is in the possession of the house of lords: that this property is equally taxable, and taxed, as the property of the commons; and therefore, the commons not being the sole persons taxed, this cannot be the reason of their having the sole right of raising and modelling the supply. The true reason, arising from the spirit of our constitution, seems to be this. The lords being a permanent hereditary body, created at pleasure by the sovereign, are supposed more liable to be influenced by the crown, and when once influenced to continue so, than the commons, who are a temporary elective body, freely nominated by the people. It would therefore be extremely dangerous to give the lords any power of framing new taxes for the subject: it is sufficient that [*204] they have a power of rejecting them, if they *think the commons too lavish or improvident in their grants. But so reasonably jealous are the commons of this valuable privilege, that herein they will not suffer the other house to exert any power but that of rejecting; they will not permit the least alteration or amendment to be made by the lords in the mode of taxing the people by a money bill; under which appellation is included every bill by which money is directed to be raised upon the subject, for any purpose or in any shape whatsoever; either for the exigencies of government, and collected from the kingdom in general, as the land-tax; or for private benefit, and collected in any particular district, as by turnpikes, parish rates, and the like. And in bills by which pecuniary burthens are imposed upon the people it is not competent to the lords to make any amendments altering the intention of the commons with regard to the amount of the rate or charge to be imposed, its duration, mode of assessment, levy, collection, appropriation, or management, or the persons who shall pay, receive, manage, or control it, or the limits within which it shall be levied(*h*).

Next with regard to the elections of knights, citizens, burgesses, and members for the universities, we may observe that herein consists the exercise of the democratical part of our constitution: for in a democracy there can be no exercise of sovereignty but by suffrage, which is the declaration of the people's will. In all democracies therefore it is of the utmost importance to regulate by

(*g*) 4 Inst. 29.

(*h*) May, Parl. Pract. 5th ed. 536-7. The rule stated *supra* has been somewhat relaxed, when a pecuniary penalty originating with the Commons has been varied by the Lords. Id. 541.

(71) Under the government of the United States, "All bills for raising revenue shall originate in the house of representatives; but the senate may propose, or concur with, amendments as on other bills." U. S. Const., art. 1, § 7.

whom, and in what manner, the suffrages are to be given. And the Athenians were so justly jealous of this prerogative, that a stranger, who interfered in the assemblies of the people, was punished by their laws with death: because such a man was esteemed guilty of high treason, by usurping those rights of sovereignty, to which he had *no title. In England, where the people do not debate in a collective body, but by representation, the exercise of this sovereignty consists in the choice of representatives. The laws have therefore very strictly guarded against usurpation or abuse of this power, by many salutary provisions, which may be reduced to these three points, 1. The qualifications of the electors. 2. The qualifications of the elected. 3. The proceedings at elections. [*205]

1. The qualifications of the electors seem susceptible of a twofold division—1, as regards property; 2, as regards knowledge and mental cultivation. 1. The reason assigned for requiring a property qualification in voters has been to exclude such persons as are in so needy and impoverished a condition that they are esteemed to have no will of their own. If these persons had votes, it has been said, they would be tempted to dispose of them under some undue influence or other. This might give a great landed proprietor, an artful, or a wealthy man, a larger share in elections than would be consistent with general liberty. If it were probable that every man would give his vote freely and without influence of any kind, then, upon the true theory and genuine principles of liberty, every member of the community, however poor, should have a vote in electing those delegates, to whose charge is committed the disposal of his property, his liberty, and his life. But since that can hardly be expected in persons of indigent fortunes, or such as are under the immediate dominion of others, all popular states have been obliged to establish certain qualifications; whereby some who are suspected to have no will of their own, are excluded from voting, in order to set those individuals, whose wills may be supposed independent, more thoroughly upon a level with each other.

Another argument in favour of some property qualification for exercising the franchise is that manhood suffrage would give a great, perhaps a dangerous, preponderance to the ignorant over the educated classes, and might so *jeopardize in times of political excitement the stability of the commonwealth. [*206]

The constitution of suffrages is indeed framed upon a wiser principle, with us, than either of the methods of voting, by centuries or by tribes, among the Romans. In the method by centuries, instituted by Servius Tullius, it was principally property, not numbers, that turned the scale: in the method by tribes, gradually introduced by the tribunes of the people, numbers only were regarded, and property was entirely overlooked. Hence the laws passed by the former method had usually too great a tendency to aggrandize the patricians or rich nobles; and those by the latter had too much of a levelling principle. Our constitution has endeavoured to steer between the two extremes by requiring, 1, a moderate qualification in property for the franchise; or, 2, a degree of knowledge and mental cultivation, as vouched for instance by a certain *academic status* in the voter. Nor is comparative wealth, or property, entirely disregarded in elections; for though the richest man has only one vote at one place, yet if his property be at all diffused, he has probably a right to vote at more places than one, and therefore may be said to have several representatives.

Such are the reasons urged in favour of the principle upon which our representative system is at present founded. An account of the existing state of the franchise is necessarily, owing to projected changes, reserved for the Appendix(i), to which the reader is likewise referred for an account of the proceedings at an election.

Any person(k) may be elected a member of the house of commons if not affected by one or other of certain disqualifications which depend upon the law Disqualifications and custom of parliament, or upon the statute law. Whence for serving in parliament. it appears that no person included in the subjoined list

[*207] *is eligible to sit amongst the commons: an alien born(l) or naturalized(m), an idiot or lunatic, if incurable(n), a person attainted of treason or convicted of felony(o), a peer of the realm or of Scotland or a representative peer of Ireland(p), a judge of a superior court in England(q) (except the master of the rolls), or of the court of admiralty(r), or in bankruptcy(s), or of a county court(t). The following officials likewise are disqualified: a metropolitan police magistrate(u), a recorder for the borough for which he is appointed(x), a revising barrister for any place within his district(y), a judge of Scotland(z) or Ireland(a), any one ordained to the office of priest or deacon of the church of England(b), a minister of the church of Scotland(c), or any one in holy orders in the church of Rome(d).

Sheriffs of counties, and mayors and bailiffs of boroughs, are not eligible in their respective jurisdictions, as being returning officers(e); but the sheriff of one county is eligible to serve as knight for another(f), or for any county [*208] *of a city or borough within his county, provided the writ for the election is directed not to himself but to some other returning officer(g).

No government contractor(h) nor person having a pension under the crown during pleasure or for any term of years(i) is qualified to be elected or to sit. Nor is any person holding an office under the crown created since 1705(j) capable of being elected or of sitting; though, should he do so, an act of indemnity may perhaps be passed by the legislature(k).

Innovations on the above rule have, however, been made by successive statutes with a view to the requirements of the government and the conduct of the public service, *ex. gr.* as regards the vice-president of the board of trade(l),

- (i) No. II.
- (k) The property qualification was abolished by stat. 21 & 22 Vict. c. 26.
- (l) *Ante*, p. 198.
- (m) 12 & 13 Will. 3, c. 2; 1 Geo. 1, st. 2, c. 4, s. 2.
- (n) D'Ewes, 126; May, Parl. Pr. 5th ed. 38.
- (o) Com. Journ. 21 Jan. 1580; 4 Inst. 47.
- (p) 39 & 40 Geo. 3, c. 67.
- (q) 1 Com. Journ. 257.
- (r) 3 & 4 Vict. c. 66.
- (s) 1 & 2 Will. 4, c. 56, ss. 60—70.
- (t) 25 & 26 Vict. c. 99, s. 4.
- (u) 10 Geo. 4, c. 44, s. 18; 3 & 4 Will. 4, c. 19, s. 19.
- (x) 5 & 6 Will. 4, c. 76, s. 108.
- (y) 6 & 7 Vict. c. 18, s. 29.
- (z) 7 Geo. 3, c. 16, s. 4.
- (a) 1 & 2 Geo. 4, c. 44.
- (b) 41 Geo. 3, c. 63. In 1801, on the election of Mr. Horne Tooke (who had taken priest's orders early in life) for Old Sarum, a com-

mittee of the House of Commons was appointed to search for precedents respecting the eligibility of the clergy to be returned to parliament; and it being found that persons had been returned with the addition "*clericus*" to their names, the above statute was passed.

- (c) 41 Geo. 3, c. 68.
- (d) 10 Geo. 4, c. 7, s. 9.
- (e) Bro. Abr. tit. parliament, 7; Com. Journ. 25 June, 1604; 14 Apr. 1614; 22 Mar. 1620; 15 Jun. and 17 Nov. 1685. Hale of parl. 114.
- (f) 4 Inst. 48; Whitelocke of parl. ch. 99, 100, 101.
- (g) May, Parl. Pr. 5th ed. 85.
- (h) 22 Geo. 3, c. 45. Loan contractors, however, are eligible (19 & 20 Vict. c. 5, s. 21).
- (i) 6 Anne, c. 7; 1 Geo. 1, st. 2, c. 56.
- (j) 6 Anne, c. 7.
- (k) See, for instance, 29 & 30 Vict. c. 20; 27 & 28 Vict. c. 21.
- (l) 57 Geo. 3, c. 66.

the president of the poor law board(*m*), the first commissioner of works(*n*), the vice-president of the committee of the privy council on education(*o*), and the postmaster-general(*p*).

It has been further enacted that not more than four of the principal and four of the under-secretaries of state shall sit at the same time in the house of commons(*q*); that the seat of any member accepting the office of under-secretary to a principal secretary of state, there being four under-secretaries then in the house, shall be thereupon vacated(*r*); that if at any general election there are returned as members to serve in parliament a greater number of persons holding such office of principal or under-secretary than are permitted to sit and vote in the house, no one of such persons shall be capable of sitting *until the number of persons returned as members and holding the [*209] same office as himself has, by death, resignation, or otherwise, been reduced to the number permitted by law to sit in the house(*r*); and that the like rules shall apply in all cases in which a limit is imposed upon the number of persons holding any other office who may at the same time sit and vote as members of the house of commons(*s*).

Lastly, if any member accepts an office under the crown, except an officer in the army or navy accepting a new commission, his seat is void; but such member is capable of being re-elected, provided the office be one created prior to the year 1705(*t*).

Subject to the above-mentioned restrictions and disqualifications, and likewise to many others which cannot here conveniently be noticed, every subject of the realm is eligible of common right to serve as a member of the lower house, though there are instances wherein persons under particular circumstances have forfeited that common right, and have been declared ineligible, for that parliament by a vote of the house of commons(*u*), or for ever by an act of the legislature(*x*). But it was an unconstitutional prohibition, grounded on an ordinance of the house of lords(*y*), and inserted in the king's writs, for the parliament holden at Coventry, 6 Hen. 4, that no apprentice or other man of the law should be elected a knight of the shire therein(*z*): in return for which, our law books and historians(*a*) have branded this parliament with the name of *parliamentum indoctum*, or the lack-learning parliament; and sir Edward Coke observes with some spleen(*b*), that there never was a good law made thereat(*c*).

*VI. I proceed, sixthly, to the method of making laws; which is [*210] much the same in both houses: and I shall touch it very briefly,

(*m*) 10 & 11 Vict. c. 109.

(*n*) 14 & 15 Vict. c. 42, s. 20.

(*o*) 19 & 20 Vict. c. 106.

(*p*) 29 & 30 Vict. c. 55.

(*q*) 21 & 22 Vict. c. 106, s. 4.

(*r*) 27 & 28 Vict. c. 34, s. 1.

(*s*) 27 & 28 Vict. c. 34, s. 2.

(*t*) *Id.* s. 3.

(*u*) 6 Anne, c. 7.

(*x*) *Ante*, p. 194.

(*y*) Stat. 7 Geo. 1, c. 28.

(*z*) 4 Inst. 10, 48; Pryn. plea for lords, 379;
2 Whitelocke, 359, 368.

(*a*) Pryn. on 4 Inst. 13.

(*b*) Walsing. A. D. 1405.

(*c*) 4 Inst. 48.

(*c*) This is not the only attempt which has

been made to exclude lawyers from parliament. In the 47 Edw. 3, the clause, known by the name of the *nolumus* clause, was first inserted in the writs; and on subsequent occasions attempts have been made to put it into force. It ran thus: "*Nolumus autem quod tu aut aliquis alius vicecomes regni nostri aut apprenticius aut aliquis alius homo ad legem aliquatiter sit electus.*" Rogers, Elect. 10th ed. 201 n. (2).

In the year 1649, a motion was made to exclude lawyers from the parliament, by enforcing the *nolumus* clause, and the speech of Whitelocke, in opposition thereto, contains much curious information on the subject. Parl. Hist. i. 1841.

beginning in the house of commons. But first I must premise, that for dispatch of business each house of parliament has its speaker. The speaker of the house of lords, whose office is to preside there, and manage the formality of business, is the lord chancellor, or keeper of the king's great seal, or in his absence one of the deputy-speakers appointed by the king's commission: and, if none such be present, the house of lords may elect a speaker *pro tempore*. The speaker of the house of commons is chosen by the house; but must be approved by the crown(*d*).(*72*) And herein the usage of the two houses differs, that the speaker of the house of commons cannot give his opinion or argue any question in the house; though he may vote and assign reasons for his vote if the members *pro* and *con*. are equal. Moreover when the house of commons resolves itself into a committee, the chairman of the committee (who in the lords is appointed at the commencement of each session, and in the commons is in general the chairman of the committee of ways and means) presides, and then the speaker may for the time speak and vote as any ordinary member. The speaker of the upper house may, if a lord of parliament, address it, but he [*211] has no casting vote, his vote being counted with *the rest of the house; and in the case of an equality of votes, the rule is, *semper præsumitur pro negante*(*e*).

In each house the act of the majority binds the whole; and this majority is declared by votes openly and publicly given: not privately or by ballot. The latter method may be serviceable in some assemblages, to prevent intrigues and unconstitutional combinations, but cannot possibly be practised in the house of commons, where every member's conduct is subject to the future censure of his constituents, and therefore should be openly submitted to their inspection.

Before bringing into the house a private bill(*f*), *i. e.*, a bill by which relief is sought of a private nature for the benefit of some particular person or persons, the requirements of the standing orders, which are minute and peremptory, must be complied with. The bill is then brought in upon petition, which must be presented by a member, and usually sets forth the grievance desired to be remedied. This petition (when founded on facts that may be in their nature disputed) is referred to a committee of members, who examine the matter alleged, and accordingly report it to the house; and then (or otherwise, upon the mere petition) leave is given to bring in the bill.

(*d*) This approval has not been withheld since the 30 Car. 2. In that year the House of Commons having elected Sir Edw. Seymour speaker, in opposition to the nominee of the court party, the king refused his approbation of their choice. After a short prorogation of parliament, the house elected a third person, whose election the court thought proper to confirm. Parl. Hist. iv. 1091—1118; Burnet. Hist. own Times, i. 275.

(*e*) Lords' Journ. 25 June, 1661.

(*f*) In passing private bills parliament exercises legislative functions, but its proceedings partake also of a judicial character. "The persons whose private interests are to be promoted appear as suitors for the bill;

while those who apprehend injury are admitted as adverse parties in the suit." Although "private bills are examined and contested before committees and officers of the house like private suits, and are subject to notices, forms, and intervals unusual in other bills, yet in every separate stage, when they come before either house, they are treated precisely as if they were public bills: they are read as many times, and similar questions are put, except when any proceeding is specially directed by the standing orders; and the same rules of debate and procedure are maintained throughout." May, Parl. Pract. 5th ed. pp. 660, 663.

(*72*) In the congress of the United States, the house of representatives chooses its own speaker and other officers. U. S. Const., art. 1, § 2. The vice-president of the United States is president of the senate, but he has no vote unless the senate is equally divided. *Ib.*, § 3.

*In public matters the bill is brought in upon motion made to the house, without any petition, or is founded upon a resolution, or in [*212] the upper house is brought in without leave. Formerly, all bills were drawn in the form of petitions from the commons, which were entered upon the parliament rolls with the king's answer thereunto subjoined; not in any settled form of words, but as the circumstances of the case required(*g*); and at the end of each parliament the judges drew the petitions and the answers to them into the form of a statute, which was entered on the statute rolls. In the reign of Henry V., to prevent mistakes and abuses(*h*), the statutes *were drawn up by the judges before the end of the parliament; and, in [*213] the reign of Henry VI., bills in the form of acts, according to the modern custom, were first introduced. The enacting words inserted in an act of parliament expressing the consent of the three branches of the legislature have much varied(*i*); the form, however, now used is as follows: "be it enacted by the king's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal and commons in this present parliament assembled, and by the authority of the same."

The persons directed to bring in the bill, present it in a printed form to the house, italics being used where anything occurs that is dubious, or necessary to be settled by the parliament itself, such especially as the precise date of times, the nature and amount of penalties, or of sums of money to be raised. In the house of lords, if the bill begins there, it is (when of a private nature) sometimes—as in the case of an estate bill—referred to two of the judges, to examine and report the state of the facts alleged, to see that all necessary parties consent to its provisions, and to settle in it points of technical propriety(*k*). This is read a first time, and after a convenient inter-

(*g*) See, for instance, the *articuli cleri*, 9 Edw. 2.

(*h*) So early as the reign of Edward II. laws had found their way on to the statute-roll of which one branch or other of the legislature afterwards complained as being without, or even against, their consent. In 1322 (15 Edw. 2) an explicit declaration, commonly called the Revocation of Ordinances, was made by statute of the necessity for the uncontrolled consent of the king and the three estates to every law and ordinance. It declares that "all matters to be established for the estate of our lord the king, and of his heirs, and for the estate of the realm, and of the people, shall be treated, accorded, and established in parliament, by our lord the king, and by the assent of the prelates, earls, and barons, and the commonalty of the realm, according as it hath been heretofore accustomed." Notwithstanding this statutory declaration, laws were still promulgated of which the commons had not approved, or which they had actually rejected. And against this practice the commons remonstrated: *temp.* Edw. 2, and in the Petition of Right (*anno* 5 Rich. 2), which states that "it had ever been their liberty and freedom that there should no statute or law be made, unless they gave thereto their assent;—that they are, and have ever been, part of the

king's parliament, and be as well assenters as petitioners." The commons then petition the king that from that time forward, on complaint from them of any mischief asking remedy thereof by their speaker, or by petition written, there never should be any law made thereon and engrossed as statute, nor any additions, diminutions, or any manner of term or terms made in the same, whereby it should be changed from the intent and meaning asked by the speaker's mouth or the petitions aforesaid, without the assent of the said commons. To this the king of his grace especial granted, that from thenceforth nothing should be enacted to the petitions of his commons that be contrary to their asking, whereby they should be bound without their own assent.

(*i*) Broom, *Const. L.* pp. 382 *et seq.*

(*k*) "A public bill being founded on reasons of state policy, the house, in agreeing to its second reading, accepts and affirms those reasons; but the expediency of a private bill being mainly founded upon allegations of fact, which have not yet been proved, the house, in agreeing to its second reading, affirms the principle of the bill conditionally, and subject to the proof of such allegations before the committee." May, *Parl. Pract.* 5th ed. p. 701.

val a second time. The introduction of the bill may be originally opposed, as the bill itself may be at either of the readings; and, if the opposition succeeds, the bill must be dropped for that session: as it must also be if opposed with success in any of its subsequent stages in either house, or if the royal assent to it be refused.

[*214] *After the second reading the bill is committed, that is, referred to a committee, which is either selected by the house, or else, upon a bill of consequence, the house resolves itself into a committee of the whole house. *The committee.* A committee of the whole house is composed of every member; and, to form it, the speaker quits the chair (another member being appointed chairman), and may sit and debate as a private member. In these committees the bill is debated clause by clause, amendments made, the blanks or italics filled up, and sometimes the bill is entirely new-modelled. After it has gone through committee, the chairman reports it to the house with such amendments as the committee have made in it; and then the house reconsiders the whole bill again, and the question is repeatedly put upon every clause and amendment. When the house has agreed or disagreed to the amendments of the committee, and sometimes added new amendments of its own, the bill was formerly engrossed, but is now reprinted in its amended form.

Afterwards the motion for the third reading of the bill is made, though, should material amendments even at this advanced stage be needed in it, the usual course is to discharge the order for the third reading in order that the bill may be recommitted and the necessary amendments be made in it. The speaker then puts the question that this bill do pass, and if this is agreed to, the title of it is settled; which used to be a general one for all the acts passed in the session, till in the first year of Henry VIII. a distinct title was used for each chapter. After this, the bill is sent to the lords by a clerk of the house of commons.

The bill passes through the same forms in the upper as in the lower house, and, if rejected, no more notice is taken of the matter, but it passes *sub silentio*, to prevent unbecoming altercations. If the bill is *Proceedings in the upper house.* agreed to, the lords send a message to the commons that they have agreed to the same: and the bill remains with the lords if they have made no amendment to it. But if any *amendments are made, such [*215] amendments are sent down with the bill, to receive the concurrence of the commons. If the commons disagree to, and the lords insist upon, the amendments, a conference usually follows between members deputed from each house; who for the most part settle and adjust the difference, but, if both houses remain inflexible, the bill is dropped. If the commons agree to the amendments, the bill is sent back to the lords with a message to acquaint them therewith. The same forms are observed, *mutatis mutandis*, when the bill begins in the house of lords. But, when an act of grace or pardon is passed, it is first signed by the sovereign, and then read once only in each house, without amendment(l). And when both houses have done with any bill, it is always deposited in the house of peers, to await the royal assent: except in the case of a bill of supply, which after receiving the concurrence of the lords is sent back to the house of commons(m).

(l) D'Ewes' Journ. 90, 78; Com. Journ. 17 June, 1747. (m) Com. Journ. 24 July, 1662.

The royal assent may be given in two ways: 1. In person; when the sovereign comes in regal state to the house of peers, and, sending for the commons to the bar, the titles of all the bills that have passed both houses are read; and the king's answer is declared by the clerk of the parliament in Norman-French: a badge, it must be owned (now the only one remaining), of conquest; and which one could wish to see fall into total oblivion, unless it be reserved as a solemn memento to remind us that our liberties are mortal, having once been destroyed by a foreign force. If the king consents to a public bill, the clerk usually declares "*le roy (or la reyne) le veut*," the king (or queen) wills it so to be; if to a private bill, "*soit fait comme il est désiré*," be it as it is desired. If the king refuses his assent, it is in the gentle language of "*le roy (or la reyne) s'avisera*"(n), the king (or queen) will advise upon it. When a bill of supply is passed, it is *carried up and presented to the sovereign by the speaker of the house of commons(o); [*216] and the royal assent is thus expressed, "*le roy (or la reyne) remercie ses bons sujets, accepte leur benevolence, et ainsi le veut*," the king (or queen) thanks his loyal subjects, accepts their benevolence, and wills it so to be. In case of an act of grace, which originally proceeds from the crown, and has the royal assent in the first stage of it, the clerk of the parliament thus pronounced(p) the gratitude of the subject; "*les prelates, seigneurs, et communes, en ce present parlement assemblés au nom de tous vos autres sujets, remercient tres humblement votre majesté, et prient à Dieu vous donner en santé bonne vie et longue*;" the prelates, lords, and commons, in this present parliament assembled, in the name of all your other subjects, most humbly thank your majesty, and pray to God to grant you in health and wealth long to live. 2. By the statute 33 Hen. 8, c. 21, the king may give his assent by letters patent under his great seal, signed with his hand, and notified in his absence to both houses assembled together in the upper house. This course is usually adopted when the royal assent is given to a bill during the continuance of the session. When the bill has received the royal assent in either of these ways, it is then, and not before, a statute or act of parliament.(73) And if no other day be specified, comes into operation from

(n) This power was last exercised by queen Anne, A. D. 1707, who refused her assent to a bill for settling the militia in Scotland. May, Parl. Pract. 5th ed. 494-5, citing 18 Lords' J. 506. William III. had refused his assent, A. D. 1692, to the bill for triennial parliaments. And on one occasion the prerogative of rejecting bills was exercised by queen Elizabeth at the close of a session, to the extent of

rejecting forty-eight bills, while she gave her assent to twenty-four public and nineteen private bills, which had passed both houses of parliament. D'Ewes, 596.

(o) Rot. Parl. 9 Hen. 4, in Pryn. 4 Inst. 80, 81.

(p) D'Ewes Journ. 35. But as to the modern procedure, see May, Parl. Pract. 5th ed. p. 494.

(73) "Every bill which shall have passed the house of representatives and the senate shall, before it become a law, be presented to the president of the United States; if he approve, he shall sign it, but if not he shall return it, with his objections, to that house in which it shall have originated, who shall enter the objections at large on their journal, and proceed to reconsider it. If, after such reconsideration, two-thirds of that house shall agree to pass the bill, it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered, and if approved by two-thirds of that house, it shall become a law. But in all such cases the votes of both houses shall be determined by yeas and nays, and the names of the persons voting for and against the bill shall be entered on the journal of each house respectively. If any bill shall not be returned by the president within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law,

the day on which it receives the royal assent, indorsed upon it by the clerk or clerk-assistant of the parliaments(*g*).

[* 217] *This statute or act, consisting since 1849 of the authenticated vellum print, is preserved in the house of lords among the records of the kingdom; there needing no formal promulgation to give it the force of a law, as was necessary by the civil law with regard to the emperor's edicts, because every man in England is, in judgment of law, party to making an act of parliament, being present thereat by his representatives. Formerly, indeed, before the invention of printing, the statute law was published by the sheriff of every county; the king's writ being sent to him at the end of every session, together with a transcript of all the acts made at that session, commanding him, "*ut statuta illa, et omnes articulos in eisdem contentos, in singulis locis ubi expedire viderit, publice proclamari, et firmiter teneri et observari faciat.*" And the usage was to proclaim them at his county court, and there to keep them, that whoever would might read or take copies thereof; which custom continued till the reign of Henry VII.(*r*). In lieu of being thus promulgated, the statutes (with the exception of some private acts) are now printed by the Queen's printer.

An act of parliament is thus made by an exercise of the highest authority which this kingdom acknowledges upon earth(*s*). It has power to bind every subject in the land, and the dominions thereunto belonging; nay, even the sovereign, if particularly named therein. And a statute thus made cannot be altered, amended, dispensed with, suspended, or repealed, but in the like forms and by the like authority of parliament: for it is a maxim in law, that it requires the same strength to dissolve as to create an obligation. It is true it was formerly held that the sovereign might in many cases dispense with penal [*218] *statutes(*t*); but now by statute 1 Will. & M. st. 2, c. 2, it is declared, that the suspending or dispensing with laws by regal authority, without consent of parliament, is illegal(*u*).

VII. There remains only, in the seventh and last place, to add a word or two concerning the manner in which parliament may be adjourned, prorogued, or dissolved.

VII. Modes of
adjourning,
proroguing
and dissolving
parliament.

Adjournment.

An adjournment is no more than a continuance of the session from one day to another, as the word itself signifies: and this is done by the authority of each house separately every day; and sometimes for a fortnight or a month together, as at Christmas or Easter, or upon other particular occasions. But the adjournment of one house is no adjournment of the other(*v*).(74) It has also been usual, when

(*g*) 88 Geo. 3, c. 13. By 48 Geo. 3, c. 106, when a bill for continuing expiring acts shall not have passed before such acts expire, the bill, when passed into a law, shall have effect from the date of the expiration of the act intended to be continued.

(*r*) 3 Inst. 41; 4 Inst. 26.

(*s*) *Ante*, pp. 191, 2.

(*t*) Finch. L. 81, 234; Bacon. Elem. c. 19.

(*u*) *Ante*, p. 169.

(*v*) 4 Inst. 28.

in like manner as if he had signed it, unless the congress, by their adjournment, prevent its return, in which case it shall not be a law." U. S. Const., art. 1, § 7 (5).

This principle of allowing a negative upon state legislation by the governor is one very generally adopted by the several states.

(74) "Neither house, during the session of congress, shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which the two houses

the sovereign's pleasure has been signified, that both or either of the houses should adjourn to a certain day, to obey the royal pleasure so signified, and to adjourn accordingly(x). Otherwise, besides the indecorum of a refusal, a prorogation would assuredly follow: which would often be very inconvenient to both public and private business. For prorogation puts an end to the session; and then such bills as are only begun and not perfected, must be resumed *de novo* (if at all) in a subsequent session; whereas, after an adjournment, all things continue in the same state as at the time of the adjournment made, and may be proceeded on without any fresh commencement. It has been enacted(y) that when both houses of parliament stand adjourned for more than fourteen days, a proclamation may issue from the crown *for the meeting of [*219] parliament on a day not less than fourteen days from the date of the proclamation.

A prorogation is the continuance of the parliament from one session to another, as an adjournment is the continuation of the session from day to day.

This is done by the royal authority, expressed either by the lord Prorogation. chancellor in the royal presence, or by writ under the great seal(z), or by commission from the crown. Both houses are necessarily prorogued at the same time; it not being a prorogation of the house of lords, or commons, but of the parliament. The session is never understood to be at an end until a prorogation; though, unless some act be passed or some judgment given in parliament, it is in truth no session at all(a). And formerly the usage was, for the king to give the royal assent to all such bills as he approved, at the end of every session, and then to prorogue the parliament; though sometimes only for a day or two(b); after which all business then depending in the houses was to be begun again. Which custom obtained so strongly, that it once became a question(c), whether giving the royal assent to a single bill did not of course put an end to the session. And, though it was then resolved in the negative, yet the notion was so deeply rooted, that the statute 1 Car. 1, c. 7, was passed to declare, that the king's assent to that and some other acts should not put an end to the session; and, even *so late as the reign of Charles [*220] II., we find a proviso frequently tacked to a bill(d), that his majesty's assent thereto should not determine the session of parliament. But it now seems to be allowed, that a prorogation must be expressly made, in order to

(z) Com. Journ. *passim*, e.g., 11 Jun. 1572; 5 Apr. 1604; 4 Jun., 14 Nov., 18 Dec. 1621; 11 July, 1625; 18 Sept. 1660; 25 July, 1667; 4 Aug. 1685; 24 Feb. 1691; 21 Jun. 1712; 16 Apr. 1717; 3 Feb. 1741; 10 Dec. 1745; 21 May, 1768.

(y) 39 & 40 Geo. 3, c. 14.

(x) When it is intended that parliament about to assemble shall meet for the dispatch of business on the day to which it is prorogued, notice of such intention is given by proclamation. But when it is intended that a parliament shall not meet for the dispatch of business, it is prorogued to another day by a writ of prorogation. Nevertheless, upon the day on which the writs of summons are

returnable, the members of the House of Commons who attend assemble (without entering their own house, or waiting for a message) in the House of Lords, when the lord chancellor reads the writ of prorogation, and declares parliament to be prorogued accordingly. Com. Dig. Parl. p. 2; Com. Journ. 26 Nov. 1790; *Ibid.* 3 Nov. 1761; 2 Hats. 239.

(a) 4 Inst. 28; Hale of Parl. 88; Hut. 61. The form of proroguing parliament has been simplified by 30 & 31 Vict. c. 81.

(b) Com. Journ. 21 Oct. 1553.

(c) *Ibid.* 21 Nov. 1554.

(d) Stat. 12 Car. 2, c. 1; 22 & 23 Car. 2, c. 1.

shall be sitting." U. S. Const., art. 1, § 5 (3). In case of a disagreement between the two houses as to the time of adjournment, the president may adjourn them to such time as he shall think proper. U. S. Const., art. 2, § 3.

determine the session. And, by 37 Geo. 3, c. 127, and 39 & 40 Geo. 3, c. 14, the sovereign can summon a prorogued parliament to meet for the dispatch of business on any day not less than fourteen days from the date of the proclamation, notwithstanding any previous prorogation to a more distant day.

A dissolution is the civil death of the parliament; and this may be effected in three ways: 1. By the sovereign's will, expressed either in person or by proclamation. For, as the sovereign has the sole right of convening parliament, Dissolution. so also it is a branch of the royal prerogative, that he may (whenever he pleases) prorogue the parliament for a time, or put a final period to its existence. If no power could prorogue or dissolve a parliament but itself, it might happen to become perpetual. And this would be extremely dangerous, if at any time it should attempt to encroach upon the executive: as was fatally experienced by king Charles I.; who, having unadvisedly passed an act to continue the parliament then in being till such time as it should please to dissolve itself, at last fell a sacrifice to that inordinate power, which he himself had consented to give them. It is therefore extremely necessary that the crown should be empowered to regulate the duration of these assemblies, under the limitations which the English constitution has prescribed: so that, on the one hand they may frequently and regularly come together for the dispatch of business, and redress of grievances; and may not, on the other, even with the consent of the crown, be continued to an inconvenient or unconstitutional length.

*2. A parliament may be dissolved by the demise of the crown. [*221] This dissolution formerly happened immediately upon the death of the reigning sovereign: for he being considered in law as the head of the parliament (*caput, principium, et finis*), that failing, the whole body was held to be extinct. But calling a new parliament immediately on the inauguration of the successor being found inconvenient, and dangers being apprehended from having no parliament in being in case of a disputed succession, it was enacted by the statutes 7 & 8 Will. 3, c. 15, and 6 Ann. c. 7, that the parliament in being should continue for six months after the death of any king or queen, unless sooner prorogued or dissolved by the successor: that if the parliament be, at the time of the sovereign's death, separated by adjournment or prorogation, it should notwithstanding assemble immediately: and that, if no parliament be then in being, the members of the last parliament should assemble, and be again a parliament. This last clause, however, was repealed by statute 37 Geo. 3, c. 127, which in lieu of it enacted that in case of the demise of the crown between the dissolution of parliament and the day appointed by the writs of summons previously issued, for assembling a new parliament, the last preceding parliament shall immediately convene and sit and continue for six months unless sooner prorogued or dissolved by the successor; and that in case of the demise of the crown on or after the day appointed as aforesaid for the assembling a new parliament, but before it has actually met and set, then such new parliament shall immediately convene and sit and may continue sitting for six months unless sooner prorogued or dissolved by the successor.

3. Lastly, a parliament may be dissolved or expire by efflux of time. For if either the legislative body were perpetual; or might last for the life of the sovereign who convened them, as formerly; and were so to be supplied, by occasionally filling the vacancies with new *representatives; in these [*222] cases, if it were once corrupted, the evil would be past all remedy: but

when different bodies succeed each other, if the people see cause to disapprove of the present, they may rectify its faults in the next. A legislative assembly also, which is sure to be separated again (whereby its members will themselves become private men, and subject to the full extent of the laws which they have enacted for others), will think themselves bound, in interest as well as duty, to make only such laws as are good. The utmost extent of time that the same parliament was allowed to sit by statute 6 Will. & M. c. 2, was three years; after the expiration of which, reckoning from the return of the first summons, the parliament was to have no longer continuance. But by the statute 1 Geo. 1, st. 2, c. 38, (in order, professedly, to prevent the great and continued expenses of frequent elections, and the violent heats and animosities consequent thereupon, and for the peace and security of the government then just recovering from the late rebellion) this term was prolonged to seven years: and, what alone is an instance of the vast authority of parliament, the very same house, that was chosen for three years, enacted its own continuance for seven. So that, as our constitution now stands, the parliament must expire, or die a natural death, at the end of every seventh year from the day of meeting; if not sooner dissolved, as usually happens, by the royal prerogative.

*CHAPTER III.

[*223]

THE SOVEREIGN.

THE supreme executive power of this kingdom is vested by our laws in a single person, the king or queen; for it matters not to which sex the crown descends: the person entitled to it, whether male or female, is immediately invested with all the ensigns, rights, and prerogatives of sovereign power; as is declared by statute 1 Mar. st. 3, c. 1.(75)

(75) ARTICLE II.

SECTION 1. (1) The executive power shall be vested in a president of the United States of America. He shall hold his office during the term of four years, and together with the vice-president, chosen for the same term, be elected, as follows:

(2) Each state shall appoint, in such manner as the legislature thereof may direct, a number of electors, equal to the whole number of senators and representatives to which the state may be entitled in the congress; but no senator or representative, or person holding an office of trust or profit under the United States, shall be appointed an elector.

[3] The electors shall meet in their respective states, and vote by ballot for two persons, of whom one at least shall not be an inhabitant of the same state with themselves. And they shall make a list of all the persons voted for, and of the number of votes for each; which list they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the president of the senate. The president of the senate shall, in the presence of the senate and house of representatives, open all the certificates, and the votes shall then be counted. The person having the greatest number of votes shall be the president, if such number be a majority of the whole number of electors appointed; and if there be more than one who have such majority, and have an equal number of votes, then

³This clause within brackets has been superseded and annulled by the twelfth amendment, hereafter given on page 158 as Article XII.

The executive power of the English nation being vested in a single person, by the general consent of the people, the evidence of which general consent is long and immemorial usage, it became necessary to the freedom and peace of

the house of representatives shall immediately choose by ballot one of them for president; and if no person have a majority, then from the five highest on the list the said house shall in like manner choose the president. But in choosing the president, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. In every case, after the choice of the president, the person having the greatest number of votes of the electors shall be the vice-president. But if there should remain two or more who have equal votes, the senate shall choose from them by ballot the vice-president.]

(3) The congress may determine the time of choosing the electors, and the day on which they shall give their votes; which day shall be the same throughout the United States.¹

(4) No person except a natural born citizen, or a citizen of the United States, at the time of the adoption of this constitution, shall be eligible to the office of president; neither shall any person be eligible to that office who shall not have attained to the age of thirty-five years, and been fourteen years a resident within the United States.

(5) In case of the removal of the president from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the vice-president,² and the congress may by law provide for the case of removal, death, resignation, or inability, both of the president and vice-president, declaring what officer shall then act as president, and such officer shall act accordingly, until the disability be removed, or a president shall be elected.³

(6) The president shall, at stated times, receive for his services a compensation which shall neither be increased nor diminished during the period for which he shall have been elected, and he shall not receive within that period any other emolument from the United States, or any of them.⁴

(7) Before he enter on the execution of his office, he shall take the following oath or affirmation:

"I do solemnly swear (or affirm) that I will faithfully execute the office of president of the United States, and will, to the best of my ability, preserve, protect and defend the constitution of the United States."

§ 2. (1) The president shall be commander-in-chief of the army and navy of the United States, and of the militia of the several states, when called into actual service of the United States; he may require the opinion, in writing, of the principal officer in each of the executive departments upon any subject relating to the duties of their respective offices, and he shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment.

(2) He shall have power, by and with the advice and consent of the senate, to make treaties, provided two-thirds of the senators present concur; and he shall nominate, and by and with the advice and consent of the senate, shall appoint ambassadors, other public ministers and consuls, judges of the supreme court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law:

¹ This date has been fixed as follows:

1st Tuesday in December: Act of March 1, 1792.

Tuesday after 1st Monday in November: Act of January 23, 1845.

² Three occasions have happened of this succession, viz.:

William H. Harrison, president, died April 4, 1841: John Tyler, vice-president, took the oath as president, April 6, 1841.

Zachary Taylor, president, died July 9, 1850: Millard Fillmore, vice-president, took the oath as president, July 10, 1850.

Abraham Lincoln, president, was assassinated April 14, 1865: Andrew Johnson, vice-president, took the oath as president, April 15, 1865.

³ Congress has provided for this contingency by act of March 1, 1792. The president of the senate *pro tempore*,—or if there be none, the speaker of the house of representatives, in case of vacancy in the offices of both president and vice-president,—succeeds to the chief executive office.

⁴ The president's salary was fixed Feb. 13, 1793, at \$25,000, and by Act of 1873, was increased to \$50,000. 17 Stat. at Large.

the state, that a rule should be laid down, uniform, universal, and permanent; in order to mark out with precision, who is that single person, to whom are committed (in subservience to the law of the land) the care and protection of the community; and to whom, in return, the duty and allegiance of every individual are due. It is of the highest importance to the public tranquillity, and to the consciences of private men, that this rule should be clear and indisputable; and our constitution has not left us in the dark upon this material occasion. It will therefore be my endeavour in this chapter to trace out the constitutional doctrine of the royal succession, with that freedom and regard to

but the congress may by law vest the appointment of such inferior officers, as they think proper, in the president alone, in the courts of law, or in the heads of departments.

(*) The president shall have power to fill up all vacancies that may happen during the recess of the senate, by granting commissions which shall expire at the end of their next session.

§ 3. He shall from time to time give to the congress information of the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient; he may, on extraordinary occasions, convene both houses, or either of them, and in case of disagreement between them, with respect to the time of adjournment, he may adjourn them to such time as he shall think proper; he shall receive ambassadors and other public ministers; he shall take care that the laws be faithfully executed, and shall commission all the officers of the United States.

§ 4. The president, vice-president, and all civil officers of the United States shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors.

ARTICLE XII.¹

The electors shall meet in their respective states, and vote by ballot for president and vice-president, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as president, and in distinct ballots the person voted for as vice-president, and they shall make distinct lists of all persons voted for as president, and of all persons voted for as vice-president, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the president of the senate; the president of the senate shall, in the presence of the senate and house of representatives, open all the certificates, and the votes shall then be counted; the person having the greatest number of votes for president shall be the president, if such number be a majority of the whole number of electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as president, the house of representatives shall choose immediately, by ballot, the president. But in choosing the president, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the house of representatives shall not choose a president whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the vice-president shall act as president, as in the case of the death or other constitutional disability of the president. The person having the greatest number of votes as vice-president shall be the vice-president, if such number be a majority of the whole number of electors appointed; and if no person have a majority, then from the two highest numbers on the list, the senate shall choose the vice-president; a quorum for the purpose shall consist of two-thirds of the whole number of senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of president shall be eligible to that of vice-president of the United States.

¹ The twelfth article was recommended for adoption by the eighth congress, at its first session, and having received the ratification of three-fourths of the states was declared valid September 25, 1804, by public notice of the secretary of state.

truth, yet mixed with that respect, which the principles of liberty and the dignity of the subject under our notice may require.

[*224] The grand fundamental maxim upon which the *jus *coronæ*, or right of succession to the throne of these kingdoms, depends, I take to be this: that the crown is, by common law and constitutional custom, hereditary; in a manner peculiar to itself: but that the right of inheritance may from time to time be changed or limited by act of parliament; if thus transferred to a new proprietor the crown retains nevertheless its descendible quality.

It will be the business of this chapter to establish the foregoing proposition in all its branches; first, that the crown is hereditary; secondly, that it is hereditary in a manner peculiar to itself; thirdly, that this inheritance is subject to limitation by parliament; fourthly, that the crown if thus transferred retains nevertheless its descendible quality.

1. First, the crown is in general hereditary, or descendible to the next heir, on the death or demise of the last proprietor. All regal governments must be either hereditary or elective: and, as I believe there is no instance wherein the crown of England has ever been asserted to be elective, except by the regicides at the trial of king Charles I., it must of consequence be hereditary. Yet while I assert an hereditary, I by no means intend a *jure divino* title to the throne. Such a title may be allowed to 1. The crown hereditary ; but not jure divino. have subsisted under the theocratic establishments of the children of Israel in Palestine; but it never yet subsisted in any other country; save only so far as kingdoms, like other human fabrics, are subject to the general and ordinary dispensations of Providence. Nor indeed have a *jure divino* and an hereditary right any necessary connection with each other. The titles of David and Jehu were equally *jure divino*, as those of either Solomon or Ahab; and yet David slew the sons of his predecessor, and Jehu his predecessor himself. And when our kings have the same warrant as they had, whether it be to sit upon the throne of their fathers, or to destroy the house of the preceding sovereign, they will then, and not before, *possess the crown of England [*225] by a right like theirs, immediately derived from heaven. The hereditary right which the laws of England acknowledge, owes its origin to the founders of our constitution, and to them only. It has no relation to, nor depends upon, the civil laws of the Jews, the Greeks, the Romans, or any other nation upon earth: the municipal laws of one society having no connection with, or influence upon, the fundamental polity of another. The founders of our English monarchy might perhaps, if they had thought proper, have made it an elective monarchy: but they rather chose, and upon good reason, to establish originally a succession by inheritance. This has been acquiesced in by general consent; and ripened by degrees into common law: the very same title that every private man has to his own estate. Lands are not naturally descendible any more than thrones: but the law has thought proper, for the benefit and peace of the public, to favour hereditary succession in the one as well as in the other.

It must be owned, an elective monarchy seems to be the most obvious, and best suited of any to the rational principles of government, and the freedom of human nature: and accordingly we find from history that, in the infancy and first rudiments of almost every state, the leader, chief magistrate, or prince, has usually been elective. And, if the individuals who compose that state could

always continue true to first principles, uninfluenced by passion or prejudice, unassailed by corruption, and unawed by violence, elective succession were as much to be desired in a kingdom, as in other inferior communities. The best, the wisest, and the bravest man would then be sure of receiving that crown, which his endowments have merited; and the sense of an unbiassed majority would be dutifully acquiesced in by the few who were of different opinions. But history and observation will inform us, that elections of every kind (in the present state of human nature) are too frequently brought about by influence, *partiality, and artifice: and, even where the case is otherwise, these [*226] practices will be often suspected, and as constantly charged upon the successful, by a splenetic, disappointed minority. This is an evil to which all societies are liable; as well those of a private and domestic kind, as the great community of the public, which regulates and includes the rest. But in the former there is this advantage; that such suspicions, if false, proceed no farther than jealousies and murmurs, which time will effectually suppress; and, if true, the injustice may be remedied by legal means, by an appeal to those tribunals to which every member of society has (by becoming such) virtually engaged to submit. Whereas in the great and independent society, which every nation composes, there is no superior to resort to but the law of nature; no method to redress the infringements of that law but the actual exertion of private force. As therefore between two nations, complaining of mutual injuries, the quarrel can only be decided by the law of arms; so in one and the same nation, when the fundamental principles of their common union are supposed to be invaded, and more especially when the appointment of their chief magistrate is alleged to be unduly made, the only tribunal to which the complainants can appeal, is that of the God of battles; the only process by which the appeal can be carried on is that of a civil and intestine war. An hereditary succession to the crown, established in this and most other countries, is calculated to prevent that periodical bloodshed and misery, which the history of ancient imperial Rome and the more modern experience of Poland and Germany, may show us are the consequences of elective kingdoms.

2. But, secondly, as to the particular mode of inheritance, it in general corresponds with the feudal path of descents, chalked out by the common law in succession to landed estates; yet with one or two material exceptions. Like estates, the crown will descend lineally to *the [*227] issue of the reigning monarch; as it did from king John to Richard II., through a regular pedigree of six lineal generations. As in common descents, the preference of males to females, and the right of primogeniture among the males, are strictly adhered to. Thus Edward V. succeeded to the crown in preference to Richard his younger brother, and Elizabeth his elder sister. Like lands or tenements, the crown, on failure of the male line, descends to the issue female; according to the ancient British custom alluded to by Tacitus(a). Thus Mary I. succeeded to Edward VI., and the line of Margaret queen of Scots, the daughter of Henry VII., succeeded on failure of the line of Henry VIII. his son. But among the females, the crown descends by right of primogeniture to the eldest daughter only and her issue; and not, as in common inheritances, to all the daughters at once; the evident

(a) Who observes (*In viti Agricola*, cap. 15) : (neque enim sexum in imperiis discernunt) that, "*Boadicea generis regni femina dux* ; *sumpsere universi bellum.*"

necessity of a sole succession to the throne having occasioned the royal law of descents to depart from the common law in this respect; and therefore queen Mary, on the death of her brother, succeeded to the crown alone, and not jointly or in partnership with her sister Elizabeth. Again; the doctrine of representation prevails in the descent of the crown, as it does in other inheritances; whereby the lineal descendants of any person deceased stand in the same place as their ancestor, if living, would have done. Thus Richard II. succeeded his grandfather Edward III., in right of his father the black prince; to the exclusion of all his uncles, his grandfather's younger children. Lastly, on failure of lineal descendants, the crown goes to the next collateral relations of the late king; provided they are lineally descended from the blood-royal, that is, from that royal stock which originally acquired the crown. Thus Henry I. succeeded [*228] to William II., John to Richard I., and James I. to *Elizabeth; being all derived from the Conqueror, who was then the only regal stock. And herein there is no objection (such as in the case of land existed prior to the statute 3 & 4 Will. 4, c. 106, s. 5) to the succession of a brother, an uncle, or other collateral relation, of the half blood; that is, where the relationship proceeds not from the same couple of ancestors (which constitutes a kinsman of the whole blood) but from a single ancestor only; as when two persons are derived from the same father, and not from the same mother, or *vice versa*: provided only, that the one ancestor, from whom both are descended, be that from whose veins the blood-royal is communicated to each. Thus Mary I. inherited to Edward VI., and Elizabeth inherited to Mary(b); all children of the same father, king Henry VIII., but all by different mothers.

3. The doctrine of hereditary right by no means implies an indefeasible right to the throne. No man will assert this who has considered our laws, constitution, and history, without prejudice, and with any degree of 3. The title defeasible by act of parliament. attention. It is unquestionably in the breast of the supreme legislative authority of this kingdom, the sovereign and both houses of parliament, to defeat this hereditary right; and, by particular entails, limitations and provisions, to exclude the immediate heir, and vest the inheritance in any one else. This is strictly consonant to our laws and constitution; as may be gathered from the expression so frequently used in our statute book, of the "king's majesty, his heirs, and successors." In which we may observe, that as the word "heirs" necessarily implies an inheritance or hereditary right, generally subsisting in the royal person; so the word "successors," distinctly taken, must imply that this inheritance may sometimes be broken through; or, that there may be a successor, without being the heir, of the sovereign. And this is so [*229] extremely reasonable, that without such a power, lodged *some-where, our polity would be very defective. For, let us barely suppose so melancholy a case, as that the heir apparent should be a lunatic, an idiot, or otherwise incapable of reigning; how miserable would the condition of the nation be, if he were also incapable of being set aside!—It is therefore necessary that this power should be lodged somewhere: and yet the inheritance and regal dignity would be very precarious indeed, if this power were expressly and avowedly lodged in the hands of the subject only, to be exerted whenever prejudice, caprice, or discontent should happen to take the lead. Consequently it can no

(b) Each of these queens, however, thought it advisable to confirm her hereditary title by an act of parliament. *Post*, p. 243.

where be so properly lodged as in the two houses of parliament, by and with the consent of the reigning sovereign; who, it is not to be supposed, will agree to any thing improperly prejudicial to the rights of his own descendants. And therefore in the sovereign, the lords, and the commons, in parliament assembled, our law has expressly lodged it.

4. But, fourthly; however the crown may be limited or transferred, it still retains its descendible quality, and becomes hereditary in the wearer of it. And hence in our law the king is said never to die, in his political capacity; though, in common with other men, he is subject to mortality in his natural; because immediately upon the natural death of Henry, William, or Edward, the king survives in his successor. For the right of the crown vests, *eo instante*, upon his heir; either the *hæres natus*, if the course of descent remains unimpeached, or the *hæres factus*, if the inheritance be under any particular settlement. So that there can be no *interregnum*(c); but, as sir Matthew Hale(d) observes, the right of sovereignty is fully vested in the successor by the very descent of the *crown. And [*230] therefore, however acquired, it becomes in him absolutely hereditary, unless by the rules of the limitation it is otherwise ordered and determined. In the same manner as landed estates are by the law hereditary, or descendible to the heirs of the owner; but still there exists a power, by which the property of those lands may be transferred to another person. If this transfer be made simply and absolutely, the lands will be hereditary in the new owner, and descend to his heir at law; but if the transfer be clogged with any limitations, conditions, or entails, the lands must descend in that channel, so limited and prescribed, and no other.

In these four points consists the constitutional notion of hereditary right to the throne; which will be still further elucidated, and made clear beyond all dispute, from a short historical view of the successions to the crown of England, the doctrines of our ancient lawyers, and the several acts of parliament that have from time to time been made to create, to declare, to confirm, to limit, or to bar the hereditary title to the throne. And in the pursuit of this inquiry we shall find, that from the days of Egbert, the first sole monarch of this kingdom, even to the present, the four cardinal maxims above mentioned have ever been held constitutional canons of succession. It is true, the succession, through fraud, or force, or sometimes through necessity, when in hostile times the crown descended on a minor or the like, has been very frequently suspended; but it has generally at last returned, though sometimes after a considerable interval, into the old hereditary channel. And, even in those instances where the succession has been violated, the crown has ever been looked upon as hereditary in the wearer of it. Of which the usurpers themselves were so sensible, that they for the most part endeavoured to vamp up some feeble show of a title by descent, in order to amuse the people while they gained possession of the kingdom. And, when possession was once gained, they considered it as *the purchase or acquisition of a new state of inheritance, and transmitted it or endeav- [*231]

(c) Therefore, in contemplation of law, Charles II. succeeded to the crown upon the execution of his royal father, and the dates of the statutes and other legal proceedings of the reign of Charles II. are reckoned from the year 1649, not from 1660, the date of the Restoration. *Post*, p. 246.

(d) 1 Hist. P. C. 61.

4. The crown always hereditary in the wearer of it.

oured to transmit it to their own posterity, by a kind of hereditary right of usurpation.

King Egbert, A. D. 800, found himself in possession of the throne of the west Saxons, by a long and undisturbed descent from his ancestors of above three hundred years. How his ancestors acquired their title, whether
 Egbert. by force, by fraud, by contract, or by election, it matters not much to inquire; and is indeed a point of such high antiquity as must render all inquiries at best but plausible guesses. His right must be supposed indisputably good, because we know no better. The other kingdoms of the heptarchy he acquired, some by consent, but most by a voluntary submission. And it is an established maxim in civil polity, and the law of nations, that when one country is united to another in such a manner, as that one keeps its government and states and the other loses them, the latter entirely assimilates with or is melted down in the former, and must adopt its laws and customs(e). And in pursuance of this maxim there has ever been, since the union of the heptarchy in king Egbert (A. D. 827), a general acquiescence under the hereditary monarchy of the west Saxons, throughout all the kingdoms which he united(f).

From the accession of Egbert to the death of Edmund Ironside, a period of above two hundred years, the crown descended regularly through a succession of fifteen princes, without any deviation or interruption: save
 Edmund Ironside. only that the sons of king Ethelwolf succeeded to each other in the kingdom, according to the rule of succession prescribed by their father, and confirmed by the wittena-gemôt, in the heat of the Danish invasions: and also that king Edred, the uncle of Edwy, mounted the throne for about nine years, [*232] in the right of his nephew a minor, the times *being very troublesome and dangerous. But this was with a view to preserve, and not to destroy, the succession; and accordingly Edwy succeeded him.

King Edmund Ironside was obliged, by the hostile irruption of the Danes, at first, to divide his kingdom with Canute king of Denmark; and Canute, after his death, seized the whole of it, Edmund's son being driven into foreign countries. Here the succession was suspended by actual force, and a new family introduced upon the throne: in whom however this new-acquired throne continued hereditary for three reigns; when, upon the death of Hardiknute, the ancient Saxon line was restored in the person of Edward the Confessor, who was the son of Ethelred II., by his queen Emma, daughter of Richard duke of Normandy.

The Confessor was not indeed the true heir to the crown, being the younger brother of king Edmund Ironside, who had a son Edward, surnamed (from his
 Edward the Confessor. exile) the outlaw, still living. But this son was then in Hungary; and, the English having just shaken off the Danish yoke, it was necessary that somebody on the spot should mount the throne; and the Confessor was the next of the royal line then in England. On his decease without issue, Harold II. usurped the throne; and almost at the same instant came on the Norman invasion: the right to the crown being all the time in Edgar, surnamed Atheling (which signifies in the Saxon language "illustrious," or of royal blood), who was the son of Edward the outlaw, and grandson of

(e) Puff. L. of N. and N. b. 8, c. 12, s. 6. under Egbert, see Turner's Hist. Anglo-Sax
 (f) As to the consolidation of England ons, Bk. iii. c. 11.

Edmund Ironside; or, as Matthew Paris well expresses the sense of our old constitution, "*Edmundus autem latusferreum, rex naturalis de stirpe regum, genuit Edwardum: et Edwardus genuit Edgarum, cui de jure debebatur regnum Anglorum.*"

William the Norman claimed the crown by virtue of a pretended grant(*g*) from king Edward the Confessor; a *grant which, if real, was in itself [*233] utterly invalid; because it was made, as Harold well [*233] William the Conqueror. observed in his reply to William's demand(*h*), "*absque generali senatûs et populi conventu et edicto.*" words which plainly imply that it then was generally understood that the king, with consent of the general council, might dispose of the crown, and change the line of succession. William's title, however, was altogether as good as Harold's, he being a mere private subject, and an utter stranger to the royal blood. Edgar Atheling's undoubted right was overwhelmed by the violence of the times; though frequently asserted by the English nobility after the Conquest, till such time as he died without issue: but all their attempts proved unsuccessful, and only served the more firmly to establish the crown in the family which had newly acquired it.

This conquest then by William of Normandy was, like that of Canute before, a forcible transfer of the crown of England into a new family; but, the crown being so transferred, it may reasonably be affirmed, all the inherent properties of the crown were with it transferred also. For, the victory obtained at Hastings being a victory not over the nation collectively, but over the person of Harold(*i*), the only right that the Conqueror could in strictness pretend to acquire thereby, was the right to possess the crown of England, not to alter the nature of the government. And therefore as the English laws still remained in force, he must necessarily take the crown subject to those laws, and with all its inherent properties; the first and principal of which was its descendibility. Here then we must drop our race of Saxon kings, at least *for a while, [*234] and derive our descents from William the Conqueror as from a new stock, who acquired by right of war (such as it is, yet still the *derrière ressource* of kings) a strong and undisputed title to the inheritable crown of England.

Accordingly it descended from him to his sons William II. and Henry I. Robert, it must be owned, his eldest son, was kept out of possession by the arts and violence of his brethren: who perhaps might proceed upon [*235] William II. a notion, which prevailed for some time in the law of descents (though never adopted as the rule of public successions(*k*)), that when the eldest son was already provided for (as Robert was constituted duke of Normandy by his father's will), in such a case the next brother was entitled to [*236] Henry I. enjoy the rest of their father's inheritance. But, as he died without issue, Henry at last had a good title to the throne, whatever he might have had at first.

(*g*) "Although the Conqueror appears to have called himself *rex hereditarius* in some charters, historians and antiquaries are agreed that this could only mean heir under the supposed will of the Confessor; for the only dispute as to his title that has ever been raised is whether he took by the sword or as conqueror by purchase under the supposed will or gift of the Confessor, about the exist-

ence of which much controversy has always been held." Per Lord Brougham, *Birt-whistle v. Vardill*, 7 Cl. & F. 947.

(*h*) William of Malmsh. 1, 8.

(*i*) Hale, Hist. C. L. c. 5; Seld. Review of Tithes, c. 8.

(*k*) See Lord Lytleton's Life of Henry II., vol. 1, p. 467.

Stephen of Blois, who succeeded him, was indeed the grandson of the Conqueror, by Adela his daughter, and claimed the throne by a feeble kind of hereditary right: not as being the nearest of the male line, but as the nearest male of the blood royal, excepting his elder brother Theobald; who was earl of Blois, and therefore seems to have waived, as he certainly never insisted on, so troublesome and precarious a claim. The real right was in the empress Matilda or Maud, the daughter of Henry I.; the rule of succession being (where women are admitted at all) that the daughter of a son shall be preferred to the son of a daughter. So that Stephen was little better than a mere usurper; and therefore he rather chose to rely on a title by election^(l), while the empress Maud did not fail to assert her hereditary right by the *sword; which dispute was attended with various success, and ended at [*235] last in the compromise made at Wallingford, that Stephen should keep the crown, but that Henry the son of Maud should succeed him; as he afterwards accordingly did.

Henry, the second of that name, was (next after his mother Matilda) the undoubted heir of William the Conqueror; but he had also another connexion in blood, which endeared him still further to the English. He Henry II. was lineally descended from Edmund Ironside, the last of the Saxon race of hereditary kings. For Edward the outlaw, the son of Edmund Ironside, had (beside Edgar Atheling, who died without issue) a daughter Margaret, who was married to Malcolm king of Scotland; and in her the Saxon hereditary right resided. By Malcolm she had several children, and among them Matilda, the wife of Henry I., who by him had the empress Maud, the mother of Henry II. Upon which account the Saxon line is in our histories frequently said to have been restored in his person: though in reality that right subsisted in the sons of Malcolm by queen Margaret; king Henry's best title being as heir to the Conqueror.

From Henry II. the crown descended to his eldest surviving son Richard I., who dying childless, the right vested in his nephew Arthur, the son of Geoffrey his next brother: but John, the youngest son of king Henry, seized the throne; claiming, as appears from his charters, the crown by hereditary right^(m): that is to say, he was next of kin to the deceased king, being his surviving brother: whereas Arthur was removed one degree farther, being his brother's son, though by right of representation he stood in the place of his father Geoffrey. And however flimsy this title, and those of William Rufus and Stephen of Blois, may appear at this distance to us, after the law of descents has now been *settled [*236] for many centuries, they were sufficient to puzzle the understandings of our brave, but unlettered ancestors. Nor indeed can we wonder at the number of partizans, who espoused the pretensions of king John in particular; since, in the reign of his father king Henry II., it was a point undetermined⁽ⁿ⁾; whether, even in common inheritances, the child of an elder brother should succeed to the land in right of representation, or the younger surviving brother in right of proximity of blood. However, on the death of Arthur and his sister Eleanor without issue, a clear and indisputable title

(l) "*Ego Stephanus Dei gratiâ assensu cleri et populi in regem Anglorum electus, &c.*" Cart. A. D. 1186; Ric. de Hagustald. 814; Hearne ad Guil. Neubr. 711. (m) "*— Regni Angliæ; quod nobis jure competit hæreditario.*" Spelm. Hist. R. Joh. apud Wilkins, 354. (n) Glanv. l. 7, c. 3.

vested in Henry III. the son of John: and from him to Richard II., a succession of six generations; the crown descended in the true hereditary line.

Henry III. Under one of which race of princes(*o*) we find a declaration by Richard II. parliament to this effect:—That the law of the crown of England is, and always hath been, that the children of the king of England, whether born in England or elsewhere, ought to bear the inheritance after the death of their ancestors. Which law our sovereign lord the king, the prelates, earls, and barons, and other great men, together with all the commons in parliament assembled, do approve and affirm for ever.

Upon Richard II.'s resignation of the crown, he having no children, the right resulted to the issue of his grandfather Edward III. That king had many children, besides his eldest, Edward the black prince of Wales, the father of Richard II.: but to avoid confusion I shall only mention three; William his second son, who died without issue; Lionel, duke of Clarence, his third son; and John of Gaunt, duke of Lancaster, his fourth. By the rules of succession, therefore, the posterity of Lionel duke of Clarence were entitled to the throne upon the resignation of king Richard; and had accordingly been declared by the king, many years before, the presumptive heirs of the crown: which declaration was also confirmed in *parliament(*p*). But Henry [*237] duke of Lancaster, the son of John of Gaunt, having then a large army in the kingdom, the pretence of raising which was to recover his patrimony from the king, and to redress the grievances of the subject, it was impossible for any other title to be asserted with safety; and he became king

under the title of Henry IV. But, as sir Matthew Hale remarks(*q*), Henry IV. though the people unjustly assisted Henry IV. in his usurpation of the crown, yet he was not admitted thereto, until he had declared that he claimed, not as a conqueror (which he very much inclined to do(*r*)), but as a successor, descended by right line of the blood royal; as appears from the rolls of parliament in those times(*s*). And in *order to this he set up [*238] a show of two titles: the one, upon the pretence of being the first of

(*o*) Stat. 25 Edw. 3, st. 2.

(*p*) Sandford's Gen. Hist. 246.

(*q*) Hist. C. L. c. 5.

(*r*) Scld. Tit. Hon. 1, 3.

(*s*) The proceedings, as stated in the Parliament Roll (vol. 3), were as follows:—In the first place, Richard II., "after absolving all his subjects from their allegiance and renouncing the name of king, and the honour, regality, and celsitude royal, purely, voluntarily, simply, and absolutely, by the best way and form that the same could be done, did confess, acknowledge, repute, and truly and out of certain knowledge judge himself to have been and to be utterly insufficient and unuseful for the rule and government of the said kingdoms and dominions, and declared that for his notorious demerits he deserved to be deposed." We then find this abdication, cession, or renunciation of the crown "unanimously admitted by the lords spiritual and temporal, and the commons of the kingdom assembled in a great multitude in parliament," or rather in convention, "the chair of state being then empty, without any person whatsoever presiding therein." In the next place, we find the convention acting

judicially and "for removing all scruples and taking away sinister suspicions, charging the king with very many crimes and defects very often committed by him, and with the general ill-governance of his kingdom, by reason of which they adjudged him unworthy to reign." The record contains no fewer than fifty articles of impeachment, setting forth elaborately the late violent and unconstitutional proceedings, and all the "frauds and deceitful tricks of the said king." After these articles and objections, the record proceeds thus: "And because it seemed to all the estates of the realm that these causes of crimes and defaults were sufficient and notorious to depose the said king; considering also his own confession of his insufficiency and other things contained in his said renunciation and cession openly delivered; all the said states did unanimously consent, that *ex abundante* they should proceed unto a deposition of the said king for the greater security and tranquillity of the people and benefit of the kingdom." Whereupon a commission consisting of two bishops, two peers, two knights, and one justice, was regularly appointed by the unanimous consent of the said

the blood royal in the entire male line, whereas the duke of Clarence left only one daughter, Philippa; from which female branch, by a marriage with Edmond Mortimer earl of March, the house of York descended; the other, by reviving an exploded rumour, first propagated by John of Gaunt, that Edmond earl of Lancaster (to whom Henry's mother was heiress) was in reality the elder brother of king Edward I.; though his parents, on account of his personal deformity, [*239] had imposed him on the world for the younger; *and therefore Henry would be entitled to the crown, either as successor to Richard II., in case the entire male line was allowed a preference to the female, or, even prior to that unfortunate prince, if the crown could descend through a female, while an entire male line was existing.

However, as in Edward III.'s time we find the parliament approving and affirming the law of the crown, as before stated, so in the reign of Henry IV. they actually exerted their right of new-settling the succession to the crown. And this was done by the statute 7 Hen. 4, c. 2, whereby it is enacted, "that the inheritance of the crown and realms of England and France, and all other the king's dominions, shall be set and remain(t) in the presence of our sovereign lord the king, and in the heirs of his body issuing;" and prince Henry is declared heir apparent to the crown, to hold to him and the heirs of his body issuing, with remainder to lord Thomas, lord John, and lord Humphry, the king's sons, and the heirs of their bodies respectively: which is indeed nothing more than the law would have done before, provided Henry IV. had been a rightful king. It however serves to show that it was then generally understood, that the king and parliament had a right to new-model and regulate the succession to the crown: and we may also observe, with what caution and delicacy the parliament then avoided declaring any sentiment of Henry's original title. However, sir Edward Coke more than once expressly declares(u), that at the time of passing this act the right of the crown was in the descent from Philippa, daughter and heiress of Lionel duke of Clarence.

Nevertheless the crown descended regularly from Henry IV. to his son and grandson Henry V. and Henry VI.; in the latter of whose reigns the house of York asserted their dormant title; and, after embruing the kingdom in blood

estates and commons "to depose the said king from all kingly dignity, majesty, and honour, on the behalf and in the name and by the authority of all the said states, as in like cases from the ancient custom of the said kingdom had been observed." And forthwith the said commissioners, sitting on a tribunal before the royal chair of state, did "on the behalf and in the name, and by the authority aforesaid, pass sentence of deposition upon the king, forbidding all and singular the lords, archbishops, bishops, and prelates, dukes, marquisses, earls, barons, knights, vassals, and valvasors, and other subjects and liege people, and that thenceforth none of them should any way obey or regard the said Richard as king or lord of the said kingdom and dominion." Commissioners were then appointed to resign fealty to king Richard. And then presently, "as soon as it appeared that the crown of England was vacant, Henry rising up from his place and humbly fortifying himself with

the sign of the cross on his forehead and on his breast, having also first called upon the name of Christ, did claim the said kingdom so vacant as aforesaid, with its crown and all its members and appurtenances." After which claim and challenge, "the lords spiritual and temporal and all the states there present, with the whole people, did unanimously consent that the said duke should reign over them." And in conclusion, the new king showed to the states of the kingdom the signet of the late king, "delivered to him as a token of his will that he should succeed him as aforesaid." It was not until after these long and formal proceedings that the title of the new king was considered complete, and his coronation took place; after which the commons chose their speaker and the business of parliament proceeded in ordinary course.

(t) *Soit mys et demourge*.

(u) 4 Inst. 37, 205.

*and confusion for seven years together, at last established it in the person of Edward IV. At his accession to the throne, after a breach [*240]
 Henry V. of the succession that continued for three descents, and above
 Henry VI. threescore years, the distinction of a king *de jure* and a king *de facto* began to be first taken; in order to indemnify such as had
 Edward IV. submitted to the late establishment, and to provide for the peace of the kingdom by confirming all honours conferred and all acts done, by those who were now called the usurpers, not tending to the disherison of the rightful heir. In statute 1 Edw. 4, c. 1, the three Henrys are styled, "late kings of England successively in deed, and not of right." And, in charters of king Edward, where he has occasion to speak of any of the line of Lancaster, he calls them "*nuper de facto, et non de jure, reges Angliæ*."

Edward IV. left two sons and a daughter; the eldest of which sons, king Edward V., having been proclaimed king, was after two months deposed by

Richard his unnatural uncle, who immediately usurped the royal
 Edward V. dignity; having previously insinuated to the populace a suspicion of bastardy in the children of Edward IV., to make a show of some hereditary title. Afterwards he is generally believed to have murdered his two nephews, upon whose death the right to the crown devolved upon their sister Elizabeth.

The tyrannical reign of king Richard III. gave occasion to Henry earl of Richmond to assert his title to the crown. A title the most remote and unaccountable that was ever set up, and which nothing could
 Richard III. have given success to, but the universal detestation of the then usurper Richard. For, besides that Henry claimed under a descent from John of Gaunt, whose title was now exploded, the claim (such as it was) was through John earl of Somerset, a bastard son, begotten by John of Gaunt upon Catherine Swinford. It is true, that by an act of parliament, 20 Ric. 2, this son was, with others, legitimated and made inheritable to all lands, offices, and dignities, as if he had been born in *wedlock: but still with an [*241] express reservation of the crown, "*exceptâ dignitate regali*"(x).

Notwithstanding all this, immediately after the battle of Bosworth field, Henry earl of Richmond assumed the regal dignity; the right to the crown then being, as sir Edward Coke expressly declares(y), in Elizabeth, eldest daughter of Edward IV.: and his possession was established by parliament, holden the first year of his reign. In the act for which purpose, the parliament seems to have copied the caution of their predecessors in the reign of Henry IV.; and therefore (as lord Bacon, the historian of this reign, observes(z)) carefully avoided any recognition of Henry VII.'s right, which indeed was none at all; and the king would not have it by way of new law or ordinance, whereby a right might seem to be created and conferred upon him; and therefore a middle course was rather chosen by way (as the noble historian expresses it) of "establishment," and that under covert and indifferent words, "that the inheritance of the crown should rest, remain, and abide in" king Henry VII. and the heirs of his body; thereby providing for the future, and at the same time acknowledging his present possession; but not determining either way, whether that possession was *de jure* or *de facto* merely. However, he soon after married Elizabeth of York, the undoubted heiress of the Conqueror,

(x) 4 Inst. 86.
 (y) *Ibid.* 87.

(z) Bac. Works, ed. 1825, iii., 117.

and thereby gained (as sir Edward Coke declares^(a)) by much his best title to the crown. Whereupon the act made in his favour was so much disregarded, that it never was printed in our statute books.

Henry VIII., the issue of this marriage, succeeded to the crown by clear indisputable hereditary right, and transmitted it to his three children in successive order. But in his reign we, at several times, find the parliament busy in regulating the succession to the kingdom. And,

[*242] *first, by statute 25 Henry 8, c. 22, which recites the mischiefs which have and may ensue by disputed titles, because no perfect and substantial provision hath been made by law concerning the succession; and then enacts, that the crown shall be entailed to his majesty, and the sons or heirs male of his body; and in default of such sons to the lady Elizabeth (who is declared to be the king's eldest issue female, in exclusion of the lady Mary, on account of her supposed illegitimacy by the divorce of her mother queen Catherine) and to the lady Elizabeth's heirs of her body; and so on from issue female to issue female, and the heirs of their bodies, by course of inheritance according to their ages, "as the crown of England hath been accustomed and ought to go," in cases where there be heirs female to the same: and, in default of issue female, then to the king's right heirs for ever. This single statute is an ample proof of all the four positions we at first set out with.

But upon the king's divorce from Ann Boleyn, this statute was, with regard to the settlement of the crown, repealed by statute 28 Hen. 8, c. 7, wherein the lady Elizabeth is also, as well as the lady Mary, bastardized, and the crown settled on the king's children by queen Jane Seymour, and his future wives; and, in defect of such children, then with this remarkable remainder, to such persons as the king by letters patent, or last will and testament, should limit and appoint the same. A vast power; but, notwithstanding, as it was regularly vested in him by the supreme legislative authority, it was therefore indisputably valid. But this power was never carried into execution; for by statute 35 Hen. 8, c. 1, the king's two daughters are legitimated again, and the crown is limited to prince Edward by name, after that to the lady Mary, and then to the lady Elizabeth, and the heirs of their respective bodies; which succession took effect accordingly, being indeed no other than the usual course of the law, with regard to the descent of the crown.

[*243] *But lest there should remain any doubt in the minds of the people, through this jumble of acts for limiting the succession, by statute 1 Mar. sess. 3, c. 1, queen Mary's hereditary right to the throne is

Mary. acknowledged and recognized in these words: the crown of this realm "is most lawfully, justly, and rightfully descended and come unto the queen's highness that now is, being the very, true, and undoubted heir and inheritrix thereof." And again, upon the queen's marriage with Philip of Spain, in the statute which settles the preliminaries of that match^(b), the hereditary right to the crown is thus asserted and declared: as touching the right of the queen's inheritance in the realm and dominions of England, the children, whether male or female, "shall succeed in them, according to the laws, statutes, and customs of the same." Which determination of the parliament, that the succession shall continue in the usual course, seems tacitly to imply a power of new-modelling and altering it, in case the legislature had thought proper.

(a) 4 Inst. 37.

(b) 1 Mar. sess. 3, c. 2.

On queen Elizabeth's accession, her right is recognized in still stronger terms than her sister's; the parliament acknowledging(c), that the queen's highness

Elizabeth. "is, and in very deed and of most mere right ought to be, by the laws of God, and the laws and statutes of this realm, our most rightful and lawful sovereign liege lady and queen:" and that her highness "is rightly, lineally, and lawfully descended and come of the blood royal of this realm of England; in and to whose princely person, and to the heirs of her body lawfully to be begotten, after her," the imperial crown and dignity of this realm doth belong. And in the same reign, by statute 13 Eliz. c. 1, we find the right of parliament to direct the succession of the crown asserted in the most explicit words. "If any person shall in any wise hold, and affirm, or [*244] *maintain that the common laws of this realm, not altered by parliament, ought not to direct the right of the crown of England;" or that the queen's majesty, with and by the authority of parliament, "is not able to make laws and statutes of sufficient force and validity, to limit and bind the crown of this realm, and the descent, limitation, inheritance, and government thereof;" — such person, so holding, affirming, or maintaining, during the life of the queen, shall be guilty of high treason; and after her decease shall forfeit his goods and chattels.

On the death of queen Elizabeth, without issue, the line of Henry VIII. became extinct. It therefore became necessary to recur to the other issue of

James I. Henry VII. by Elizabeth of York his queen; whose eldest daughter Margaret having married James IV. king of Scotland, king James the Sixth of Scotland, and of England the First, was the lineal descendant from that alliance. So that in his person, as clearly as in Henry VIII., centered all the claims of different competitors, from the Conquest downwards, he being indisputably the lineal heir of the Conqueror. And, what is still more remarkable, in his person also centered the right of the Saxon monarchs which had been suspended from the Conquest till his accession. For, as was formerly observed, Margaret, the sister of Edgar Atheling, the daughter of Edward the outlaw, and grand-daughter of king Edmund Ironside, was the person in whom the hereditary right of the Saxon kings, supposing it not abolished by the Conquest, resided. She married Malcolm king of Scotland; and Henry II., by a descent from Matilda their daughter, is generally called the restorer of the Saxon line. But it must be remembered, that Malcolm by his Saxon queen had sons as well as daughters: and that the royal family of Scotland from that time downwards were the offspring of Malcolm and Margaret. Of this royal family king James I. was the direct lineal heir, and therefore united in his person every possible claim by hereditary right to *the English as well as Scottish throne, being the heir of both Egbert and [*245] William the Conqueror.

And it is no wonder that a prince of greater learning than wisdom, who could deduce an hereditary title for more than eight hundred years, should easily be taught by the flatterers of the times, to believe there was something divine in this right, and that the finger of Providence was visible in its preservation. Whereas, though a wise institution, it was clearly a human institution; and the right inherent in him no natural, but a positive right. And in this and no other light was it taken by the English parliament; who by statute 1

(c) Stat. 1 Eliz. c. 8.

Jac. 1, c. 1, did "recognise and acknowledge," that immediately upon the dissolution and decease of Elizabeth late queen of England, the imperial crown thereof "did by inherent birthright, and lawful and undoubted succession, descend and come to" his most excellent majesty, "as being lineally, justly, and lawfully, next and sole heir of the blood royal of this realm." Not a word here of any right immediately derived from heaven: which, if it existed any where, must be sought for among the aborigines of the island, the ancient Britons; among whose princes indeed some have gone to seek it for him(*d*).

But, wild and absurd as the doctrine of divine right most undoubtedly is, it is scarcely less astonishing, that when so many human hereditary rights had centered in this king, his son and heir king Charles I. should be

Charles I.

told by the judges who pronounced his sentence, that he was an elective prince; elected by his people, and therefore accountable to them, in his own proper person, for his conduct(*e*). Very different from this was the lan-

[*246] guage *afterwards used when a solemn parliamentary convention of the estates restored the right heir of the crown. For in the proclamation for that purpose, which was drawn up and attended by both houses(*f*), they declared, that they did, according to their duty and allegiance, "heartily, joyfully, and unanimously acknowledge and proclaim, that immediately upon the decease of our late sovereign lord king Charles," the imperial crown of these realms "did by inherent birthright, and lawful and undoubted succe-

Charles II.

sion, descend and come to his most excellent majesty Charles II., as being lineally, justly, and lawfully, next heir of the blood royal of this realm:" and thereunto they did most humbly and faithfully submit and oblige themselves, their heirs, and posterity for ever.

Thus it clearly appears, from the highest authority this nation is acquainted with, that the crown of England has ever been an hereditary crown; though subject to limitations by parliament. This right of alter-
Crown is heredi-
tary. ing and limiting the succession; a right which, we have seen, was exercised and asserted in the reigns of Henry IV., Henry VII., Henry VIII., queen Mary, and queen Elizabeth, has also been asserted and exercised on the following occasions(*g*):—

First, in point of time, when the famous bill of exclusion was introduced, which raised such a ferment in the latter end of the reign of king Charles II. It is well known that the purport of this bill was to set aside the king's brother and presumptive heir, the duke of York, from the succession, on the score of his being a papist; *that it
Instances in
which parlia-
ment has altered
the succession. [*247] passed the house of commons, but was rejected by the lords; the king having also declared beforehand, that he never would be brought to consent to it. And from this transaction we may collect two things: 1. That the crown was universally acknowledged to be hereditary; and the inheritance indefeasible

(*d*) Elizabeth of York, the mother of queen Margaret of Scotland, was heiress of the house of Mortimer. And Mr. Carte observes that the house of Mortimer, in virtue of its descent from Gladys only sister to Lewellin ap Iorwerth the Great, had the true right to the principality of Wales. Hist. Eng. iii. 705.

(*e*) Trial of Charles I., 4 St. Tr. 994.

(*f*) Com. Journ. 8 May, 1660.

(*g*) "Nothing is plainer than that the

people have a right to the laws and the constitution. This right the nation hath asserted and recovered out of the hands of those who had dispossessed them of it at several times. There are of this two famous instances in the knowledge of the present age: I mean that of the Restoration and that of the Revolution; in both these great events were the regal power and the rights of the people recovered." Per Sir Jos. Jekyll, 15 St. Tr. 97.

unless by parliament: else it had been needless to prefer such a bill. 2. That the parliament had a power to have defeated the inheritance; else such a bill had been ineffectual. The commons acknowledged the hereditary right then subsisting; and the lords did not dispute the power, but merely the propriety of an exclusion. However, as the bill took no effect, king James II. succeeded to the throne of his ancestors: and might have enjoyed it during the remainder of his life, but for his own infatuated conduct, which, (with other concurrent circumstances), brought on the Revolution in 1688.

That memorable event ensued upon the abdication of the reigning monarch, and a vacancy of the throne thereby occasioned. There had not been a defeasance of the right of succession, and a new limitation of the crown, by the king and both houses of parliament; it was the act of the nation alone, upon a conviction that there was no king in being. For in a full assembly of the lords and commons, met in a convention upon the supposition of this vacancy, both houses(*h*) resolved:—that king James II., by the advice of divers evil counsellors, judges, and ministers employed by him, did endeavour to subvert and extirpate the protestant religion, and the laws and liberties of this kingdom, and, having abdicated the government, that the throne is thereby vacant(*i*). Thus ended at once, *by this sudden and unexpected vacancy of the throne, the old line of succession; [*248] which from the Conquest had lasted above six hundred years, and from the union of the heptarchy in king Egbert almost nine hundred. The facts themselves thus appealed to, the king's endeavour to subvert the constitution by breaking the original contract, his violation of the fundamental laws, and his withdrawing himself out of the kingdom, were evident and notorious; and the consequences drawn from these facts (namely, that they amounted to an abdication of the government; which abdication did affect not only the person of the king himself, but also all his heirs, and rendered the throne absolutely and completely vacant) it belonged to our ancestors to determine. For whenever a question arises between society at large and any magistrate vested with powers originally delegated by that society, it must be decided by the voice of society itself; there is not upon earth any other tribunal to resort to. And that these consequences were fairly deduced from these facts, our ancestors solemnly determined, in a full parliamentary convention representing the whole society. The reasons upon which they decided may be found at large in the parliamentary proceedings of the time(*k*); *and may be contemplated with interest by the philosophical historian, with interest however due to [*249] the magnitude of the event thus consummated rather than to its value as a precedent. For should a political crisis equally imminent recur, posterity regardless of the text of precedents will act.

(*h*) Com. Journ. 12 Feb. 1688.

(*i*) The convention in Scotland drew the same conclusion—"The estates of the kingdom of Scotland find and declare, that king James the Seventh being a professed papist, did assume the royal power and acted as a king, without ever taking the oath required by law; and had, by the advice of evil and wicked counsellors, invaded the fundamental constitution of this kingdom and altered it from a legal and limited monarchy to an arbitrary despotic power, and had governed the same to the subversion of the protestant

religion and violation of the laws and liberties of the nation, inverting all the ends of government, whereby he had defaulted the crown, and the throne became vacant." Tyn-dall, 71; Fol. Cont. of Rapin.

(*k*) Major-General Stanhope, at the impeachment of Dr. Sacheverell (15 St. Tr. 129), after citing the maxim, "wherever there is a right there is a remedy," proceeds to apply it thus: addressing the Lords, he says, "That your lordships have rights nobody will presume to deny; that the commons have rights nobody will deny; that every subject of

But, without overvaluing this fundamental transaction, as a precedent, we are bound both in justice and gratitude to note that it was conducted with a temper and moderation which naturally arose from its equity; that, however it might in some respects go beyond the letter of our ancient laws (the reason of which will more fully appear hereafter^(l)), it was agreeable to the spirit of our constitution, and the rights of human nature; and that though in other points (owing to the peculiar circumstances of things and persons) it was not altogether so perfect as might have been wished, yet from thence a new era commenced, in which the bounds of prerogative and liberty have been better defined, the principles of government more thoroughly examined and understood, and the rights of the subject more explicitly guarded by legal provisions, than in any other period of English history. In particular it is worthy of observation that the convention, in this their judgment, avoided with great wisdom the wild extremes into which the visionary theories of some zealous republicans would have led them. They held that the misconduct of king James amounted to an "endeavour" to subvert the constitution; and not to an actual subversion, or total dissolution, of the government, according to the principles of Mr. Locke^(m): which would have reduced society almost to a state of nature; would [* 250] have levelled all distinctions of honour, rank, offices and *property; would have annihilated the sovereign power, and in consequence have repealed or jeopardized the efficacy of all positive laws; and would have left the people at liberty to have erected a new system of state upon a new foundation of polity. They therefore very prudently voted it to amount to no more than an abdication of the government, and a consequent vacancy of the throne; whereby the government was allowed to subsist, though the executive magistrate was gone, and the kingly office to remain, though king James was no longer king⁽ⁿ⁾. And thus the constitution was kept entire; which upon every sound principle of government must otherwise have fallen to pieces, had so principal and constituent a part of it as the royal authority been abolished, or suspended.

This single postulate, the vacancy of the throne, being once established, the rest that was then done followed almost of course. For, if the throne be at any time vacant (which may happen by other means besides that of abdication; as if all the blood royal should fail, without any successor appointed by parliament); if, I say, a vacancy by any means whatsoever should happen, the right of disposing of this vacancy seems naturally to result to the lords and commons, the trustees and representatives of the nation. For there are no other hands in which it can so properly be intrusted; and there is a necessity for its being intrusted somewhere, else the whole frame of government must be dissolved and perish. The lords and commons having therefore determined this main fundamental article, that there was a vacancy of the throne, proceeded to fill up that vacancy in such a manner as they judged the most proper. And this was done

Britain has rights nobody will deny. Now to say that when a prince shall invade all these rights at once,—to say that the whole collective body of the nation has no way to vindicate those rights, is so inconsistent, so contrary to reason, that it is to be wondered it could ever enter into the mind of man." And the same speaker, citing Fortescue (de Laud. L. Ang. cc. 10—13) and Hooker (Ecc.

Pol.), affirms that "the constitution of England is founded upon compact, and that the subjects of this kingdom have in their several public and private capacities as legal a title to what are their rights by law as a prince to the possession of his crown."

(l) See chap. 7.

(m) On Gov. pt. 2, c. 19.

(n) Law of Forfeit. 118, 119.

by their declaration of 12 February, 1688(o), in the following manner: "that William and Mary, prince and princess of Orange, be, and be declared king and queen" *of England, to hold the crown and royal dignity during their lives, and the life of the survivor of [*251] them; and "that the sole and full exercise of the regal power be only in, and executed by, the said prince of Orange, in the names of the said prince and princess, during their joint lives: and after their deceases the said crown and royal dignity" . . . "to be to the heirs of the body of the said princess; and for default of such issue to the princess Anne of Denmark, and the heirs of her body; and for default of such issue to the heirs of the body of the said prince of Orange."

Doubtless, upon the principles before established, the convention might (if they pleased) have vested the regal dignity in a family entirely new, and strangers to the royal blood; but they were too well acquainted with the benefits of hereditary succession, and the influence which it has by custom over the minds of the people, to depart any farther from the ancient line than temporary necessity and self-preservation required. They therefore settled the crown, first on king William and queen Mary, king James's eldest daughter, for their joint lives: then on the survivor of them; and then on the issue of queen Mary: upon failure of such issue, it was limited to the princess Anne, king James's second daughter, and her issue; and lastly, on failure of that, to the issue of king William, who was the grandson of Charles I., and nephew as well as son-in-law of king James II., being the son of Mary his eldest sister. This settlement included all the protestant posterity of king Charles I. except such other issue as king James might at any time have, which was totally omitted, through fear of a popish succession. And this order of succession took effect accordingly.

These three princes therefore, king William, queen Mary, and queen Anne, did not take the crown by hereditary right or descent, but by way of donation or purchase, as the lawyers call it; by which they mean any method of acquiring an estate otherwise than by descent. *The new settlement did not merely consist in excluding king James, and the person pretended to be [*252] prince of Wales, and then suffering the crown to descend in the old hereditary channel: for the usual course of descent was in some instances broken through; and yet the convention still kept it in their eye, and paid a great, though not total, regard to it. Let us see how the succession would have stood, if no abdication had happened, and king James had left no other issue than his two daughters queen Mary and queen Anne. It would have stood thus: queen Mary and her issue: queen Anne and her issue: king William and his issue. But we may remember, that queen Mary was only nominally queen, jointly with her husband king William, who alone had the regal power; and king William was personally preferred to queen Anne, though his issue was postponed to hers. Clearly therefore these princes were successively in possession of the crown by a title different from the usual course of descent.

It was towards the end of king William's reign, when all hopes of any surviving issue from any of these princes died with the duke of Gloucester, that the king and parliament thought it necessary again to exert their power of limiting and appointing the succession, in order to prevent another vacancy

(o) Com. Journ. 12 Feb. 1688.

of the throne; which must have ensued upon their deaths, as no further provision was made at the Revolution, than for the issue of queen Mary, queen Anne, and king William. The parliament had previously by the statute 1 Will. & M. st. 2, c. 2, enacted, that every person who should be reconciled to, or hold communion with, the see of Rome, should profess the popish religion, or should marry a papist, should be excluded and be for ever incapable to inherit, possess, or enjoy the crown: and that in such case the people should be absolved from their allegiance, and the crown should descend to such persons, being protestants, as would have inherited the same, in case the person so *reconciled, [*253] holding communion, professing, or marrying, were naturally dead. To act therefore consistently with themselves, and at the same time pay as much regard to the old hereditary line as their former resolutions would admit, they turned their eyes on the princess Sophia, electress and duchess dowager of Hanover, the most accomplished princess of her age(*p*). For, upon the impending extinction of the protestant posterity of Charles I., the old law of regal descent directed them to recur to the descendants of James I.; and the princess Sophia, being the youngest daughter of Elizabeth, queen of Bohemia, who was the daughter of James I., was the nearest of the ancient blood royal, who was not incapacitated by professing the popish religion. On her therefore, and the heirs of her body, being protestants, the remainder of the crown, expectant on the death of king William and queen Anne, without issue, was settled by statute 12 & 13 Will. 3, c. 2. And at the same time it was enacted that whosoever should hereafter come to the possession of the crown should join in the communion of the church of England as by law established.

This is the last limitation of the crown that has been made by parliament; and these several actual limitations, from the time of Henry IV. to the present, do clearly prove the power of the king and parliament to new model or alter the succession. And indeed it is now made highly penal to dispute it: for by

the statute 6 Ann. c. 7, it is enacted, that if any person maliciously, advisedly, and directly, shall maintain, by writing or printing, that the kings of this realm with the authority of parliament are not able to make laws to bind the crown and the descent thereof, he shall be guilty of high treason; *or if he maintains the same by only preaching, [*254] teaching, or advised speaking, he shall incur the penalties of a *præmunire*(*q*).

The princess Sophia dying before queen Anne, the inheritance thus limited descended on her son and heir king George I., and, having on the death of the queen taken effect in his person, from him it descended to king George II.; and from him to his grandson and heir, king George III. From George III. the inheritance descended to his eldest son king George IV., who dying without issue, was succeeded by king William IV., the third son of king George III.; whose second son Frederick Augustus duke of York had previously died without issue. On the death of king William IV., the inheritance descended to the only child of Edward duke of Kent, the fourth son of king George III., our present gracious sovereign queen Victoria.

(*p*) Sandford, in his genealogical history, published A. D. 1677, speaking (page 535) of the princesses Elizabeth, Louisa, and Sophia, daughters of the queen of Bohemia, says the

first was reputed the most learned, the second the greatest artist, and the last one of the most accomplished ladies in Europe.

(*q*) As to which *post*, vol. iv.

Hence it is easy to collect, that the title to the crown is at present hereditary, though not quite so absolutely hereditary as formerly; and the common stock or ancestor, from whom the descent must be derived, is also different. Formerly the common stock was king Egbert; then William the Conqueror; afterwards in James I.'s time the two common stocks united, and so continued till the vacancy of the throne in 1688: now it is the princess Sophia, in whom the inheritance was vested by the new king and parliament. Formerly the descent was absolute, and the crown went to the next heir without any restriction: but now, upon the new settlement, the inheritance is conditional; being limited to such heirs only, of the body of the princess Sophia, as are protestant members of the church of England, and are married to none but protestants.

And in the due medium which has thus been historically traced between a right of election vested in the people and an hereditary right vested irrevocably in the sovereign *consists, I apprehend, the true constitutional notion [* 255] of the right of succession to the imperial crown of these kingdoms. The extremes between which it steers, are equally destructive of those ends for which societies were formed and are kept on foot. Where the magistrate, upon every succession, is elected by the people, and may by the express provision of the laws be deposed (if not punished) by his subjects, this may sound like the perfection of liberty, and look well enough when delineated on paper: but in practice will be ever productive of tumult, contention, and anarchy. And, on the other hand, divine indefeasible hereditary right, when coupled with the doctrine of unlimited passive obedience, is surely of all constitutions the most thoroughly slavish and dreadful. But when such an hereditary right, as our laws have created and vested in the royal stock, is closely interwoven with those liberties, which, we have seen in a former chapter, are equally the inheritance of the subject; this union will form a constitution, in theory the most beautiful of any, in practice the most approved, and, I trust, in duration the most permanent. It was the duty of an expounder of our laws to lay this constitution before the student in its true and genuine light: it is the duty of every good Englishman to understand, to revere, to defend it.

*CHAPTER IV.

[* 256]

THE ROYAL FAMILY.

WE shall in this chapter speak of the members of the royal family in the order which seems natural and proper.

The queen of England is either queen regent, queen consort, or queen dowager. The queen regent, regnant, or sovereign, is she who holds the crown in her own

Queen regent. right; as the first (and perhaps the second) queen Mary, queen Elizabeth, queen Anne, and our present most gracious sovereign queen Victoria; and such a one has the same powers, prerogatives, rights, dignities, and duties, as if she had been a king. This was observed at the commencement of the last chapter, and is expressly declared by statute 1 Mar. 1, st.

Queen consort. 3, c. 1. But the queen consort is the wife of the reigning king; and she, by virtue of her marriage, is participant of divers prerogatives above other women(a).

(a) Finch. L. 86.

And, first, she is a public person, exempt and distinct from the king: and not, like other married women, so closely connected as to have lost all legal or Her separate and distinct rights. separate existence so long as the marriage continues. For a queen consort is of ability to purchase lands, and to convey them, to make leases, to grant copyholds, and do other acts of ownership without the concurrence of her lord: which no other married woman can do(*b*); a privilege [**257*] as old as the Saxon era(*c*). She is also capable *of taking a grant from the king, and in this particular she agrees with the *Augusta*, or *piissima regina conjux divi imperatoris* of the Roman laws; who, according to Justinian(*d*), was equally capable of making a grant to, and receiving one from, the emperor. The queen of England has separate courts and officers distinct from the king's, not only in matters of ceremony, but even of law; and her attorney and solicitor-general are entitled to a place within the bar of his majesty's courts, together with the king's counsel(*e*). She may likewise sue and be sued alone, without joining her husband. She may also have a separate property in goods as well as lands, and has a right to dispose of them by will(*f*). In short, she is in all legal proceedings looked upon as a feme sole, and not as a feme covert; as a single, not as a married woman(*g*). For which the reason given by sir Edward Coke is this: because the wisdom of the common law would not have the king (whose continual care and study is for the public, and *circa ardua regni*) to be troubled and disquieted on account of his wife's domestic affairs; and therefore it vests in the queen a power of transacting her own concerns, without the intervention of the king, as if she was an unmarried woman.

The queen consort has also many exemptions, and minute prerogatives. For instance: she pays no toll(*h*); nor is she liable to any amercement in any Her exemptions. court(*i*). But in general, unless where the law has expressly declared her exempted, she is upon the same footing with other subjects; being to all intents and purposes the king's subject, and not his equal; in like manner as, in the imperial law, "*Augusta legibus soluta non est*"(*k*).

[**258*] *The queen enjoys also some pecuniary advantages, which in early times formed for her a distinct revenue: as, in the first place, she is entitled to an ancient perquisite called queen-gold, or *aurum reginæ*; which is a royal revenue, belonging to every queen consort during her marriage with the king, and due from every person who has made a voluntary offering or fine to the king amounting to ten marks or upwards, for and in consideration of any privileges, grants, licences, pardons, or other matter of royal favour conferred upon him by the king: it is due in the proportion of one-tenth part more, over and above the entire offering or fine made to the king; and becomes an actual debt of record to the queen's majesty by the mere recording of the fine(*l*). As, if a hundred marks of silver be given to the king for liberty to take in mortmain, or to have a fair, market,

(*b*) 4 Rep. 23.

(*c*) Seld. Jan. Angl. 1. 42.

(*d*) Cod. 5, 16, 26.

(*e*) Seld. Tit. Hon. 1, 6, 7.

(*f*) This is expressly declared by 39 & 40 Geo. 3, c. 88, ss. 8, 9. If she neglect to dispose of them they go to the king her husband. Wood's Inst. p. 22. See also the 2

Geo. 3, c. 1; 15 Geo. 3, c. 33; 47 Geo. 3, sess. 2, c. 45.

(*g*) Finch. L. 86; Co. Litt. 133.

(*h*) Co. Litt. 133.

(*i*) Finch. L. 185.

(*k*) Dig. 1, 3, 81.

(*l*) Pryn. Aur. Reg. 2.

park, chase, or free-warren: there the queen is entitled to ten marks in silver, or (what was formerly an equivalent denomination) to one mark in gold, by the name of queen-gold, or *aurum reginæ*(*m*). But no such payment is due for any aids or subsidies granted to the king in parliament or convocation; nor for fines imposed by courts on offenders, against their will; nor for voluntary presents to the king, without any consideration moving from him to the subject; nor for any sale or contract whereby the present revenues or possessions of the crown are granted away or diminished(*n*).

The original revenue of our ancient queens, before and soon after the Conquest, seems to have consisted in certain reservations or rents out of the demesne lands of the crown, which were expressly appropriated to her majesty, distinct from the king. It is frequent in domesday book, after specifying the rent due to the crown, to add likewise the quantity of gold or other *renders reserved to the queen(*o*). These were frequently appropri- [* 259] ated to particular purposes: to buy wool for her majesty's use(*p*), to purchase oil for her lamps(*q*), or to furnish her attire from head to foot(*r*), which was frequently very costly, as one single robe in the fifth year of Henry II. stood the city of London in upwards of fourscore pounds(*s*). A practice somewhat similar to that of the eastern countries, where whole cities and provinces were specifically assigned to purchase particular parts of the queen's apparel(*t*). And, for a further addition to her income, this duty of queen-gold is supposed to have been originally granted; those matters of grace and favour, out of which it arose, being frequently obtained from the crown by the powerful intercession of the queen. There are traces of its payment, though obscure ones, in the book of domesday and in the great pipe-roll of Henry I.(*u*). In the reign of Henry II. the manner of collecting it appears to have been well understood, and it forms a distinct head in the ancient dialogue of the exchequer(*x*), written in the time of that prince, and usually attributed to Gervase of Tilbury. From that time downwards it was regularly claimed and *enjoyed by [* 260] all the queen consorts of England till the death of Henry VIII.; though from the accession of the Tudor family the collecting of it seems to have been much neglected: and, there being no queen consorts afterwards till the accession of James I., its very nature and quantity became then a matter of doubt: and, being referred by the king to the chief justices and chief baron, their report of it was so very unfavourable(*y*), that his consort queen Anne (though she claimed it) yet never thought proper to exact it. In 1635, 11 Car. 1, a time fertile of expedients for raising money upon dormant precedents in our old records (of which ship-money was a fatal instance), the king, at the

(*m*) 12 Rep. 21; 4 Inst. 358.

(*n*) Pryn. Aur. Reg. 6; Madox. Exch. 423.

(*o*) *Bede*fordscire *Maner. Lestone redd. per annum xxi lib. 6s.*, ad opus reginæ ii uncias auri. *Herefordscire. In Lene, &c. consuetud. ut propositus maneris veniente dominâ suâ (reginâ) in maner. præsenteret ei xviij oras denar. ut esset ipsa læto animo.* Pryn. Append. to Aur. Reg. 2, 3.

(*p*) *Causa coadunandi lanam reginæ.* Domesd. *ibid.*

(*q*) *Civitas London. Pro oleo ad lampad. reginæ.* Mag. rot. pip. temp. Hen. II., *ibid.*

(*r*) *Viccomes Berkesaire, xvi l. pro cappâ reginæ.* Mag. rot. pip. 19; 22 Hen. II., *ibid.*

Civitas Lund. cordubario reginæ xx s. Mag. rot. 2 Hen. II.; Madox. Exch. 419.

(*s*) *Pro robâ ad opus reginæ quater xxi l. & vi s. viii d.* Mag. rot. 5 Hen. II.

(*t*) *Solere aiunt barbaros reges Perarum ac Syrorum — uzoribus civitates attribuere, hoc modo; hæc civitas mulieri redimiculum præbeat, hæc in collum, hæc in crines, &c.* Cic. in Verrem. lib. 3, cap. 33.

(*u*) See Madox. Disceptat. epistolar. 74; Pryn. Aur. Reg. Append. 5.

(*x*) Lib. 2, c. 26.

(*y*) Mr. Prynne, with some appearance of reason, insinuates that their researches were very superficial. Aur. Reg. 125.

petition of his queen, Henrietta Maria, issued out his writ(z) for levying it: but afterwards purchased it of his consort at the price of ten thousand pounds; finding it, perhaps, too trifling and troublesome to levy. And when afterwards, at the Restoration, by the abolition of the military tenures, and the fines that were consequent upon them, the little that legally remained of this revenue was reduced to almost nothing at all, in vain did Mr. Prynne, by a treatise which does honour to his abilities as a painstaking and judicious writer, endeavour to excite queen Catherine to revive this antiquated claim.

Another ancient perquisite belonging to the queen consort, mentioned by our old writers(a), and on that account only worth notice, is this: that on the taking of a whale on the coasts, which is a royal fish, it shall be divided between the king and queen; the head only being the king's property, and the tail of it the queen's. "*De sturgione observetur, quod rex illum habebit integrum: de balend vero sufficit, si rex habeat caput, et regina caudam*"(b).

[* 261] *But further: though the queen is in all respects a subject, yet, in point of the security of her life and person, she is put on the same footing with the king. It is equally treason (by the statute 25 Edw. 3) to compass or imagine the death of our lady the king's companion, as of the king himself: and to violate, or defile the queen consort, amounts to the same high crime; as well in the person committing the fact, as in the queen herself, if consenting. A law of Henry VIII.(c) made it treason also for any woman, who was not a virgin, to marry the king without informing him thereof: but this law was soon after repealed(d), it trespassing too strongly, as well on natural justice, as on female modesty. If, however, the queen be accused of any species of treason, she shall (whether consort or dowager) be tried by the peers of parliament, as queen Ann Boleyn was in 28 Henry 8.

The husband of a queen regnant, as prince George of Denmark was to queen Anne, or as the late prince consort(e) was to her majesty queen Victoria, is her subject; and may be guilty of high treason against her: but, in the instance of conjugal infidelity, he is not subjected to the same penal restrictions. For which the reason seems to be, that if a queen consort is unfaithful to the royal bed, this may debase or bastardize the heirs to the crown; but no such danger can be consequent on the infidelity of the husband to a queen regnant.

A queen dowager is the widow of the king, and as such enjoys most of the privileges belonging to her as queen consort. But it is not high treason to conspire her death, or to violate her chastity, for

[* 262] the same reason as was *before alleged, because the succession to the crown is not thereby endangered. Yet still, *pro dignitate regali*, no man can marry a queen dowager without special licence from the king, on pain of forfeiting his lands and goods. This sir Edward Coke(f) tells us was enacted in parliament in 6 Hen. 6, though the statute be not in print(g). But

(z) 19 Rym. Feod. 721.

(a) Bracton, l. 3, c. 8; Britton, c. 17; Flet. l. 1, cc. 45 & 46.

(b) See Pryn. Aur. Reg. 127.

(c) Stat. 38 Hen. 8, c. 21.

(d) By the 1 Edw. 6, c. 12, which abrogated all treasons created since 25 Edw. 3.

(e) See 3 & 4 Vict. cc. 1 & 2, by which his late royal highness prince Albert was natural-

ised into this realm, without the restrictions provided by 1 Geo. 1, st. 2, c. 4, subject only to the condition of taking the oaths of allegiance and supremacy.

(f) 2 Inst. 18. See Riley's Plac. Parl. 672.

(g) What gave rise to this statute (if it ever were in fact an act of the legislature) was the marriage of Catherine mother of Henry VI. to Owen Tudor, a private Welsh gentleman.

she, though an alien born, shall still be entitled to dower after the king's demise, as no other alien is^(h). A queen dowager, when married again to a subject, loses not her regal dignity, as peeresses dowager do their peerage when they marry commoners. For Catharine, queen dowager of Henry V., though she married a private gentleman, Owen ap Meridith ap Theodore, commonly called Owen Tudor: yet, by the name of Catharine queen of England, maintained an action against the bishop of Carlisle. And so, the queen dowager of Navarre marrying with Edmond earl of Lancaster, brother to king Edward I., maintained an action of dower (after the death of her second husband) by the name of queen of Navarre⁽ⁱ⁾.

The prince of Wales or heir apparent to the crown, and also his royal consort, and the princess royal, or eldest daughter of the king, are likewise peculiarly regarded by the laws. For, by statute 25 Edw. 3, to compass or conspire the death of the former, or to violate the chastity of either of the latter, are as much high treason as to conspire the death of the king, or violate the chastity of the queen. And this upon the same reason as was before given; because the prince of Wales is next in succession to the crown, and to violate his *wife might taint the blood royal with bastardy; and the eldest daughter of the king is sole heiress to the crown, on failure of issue male, and therefore more respected by the laws than any of her younger sisters; insomuch that upon this, united with other (feudal) principles, while our military tenures were in force, the king might levy an aid for marrying his eldest daughter, and her only. The heir apparent^(k) to the crown is usually made prince of Wales and earl of Chester, by special creation and investiture; and if born after his father's accession to the throne he is by inheritance, peculiar in its nature^(l), duke of Cornwall.

In Co. Litt. 183, Lord Coke refers to this act as 8 Hen. 6, No. 7, but in 2 Inst. 18 as 6 Hen. 6, No. 41. In Riley's Plac. Parl. it is called 2 Hen. 6. In Harg. Co. Litt. p. 183, its existence as a statute is doubted.

(h) Co. Litt. 81 b.

(i) 2 Inst. 50.

(k) When the first prince of Wales was created, it was upon Edward, the second son of Edward I., and not upon his eldest son Alphonso, that the new title was conferred; but Alphonso dying without issue, the prince of Wales became heir apparent to the crown, and thenceforth the title has never been conferred on any but the eldest sons and eldest daughters of the monarch. Mary and Elizabeth were created princesses of Wales by their father Henry VIII., each being at the time (the latter after the illegitimation of Mary) heiress presumptive to the crown.

(l) In *Clayton v. Attorney-General*, 1 Coop. R. (temp. Lord Cottenham), 125-8, Lord Brougham observes as follows:—"The duchy of Cornwall was created by Edward III. for the Black Prince in the eleventh year of his reign, by a charter made in parliament, and having the force of a statute, as was solemnly adjudged in the *Prince's case*, 8 Rep. 1. The species of succession is of a singular nature. The duchy vests in the king's eldest son and heir apparent of the crown at

the instant of his birth, and without gift or creation; it vests in him, too, according to the sounder opinion, as if he were of full age at his birth, and as if minority could no more be predicated of him than of the sovereign himself. Lord Coke, indeed, has said that only the first-born son takes the duchy, and that on his decease without issue the second or other son cannot succeed. But this has been refuted by Lord Hardwicke in *Lomas v. Holmden*, 1 Ves. Sen. 295, referring to the fact of Henry VIII. being duke of Cornwall after the death of his brother prince Arthur; and to Charles I. (then prince Charles) having the duchy after prince Henry's death. Yet still the shifting of the title is of a very peculiar nature. For if the crown devolves upon the duke of Cornwall having no son, there ceases to be a duke, and then the duchy is in the crown. But at any moment a son may be born; his birth divests the duchy; and the duke then holds it subject to the double contingency of his own and his father's death. See also Seld. Tit. Hon. 2, 5.

"The duchy of Cornwall," says Lord Abinger (*Jewison v. Dyson*, 9 M. & W. 588), "is indeed a very peculiar tenure. It only exists when there is the eldest son of a king born after he becomes reigning king. He alone can enjoy it, and the moment he becomes king it ceases and is absorbed in the crown."

[* 264] *The rest of the royal family may be considered in two different lights, according to the different senses in which the term "royal family" is used. The larger sense includes all those who are by ^{Younger sons} ~~and daughters.~~ any possibility inheritable to the crown. Such, before the Revolution, were all the descendants of William the Conqueror; who had branched into an amazing extent, by intermarriages with the ancient nobility. Since the Revolution and Act of Settlement, it means the protestant issue of the princess Sophia; which in process of time may possibly be as largely diffused. The more confined sense includes only those, who are in a certain degree of propinquity to the reigning prince, and to whom therefore the law pays an extraordinary regard and respect: but, after that degree is past, the relations of the sovereign fall into the rank of ordinary subjects, and are seldom considered any further, unless called to the succession upon failure of the nearer lines. For, though collateral consanguinity is regarded indefinitely, with respect to inheritance or succession, yet it is, and can only be regarded, within some certain limits, in any other respect, by the natural constitution of things and the dictates of positive law(*m*).

The younger sons and daughters of the king, and other branches of the royal family, who are not in the immediate line of succession, were therefore little further regarded by the ancient law, than to give them, to a certain degree, precedence before all peers and public officers, as well ecclesiastical as temporal. This is done by the statute 31 Hen. 8, c. 10, which enacts, that no person, [* 265] except the king's children, shall presume to sit or have *place at the side of the cloth of estate in the parliament chamber; and that certain great officers therein named shall have precedence above all dukes, except only such as shall happen to be the king's son, brother, uncle, nephew (which sir Edward Coke(*n*) explains to signify grandson or *nepos*), or brother's or sister's son. Therefore, after these degrees are past, peers or others of the blood royal are entitled to no place or precedence except what belongs to them by their personal rank or dignity. Which made sir Edward Walker complain(*o*), that by the hasty creation of prince Rupert to be duke of Cumberland, and of the earl of Lennox to be duke of that name, previous to the creation of king Charles's second son, James, to be duke of York, it might happen that their grandsons would have precedence of the grandsons of the duke of York.

Indeed, under the description of the king's children, his grandsons are held to be included, without having recourse to sir Edward Coke's interpretation of ^{Grandsons.} nephew: and therefore when his late majesty king George II. created his grandson Edward, the second son of Frederick prince of Wales deceased, duke of York, and referred it to the house of lords to settle his place and precedence, they certified(*p*) that he ought to have place next to the then duke of Cumberland, the king's youngest son; and that he might have a seat on the left hand of the cloth of estate. But when, on the accession of king George III., those royal personages ceased to take place as children, and ranked only as the brother and uncle of the king, they also left their seats on the side of the cloth of estate: so that when the duke of Gloucester, his then majesty's second brother, took his seat in the house of peers(*q*),

(*m*) See Blackstone's Essay on Collateral Consanguinity, Law Tracts, 4to. Oxon. 1771, pp. 151. *et seq.*

(*n*) 4 Inst. 362.

(*o*) Tracts, p. 301.

(*p*) Lords' Journ. 24 Apr. 1760.

(*q*) Lords' Journ. 10 Jan. 1765.

he was placed on the upper end of the earls' bench (on which the dukes usually sit) next to his royal highness the duke of York. And in 1718, upon a question referred to all the *judges by king George I., it was resolved by [*266] the opinion of ten against the other two(r), that the education and care of all the king's grandchildren while minors, belonged of right to his majesty as king of this realm, even during their father's life(s). And they all agreed, that the care and approbation of their marriages, when grown up, belonged to the king their grandfather. The judges also have more recently concurred in opinion(t), that this care and approbation extend to the presumptive heir of the crown; though to what other branches of the royal family the same extended they did not find precisely determined. The most frequent instances of the crown's interposition go no further than nephews and nieces(u); but examples are not wanting of its reaching to more distant collaterals(x). And the statute 6 Hen. 6, before mentioned, which prohibited the marriage of a queen dowager without the consent of the king, assigns this reason for it: because the "disparagement" of the queen "shall give greater comfort and example to other ladies of estate, who are of the blood royal, more lightly to disparage themselves(y)." Therefore by the statute 28 Hen. 8, c. 18, (repealed among other statutes of treasons, *by 1 Edw. 6, c. 12,) it was made high treason for any man to contract marriage with the [*267] king's children or reputed children, his sisters or aunts *ex parte paterna*, or the children of his brethren or sisters; being exactly the same degrees, to which precedence is allowed by the statute 31 Hen. 8, before mentioned. And now, by statute 12 Geo. 3, c. 11(z), no descendant of the body of king George II. (other than the issue of princesses married into foreign families) is capable of contracting matrimony, without the previous consent of the king signified under the great seal; and any marriage contracted without such consent is void. Provided, that such of the said descendants, as are above the age of twenty-five, may after a twelvemonth's notice, given to the king's privy council, contract and solemnise marriage without the consent of the crown; unless both houses of parliament shall, before the expiration of the said year, expressly declare their disapprobation of such intended marriage. And all persons solemnising, assisting, or being present at any such prohibited mar-

(r) 11 St. Tr. 295.

(s) Fortesc. 401—440.

(t) Lords' Journ. 28 Feb. 1772.

(u) See (besides the instances cited in Fortescue) for brothers and sisters: under king Edward III., 4 Rym. 392, 408, 411, 501, 508, 512, 549, 683; under Henry V., 9 Rym. 710, 711, 741; under Edward IV., 11 Rym. 564, 565, 590, 601; under Henry VIII., 13 Rym. 249, 423; under Edward VI., 7 St. Tr. 3, 8. For nephews and nieces: under Henry III., 1 Rym. 852; under Edward I., 2 Rym. 489; under Edward III., 5 Rym. 561; under Richard II., 7 Rym. 264; under Richard III., 12 Rym. 282, 244; under Henry VIII., 15 Rym. 26, 81.

(z) To great nieces: under Edward II., 8 Rym. 575, 644. To first cousins: under Edward III., 5 Rym. 177. To second and third cousins: under Edward III., 5 Rym. 729; under Richard II., 7 Rym. 225; under Henry

VI., 10 Rym. 322; under Henry VII., 12 Rym. 529; under queen Elizabeth, Camd. Ann. A. D. 1562. To fourth cousins: under Henry VII., 12 Rym. 329. To the blood royal in general: under Richard II., 7 Rym. 787.

(y) Ril. Plac. Parl. 672.

(2) This act was passed in consequence of the marriages of the king's brothers, the dukes of Gloucester and Cumberland, the former to the dowager-countess of Waldegrave, the latter to Mrs. Horton, daughter of Lord Irnham.

For the old doctrine as to the marriages of the royal family, the student is referred to the above-mentioned opinion of the judges (Fortesc. 401—440; St. Tr. xv. 1195). See also the debates which took place, and the protests of the dissentient lords, on the Royal Marriage Act (12 Geo. 3, c. 11; Parl. Deb. vol. xvii., and Journ. of the House of Lords, 3rd March, 1772).

riage, shall incur the penalties of the statute of *præmunire*(a). The effect of this statute is to prohibit and to annul marriages contracted or solemnised in violation of its provisions whether within the realm of England or without(b).

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*CHAPTER V.

THE COUNCILS BELONGING TO THE SOVEREIGN.

IN order to assist the sovereign in the discharge of his duties, the maintenance of his dignity, and the exertion of his prerogative, our law has assigned him a diversity of councils to advise with.(76)

1. The parliament.

1. The first of these is the high court of parliament, whereof we have already treated(a).

2. Secondly, the peers of the realm are by their birth hereditary counsellors of the crown, and may be called together by the sovereign to impart their advice in all matters of importance to the realm, either in time

2. The peers.

of parliament, or when there is no parliament in being(b). Accordingly, Bracton(c), speaking of the nobility of his time, says they might probably be called "*consules, a consulendo; reges enim tales sibi associant ad consulendum.*" And in our law books(d), it is laid down, that peers are created for two reasons: 1. *Ad consulendum*, 2. *Ad defendendum regem*: on which account the law gives them certain great and high privileges: such as freedom from arrest, &c., even when no parliament is sitting: because it intends, that

(a) See also stat. 3 & 4 Vict. c. 52, s. 4.

(b) *The Sussex Peerage*, 11 Cl. & F. 85, where the facts were as under:—In the year 1793 a marriage had been solemnised according to the liturgy and by a minister of the Church of England, between his late Royal Highness the Duke of Sussex, the fifth son of George III., and Lady Augusta Murray, daughter of the earl of Dunmore, both then resident at Rome. The celebration of the ceremony was preceded by a written contract of marriage signed by both parties. Shortly afterwards they returned to England, where the ceremony was again performed according to the same rites. Lady Augusta died in 1830, leav-

ing sir Augustus D'Este and a daughter issue of the marriage. After the death of the duke of Sussex a claim of the dukedom by sir Augustus D'Este was disallowed, upon the ground stated in the text, that the Royal Marriage Act extends to marriages by any descendants of George II., though contracted and solemnised *bona fide* out of Great Britain, and beyond the limits of British jurisdiction.

(a) *Vide supra*, chap. ii.

(b) Co. Litt. 110.

(c) L. 1, c. 8.

(d) *Nevil's Case*, 7 Rep. 84; *Countess of Shrewsbury's Case*, 12 Rep. 96.

(76) Under the government of the United States the heads of the several departments are frequently convened for the purpose of a joint consultation upon important measures. The president may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices. U. S. Const., art. 2, § 2. The heads of the departments consist of the secretaries of state, of the treasury, of war, of the navy, of the interior, of the attorney-general, and of the postmaster-general. These joint consultations are usually called "cabinet meetings." But the cabinet as a body is not a necessary part of our constitutional system of government, and their opinions have such influence upon the president as he may judge proper. As the president is the chief executive, he is considered responsible for the acts of the various secretaries, who are regarded as executive agents, and their acts are regarded, in law, as his acts. *Wilcox v. Jackson*, 18 Pet. 498, 518.

they are always assisting the sovereign with their counsel for the commonwealth, or keeping the realm in safety by their prowess and valour.

Instances of conventions of the peers, to advise the crown, were in former times frequent: though the practice *of convening them specially for this purpose has fallen into disuse, by reason of the more regular [*270] meetings of parliament. Sir Edward Coke(e) gives us an extract of a record, 5 Hen. 4, concerning an exchange of lands between the king and the earl of Northumberland, wherein the value of each was agreed to be settled by advice of parliament (if any should be called before the feast of saint Lucia), or otherwise by advice of the grand council of peers which the king promises to assemble before the said feast, in case no parliament shall be called. Other instances of this kind of meeting are to be found under our ancient kings: though this formal method of convoking the peers had been so long left off, that when king Charles I. in 1640, issued out writs under the great seal to call a council of all the peers of England to attend his majesty at York, previous to the meeting of the long parliament, the earl of Clarendon(f) mentions it as a new invention, not before heard of; that is, as he explains himself, so old, that it had not been practised in some hundreds of years. But though there had not so long before been an instance, nor has there been any since, of assembling them in so solemn a manner, yet in cases of emergency, our princes have at several times thought proper to call for and consult as many of the nobility as could easily be got together: as was particularly the case with king James II., after the landing of the prince of Orange; and with the prince of Orange himself, before he summoned that convention parliament, which afterwards called him to the throne.

Besides this general meeting, it has long been looked upon as the right of each particular peer of the realm to demand an audience of the sovereign, and, with decency and respect, to make an exposition of such matters as may be judged of importance to the public weal. And therefore, in the reign of Edward II., it was made an article of impeachment in parliament against the two *Hugh Spencers, father and son, for which they were banished the kingdom, "that they by their evil covin would not suffer the [*271] great men of the realm, nor the king's good counsellors, to speak with or come near the king, or that the king might speak with them: but only in the presence or hearing of the said Hugh the father and Hugh the son, or one of them, and at their will, and according to such things as pleased them"(g).

3. A third council belonging to the king is composed, according to sir Edward Coke(h), of his judges of the courts of law, for law matters. And this appears in our statutes(i), so that when the king's council is mentioned
 2. The judges. generally, it must be defined, particularized, and understood *secundum subjectam materiam*: and if the subject be of a legal nature, then by the king's council is understood his council for matters of law; namely, his judges. Therefore when by statute 16 Ric. 2, c. 5, it was made a high offence to import into this kingdom any papal bulls, or other processes from Rome; and it was enacted, that the offenders should be attached by their bodies, and brought before the king and his "council" to answer for such offence; here by

(e) 1 Inst. 110.
 (f) Hist. b. 2.
 (g) 4 Inst. 58.

(h) 1 Inst. 110.
 (i) 14 Edw. 3, c. 5; 18 Edw. 3, st. 4.

the expression king's "council," were understood the king's judges of his courts of justice, the subject-matter being legal(*j*).

4. But the principal council belonging to the king is his privy council. And this, according to sir Edward Coke's description of it(*k*), is a noble, honourable,

and reverend assembly, of the king and such as he wills to be of his privy council, in the king's court or palace. The king's will is the sole constituent of a privy counsellor; and this also regulates their number, which of ancient time was twelve or thereabouts. Afterwards it increased [**272*] to so *large a number, that it was found inconvenient for secrecy and dispatch; and therefore king Charles II. in 1679 limited it to thirty:

whereof fifteen were to be the principal officers of state, and counsellors *virtute officii*; and the other fifteen were composed of ten lords and five commoners of the king's choosing(*l*). But since the time of Charles II. the number of the privy council has been much augmented, and now continues indefinite.

Privy counsellors are made by the sovereign's nomination, without either patent or grant; and, on taking the necessary oaths, they become immediately privy counsellors during the life of the king who chooses them, but subject to removal at his discretion. Of these some few only being actually honoured with the confidence of the sovereign are summoned to attend meetings of the council. The "cabinet"(*m*) consists exclusively of members of this high council; to it the lord president(*n*) of the council invariably belongs, and by it the government of the country is conducted.

As to the qualifications of members to sit at this board; any natural-born subject of England is capable of being a member of the privy council on making the declaration and taking the oath, respectively prescribed by 9 Geo. 4, c. 17 and 21 & 22 Vict. c. 48.* However, in order to prevent foreigners from insinuating themselves into this important trust, as happened in the reign of king William in many instances, it was enacted by the act of settlement(*o*), that no person born out of the dominions of the crown of England, *unless born of English parents, even though naturalised by parliament, shall be capable of being of the privy council.

The duty of a privy counsellor appears from the oath of office(*p*), which consists of seven articles: 1. To advise the king according to the best of his cunning and discretion. 2. To advise for the king's honour and good of the public, without partiality through affection, love, meed, doubt, or dread. 3. To keep the king's counsel secret. 4. To avoid corruption. 5. To help and strengthen the execution of what shall be there resolved. 6. To withstand all persons who would attempt the contrary.

(*j*) 3 Inst. 125. As to the right of the crown to consult the judges extra-judicially, see Broom's Const. L. 148, *et seq.*

(*k*) 4 Inst. 58.

(*l*) Temple's Mem. Pt. 3.

(*m*) Each member of which is usually invested with some important office in the ministry.

(*n*) An officer who, by the statute 31 Hen. 8, c. 10, s. 4, had precedence next after the lord chancellor and lord treasurer. Lord Coke

says (4 Inst. 55): "There is, and of ancient time has been, a president of the council."

"This office was never granted but by letters patent under the great seal, *durante bene placito*, and is very ancient; for John bishop of Norwich was president of the council, *in anno septimo regis Johannis. Dormivi tamen hoc officium regnante magna Elisabetha.*"

(*o*) Stat. 12 & 13 Will. 3, c. 2; 7 & 8 Vict. c. 66, s. 6.

(*p*) 4 Inst. 54.

* The oath of allegiance to be taken by privy counsellors is now such as prescribed by the Promissory Oaths Act, 1868, 31 & 32 Vict. c. 72. See s. 14.

And lastly, in general, 7. To observe, keep, and do all that a good and true counsellor ought to do to his sovereign lord.

The functions of the privy council are twofold: 1st, political; 2ndly, magisterial and judicial.

By those members of the privy council, designated the cabinet, the government of the country and the general administration of affairs are—subject to the approval of the sovereign—in fact, conducted. The cabinet, accordingly, consists of the highest officers of state. 1. The first lord of the treasury (anciently, the lord treasurer), who has been in the first instance entrusted with the formation of the ministry, and who, during its existence, continues to be its “premier” and head. 2. The lord chancellor. 3. The president of the council(*q*). 4. The lord privy seal(*r*). 5. The chancellor of the exchequer, who is especially charged with the management of the national finances. 6. The home secretary(*s*), who exercises a *general surveillance over the administration of the law and the exercise of the royal prerogative of mercy in regard to convicted criminals, and likewise superintends the magistracy and police. 7. The foreign secretary, who has exclusive charge of the interests of the British empire abroad, and extends protection to subjects of the crown in foreign countries. 8. The secretary for the colonies. 9. The secretary for India(*t*). 10. The secretary for war(*u*). 11. The first lord of the admiralty. 12. The president of the board of trade. 13. The president of the poor law board. 14. The postmaster-general; and 15, the chancellor of the duchy of Lancaster, an officer of high antiquity, whose duties, however, except such as are legal and are performed by his deputy, the vice-chancellor, have become at the present day almost nominal. [* 274]

Although the cabinet usually consists of the above-mentioned officials, it does not always exclusively do so, for the holding of office under the crown is not essential to the constitution of a member of the cabinet.

Of the above members of the government, two it may be noticed preside over particular departments, which are technically to be regarded as committees of the privy council, viz.: 1. the committee “appointed for the consideration of matters relating to trade and foreign plantations,” the functions of which for furthering our foreign and internal commerce are very miscellaneous and important(*x*); and 2. the committee of the privy council on education, a board not possessing compulsory powers, but principally charged with the distribution of *money voted by parliament for purposes of public educa- [* 275]

tion. Irrespective of the political functions which devolve upon that section of the privy council charged specifically with the government of the country, this council is occasionally summoned to meet in the presence of the sovereign for

(*q*) *Supra*, note (*n*).

(*r*) “This officer has the custody of the privy seal, but no power to put it to any grant without royal warrant. The privy seal derives its name from the secrecy with which it was used. The difference between it and the great was, that the privy seal was attached to grants of favours—as charters, pardons, &c.—and the great seal to grants of rights.” Bennett’s Const. Hist. Eng. 111.

(*s*) As to the office of secretary of state generally, its origin and functions, see *per*

Lord Camden, *Entick v. Carrington*, 19 St. Tr. 1046, *et seq.*

(*t*) *Ante*, p. 129.

(*u*) See stat. 26 & 27 Vict. c. 12.

(*x*) See, for instance, the following statutes:—25 & 26 Vict. c. 63; 17 & 18 Vict. c. 104; 16 & 17 Vict. c. 129 (concerning merchant ships and seamen); 14 & 15 Vict. c. 64 (concerning railways); 25 & 26 Vict. c. 89 (concerning trading companies); 13 & 14 Vict. c. 104 (concerning copyright of designs).

the preparing of orders which are afterwards made public by proclamation and for other purposes, such as the summoning, proroguing, and dissolving of parliament, which when thus accomplished are the acts of the king or queen in council.

2ndly. The privy council has power to inquire into all offences against the government, and to commit the offenders to safe custody for trial. But their jurisdiction herein is only to inquire, not to punish: and the persons committed by them are entitled to their *habeas corpus* by statute 16 Car. 1, c. 10, s. 8, as much as if committed by an ordinary justice of the peace(y). By this same statute, the court of starchamber, and the court of requests(z), both of which consisted of privy counsellors, were dissolved; and it was declared(a) illegal for them to take cognizance of any matter of property, belonging to the subjects of this kingdom.

From all the dominions of the crown, excepting Great Britain and Ireland, an appeal (either as of right or by leave obtained on petition) lies in the last resort to the sovereign in council, this appellate tribunal, or judicial committee of the privy council, being now constituted conformably to the requirements of the statute law(b) and exercising an authority derived immediately [* 276] *therefrom. The judicial committee hear the allegations and proofs adduced by the litigating parties, and make their report to the sovereign, by whom judgment in the case *sub judice* is finally given.

In regard to decisions of the ecclesiastical courts, except such as concern testamentary and matrimonial causes, to decisions of the admiralty and vice-admiralty courts, to orders of the Lord Chancellor in matters of lunacy or idiocy(c), being a special flower of the prerogative; with regard to these decisions and orders, although they may eventually involve questions of property, the privy council has cognizance, being the court of appeal in such cases; or rather, the appeal lies to the sovereign in council. Should also a question arise between two of our dependencies concerning the extent of their charters and the like, the sovereign in council exercises original jurisdiction therein, upon the principle of feudal sovereignty. And so likewise should any person claim an island or a province, in the nature of a feudal principality, by grant from the crown, the determination of that right belongs to the sovereign in council: as in the case of the earl of Derby with regard to the Isle of Man in the reign of queen Elizabeth, and the earl of Cardigan and others, as representatives of the duke of Montague, with relation to the island of St. Vincent in 1764. Further, upon the judicial committee of the privy council, has been imposed by statutory pro-

(y) *Darnel's Case* and Note thereto, Broom's Const. L. 162, 207.

(z) As to which see 4 Inst. c. 9.

(a) S. 5.

(b) 8 & 4 Will. 4, c. 41; 6 & 7 Vict. c. 38, s. 1; 14 & 15 Vict. c. 83, s. 15; 5 Vict. c. 5, s. 24.

For the hearing of lay as contra-distinguished from ecclesiastical appeals, the judicial committee of the privy council is composed of the president of the council, the lord chancellor, the lords justices and master of the rolls, the vice-chancellors, the chief justices of the courts of Queen's Bench and Common Pleas, the lord chief baron of the Exchequer, the judges of the probate court and of the high court of admiralty, being members of

the privy council; all members of the privy council who have held any of the above offices; and two other privy counsellors appointed by the crown. Of these members three (exclusive of the lord president) are required to be present at the hearing of a cause. There may also be two Indian assessors appointed under 8 & 4 Will. 4, c. 41, s. 80.

As to the constitution of the judicial committee on the hearing of appeals in ecclesiastical cases, see 2 & 3 Will. 4, c. 92, s. 3; Cripp's Law of the Church, 4th ed. p. 45.

(c) 3 P. Wms. 108. Very few such appeals however, have been brought. Macpherson Priv. Coun. Pract. 222.

visions the duty of adjudicating upon *applications for prolonging the term of patents for new inventions(*d*), and of making orders under the copyright acts in certain cases(*e*). [*277]

Members of the privy council do not now enjoy any privilege except that of honorary precedence hereinafter noticed(*f*). Though formerly a special protection against attempts and conspiracies to destroy their lives was extended to them by statute(*g*).
Privilege of Members.

The dissolution of the privy council depends upon the sovereign's pleasure; and he may, whenever he thinks proper, discharge any particular privy counsellor, or he may discharge the entire council, and appoint another. By the common law also this high council was dissolved *ipso facto* by the demise of the sovereign; as deriving all its authority from him. But now, to prevent the inconveniences of having no council in being at the accession of a new prince, it is enacted by statute 6 Ann. c. 7, that the privy council shall continue for six months after the demise of the crown, unless sooner determined by the successor.
How dissolved.

* CHAPTER VI.

[*278]

THE SOVEREIGN'S DUTIES.

I PROCEED next to the duties incumbent on the sovereign by our constitution; in consideration of which duties his dignity and prerogative are established by the laws of the land: it being a maxim in the law, that protection and subjection are reciprocal(*a*). And these reciprocal duties are what, I apprehend, were meant by the convention in 1688, when they declared king James had broken the original contract between king and people(*b*). But however, as the terms of that original contract were in some measure disputed, being alleged to exist principally in theory, and to be only deducible by reason and the rules of natural law; in which deduction different understandings might very considerably differ; it was, after the Revolution, judged proper to declare these duties expressly, and to reduce that contract to a plain certainty. So that whatever doubts might be formerly raised by enquiring and scrupulous minds about the existence of such an original con-

(*d*) Macph. Priv. Coun. Pract. chap. 18.

(*e*) 5 & 6 Vict. c. 45, s. 5.

(*f*) *Post*, chap. xii.

(*g*) By stat. 8 Hen. 7, c. 14, if any of the king's servants of his household conspired or imagined to take away the life of a privy counsellor, it was felony, though nothing were done upon it. The reason of making this statute, sir Edward Coke tells us (8 Inst. 88), was because such a conspiracy had just before been made by some of king Henry VII.'s household servants, and great mischief was like to have ensued thereupon. This statute extended only to the king's menial servants. But the statute 9 Ann. c.

18, went further, and enacted that any person unlawfully attempting to kill, or unlawfully assaulting and striking or wounding any privy counsellor in the execution of his office, should be guilty of felony. This statute was made upon the daring attempt of the sieur Guiscard, who stabbed Mr. Harley, afterwards earl of Oxford, with a penknife, when under examination for high crimes in a committee of the privy council. Both of the above-mentioned statutes were repealed by the 9 Geo. 4, c. 81.

(*a*) 7 Rep. 5.

(*b*) *Ante*, p. 248.

tract, they must now entirely cease with regard to every prince who has reigned since the year 1688.

The principal duty of the sovereign is to govern his people according to law.⁽⁷⁷⁾ *Nec regibus infinita aut libera potestas*, was the constitution of our German ancestors on the continent^(c). And this is not only consonant to the principles of nature, of liberty, of reason, and of society, *but has always been esteemed an express part of the common law of England, even when prerogative was at the highest. [*279] "The king," says Bracton^(d), who wrote under Henry III., "ought not to be subject to man, but to God, and to the law; for the law maketh the king. Let the king therefore render to the law, what the law has invested in him with regard to others; dominion and power: for he is not truly king, where will and pleasure rules, and not the law." And again^(e), "the king also hath a superior, namely God, and also the law, by which he was made a king." Thus Bracton: and Fortescue also^(f), having first well distinguished between a monarchy absolutely and despotically regal, which is introduced by conquest and violence, and a political or civil monarchy, which arises from mutual consent (of which last species he asserts the government of England to be), immediately lays it down as a principle, that "the king of England must rule his people according to the decrees of the laws thereof: insomuch that he is bound by an oath at his coronation to the observance and keeping of his own laws." But, to obviate all doubts and difficulties concerning this matter, it was expressly declared by statute 12 & 13 Wm. 3, c. 2, that "the laws of England are the birthright of the people thereof; and all the kings and queens who shall ascend the throne of this realm ought to administer the government of the same according to the said laws: and all their officers and ministers ought to serve them respectively according to the same: and therefore all the laws and statutes of this realm, for securing the established religion, and the rights and liberties of the people thereof, and all other laws and statutes of the same now in force, are ratified and confirmed accordingly."

(c) Tac. Germ. c. 7.

(d) L. 1, c. 8.

(e) L. 2, c. 16, s. 8.

(f) Cc. 9 & 84.

(77) The executive power of the United States government is vested in the president, who holds his office during the term of four years. U. S. Const. art. 2, § 1. At stated times he receives for his services a compensation which cannot be increased nor diminished during the period for which he was elected; and he cannot, within that period, receive any other emolument from the United States, or any of them. *Ib.* He is commander-in-chief of the army and navy of the United States, and of the militia of the several states, when called into the actual service of the United States. *Ib.* § 2. He may grant reprieves and pardons for offenses against the United States, except in case of impeachment. *Ib.* He has power, by and with the advice and consent of the senate, to make treaties, if two-thirds present concur; and by and with the advice and consent of the senate he appoints the principal judicial and other public officers of the government. He has power to fill vacancies in office which happen during the recess of the senate by granting commissions which expire at the end of the next session. *Ib.* It is his duty, from time to time, to give congress information of the state of the Union, and to recommend to their consideration such measures as he shall judge necessary and expedient. *Ib.* § 3. He may, on extraordinary occasions, convene both houses, or either of them. *Ib.* He also receives ambassadors and other public ministers; and is to take care that the laws be faithfully executed; and is required to commission all the officers of the United States. *Ib.* And he is liable to impeachment and removal from office. *Ib.* § 4.

As to the terms of the original contract between sovereign and people, these I apprehend to be now couched in *the coronation oath, which by the statute 1 Wm. & M. st. 1, c. 6, is to be administered to [*280] every king and queen, who shall succeed to the imperial crown of these realms, by one of the archbishops or bishops of the realm, in the presence of all the people; who on their parts do reciprocally take the oath of allegiance to the crown. This coronation oath is conceived in the following terms:

"The archbishop or bishop shall say, Will you solemnly promise and swear to govern the people of this kingdom of England, and the dominions thereto belonging, according to the statutes in parliament agreed on, and the laws and customs of the same?—The king or queen shall say, I solemnly promise so to do.—Archbishop or bishop. Will you to your power cause law and justice, in mercy, to be executed in all your judgments?—King or queen. I will.—Archbishop or bishop. Will you to the utmost of your power maintain the laws of God, the true profession of the gospel, and the protestant reformed religion established by law? And will you preserve unto the bishops and clergy of this realm, and to the churches committed to their charge, all such rights and privileges as by law do or shall appertain unto them, or any of them?—King or queen. All this I promise to do.—After this the king or queen, laying his or her hand upon the holy gospels, shall say, The things which I have here before promised I will perform and keep: So help me God: and then shall kiss the book."

This is the form of the coronation oath, as it is now prescribed by our laws; the principal articles of which appear to be at least as ancient as the Mirror of Justices(*g*), and even as the time of Bracton(*h*): but the wording of it was changed at the Revolution, because (as the statute alleges) the oath itself had been framed in doubtful words and expressions, with relation to ancient laws and constitutions at that time unknown(*i*). *However, in what form soever it be conceived, this is most indisputably a fundamental and [*281] original express contract; though doubtless the duty of protection is impliedly as much incumbent on the sovereign before coronation as after: in the same manner as allegiance to the sovereign becomes the duty of the subject immediately on the descent of the crown, before he has taken the oath of allegiance, or if he should never take it at all. This reciprocal duty of the subject will be considered in its proper place. At present we are only to observe, that in the

(*g*) Cap. 1, § 2.

(*h*) L. 8, tr. 1, c. 9.

(*i*) "In the old folio abridgment of the statutes, printed by Lettou and Machlinia in the reign of Edward IV. (*penes me*)," observes sir W. Blackstone (Commentaries, I. 285, 21st ed.), "there is preserved a copy of the old coronation oath; which, as the book is extremely scarce, I will here transcribe. *Ceo est le serement que le roy furre a soun coronement: que il gardera et meintenera les droites et les franchises de seynt esglise grauntes auncienment des droitz roys christiens d'Engleterre, et quil gardera toutes ses terres, honours et dignites droitureles et franks del coron du roialme d'Engleterre en tout maner denterie sans null maner damenuement, et les droites dispergez dilapidez ou perdues de la corone a*

soun poiain reappeller en launcien state, et quil gardera le peas de seynt esglise et al clergie et al peopie de bon accorde, et quil face faire en toutes ses jugementes ovel et droit justice ouz discretion et misericorde, et quil grauntera a tenure les leys et custumes du roialme, et a soun poiain les face garder et affirmer que les gentes du peopie avont faictes et eslees, et les maloeys leys et custumes de tout oustera, et ferme peas et establie al peopie de soun roialme en ceo garde esgardera a soun poiain; come Dieu luy aide. (Tit. sacramentum regie, fol. m. v.) Prynné has also given us a copy of the coronation oaths of Richard II. (Signal Loyalty, II. 246), Edward VI. (*ibid.* 251), James I., and Charles I. (*ibid.* 269)."

sovereign's part of this original contract are expressed all the duties that a monarch can owe to his people: *viz.*, to govern according to law; to execute judgment in mercy; and to maintain the established religion. And with respect to the latter of these three branches, we may further remark:—

I. That by the act of union with Scotland, 5 Ann. c. 8, two preceding statutes^(k) are recited and confirmed; the one of the parliament of Scotland, [*282] the other of the *parliament of England: which enact; the former, that every king at his accession shall take and subscribe an oath, to preserve the protestant religion and presbyterian church government in Scotland; the latter, that at his coronation he shall take and subscribe a similar oath, to preserve the settlement of the church of England within England, Ireland, Wales, and Berwick, and the territories thereunto belonging.

II. That by the act of union with Ireland^(l), the continuance and preservation of the united church of England and Ireland as the established church of those kingdoms “shall be deemed and taken to be an essential and fundamental part of the union; and that in like manner the doctrine, worship, discipline, and government of the church of Scotland shall remain and be preserved as the same are now established by law and by the acts for the union of the two kingdoms of England and Scotland.”

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*CHAPTER VII.

THE ROYAL PREROGATIVES.

It was observed in a former chapter^(a), that one of the principal bulwarks of civil liberty, or (in other words) of the British constitution, was the limitation of the sovereign's prerogative by bounds so certain and notorious, that it is impossible he should ever exceed them, without the consent of the people, on the one hand; or without, on the other, a violation of that original contract, which, in all states impliedly, and in ours most expressly, subsists between the prince and the subject. It will now be our business to consider this prerogative minutely; to demonstrate its necessity in general; and to mark out in the most important instances its particular extent and restrictions: from which considerations this conclusion will evidently follow, that the powers, which are vested in the crown by the laws of England, are necessary for the support of society; and do not trench any farther on our natural than is expedient for the maintenance of our civil liberties.

There cannot be a stronger proof of that genuine freedom, which is the boast of this age and country, than the power of discussing and examining with decency and respect, the limits of the sovereign's prerogative. A topic, which in some former ages was thought too delicate and sacred to be profaned by the pen of a subject. It was ranked among the *arcana imperii*; and, like the [* 284] mysteries *of the *bona dea*, was not suffered to be pried into by any but such as were initiated in its service: because perhaps the exer-

(k) 1 Will. & M. sess. 2, c. 2; 12 & 13 Will. 8, c. 2.

(l) Art. 5.

(a) Chap. 1. p. 168.

tion of the one, like the solemnities of the other, would not bear the inspection of a rational and sober inquiry. The glorious queen Elizabeth herself made no scruple to direct her parliaments to abstain from discoursing of matters of state(b); and it was the constant language of this favourite princess and her ministers, that even that august assembly "ought not to deal, to judge, or to meddle with her majesty's prerogative royal"(c). And her successor, king James I., who had imbibed high notions of the divinity of regal sway, more than once laid it down in his speeches, that "as it is atheism and blasphemy in a creature to dispute what the Deity may do, so it is presumption and sedition in a subject to dispute what a king may do in the height of his power: good christians (he adds) will be content with God's will, revealed in his word; and good subjects will rest in the king's will, revealed in his law"(d).

But, whatever might be the sentiments of some of our princes, this was never the language of our ancient constitution and laws. The limitation of the regal authority was a first and essential principle in all the Gothic systems of government established in Europe; though gradually driven out and overborne, by violence and chicane, in most of the kingdoms on the continent(e). We have seen, in the preceding chapter, the sentiments hereon of Bracton and Fortescue, at the distance of two centuries from each other. And sir Henry Finch, under Charles I., after the lapse of two centuries more, though he lays down the law of prerogative in very strong and emphatical terms, yet qualifies it with a general restriction, in regard to the liberties of the people. "The king hath a prerogative in all things that are not injurious to *the subject: for in them all it must be remembered, that the king's prerogative stretcheth not to the doing of any [*285] wrong"(f). *Nihil enim aliud potest rex, nisi id solum quod de jure potest(g).* And here we may remark, how widely the civil law differs from our own, with regard to the authority of the laws over the prince, or (as a civilian would rather have expressed it) the authority of the prince over the laws. It is a maxim of the English law, as we have seen from Bracton, that "*rex debet esse sub lege, quia lex facit regem*;" the imperial law will tell us, that, "*in omnibus imperatoris excipitur fortuna; cui ipsas leges Deus subjecit(h).*" We shall not long hesitate to which of them to give the preference, as most conducive to those ends for which societies were framed, and are kept together; especially as the Roman lawyers themselves seem to be sensible of the unreasonableness of their own constitution. "*Decet tamen principem,*" says Paulus, "*servare leges, quibus ipse solutus est(i).*" This is at once laying down the principle of despotic power, and at the same time acknowledging its absurdity.

By the word "prerogative" we usually understand that special pre-eminence, which the king has, over and above all other persons, and out of the ordinary course of the common law, in right of his regal dignity. It signifies, in its etymology (from *pras* and *rogo*) something that is required or demanded before, or in preference to, all others(k). And hence it

(b) D'Ewee, 479.

(c) *Ibid.* 645.

(d) King James's Works, 557, 581.

(e) See Allen on the Royal Prerogative, pp. 20-24.

(f) Finch. L. 84, 85.

(g) Bracton, l. 8, tr. 1, c. 9.

(h) Nov. 106, s. 2.

(i) Dig. 83, 1, 28.

(k) So in the inductive philosophy "prerogative instances are those which, by possessing singular and eccentric qualities, are primarily to be inquired into." (Bac. Nov. Org.) For other derivations of this word, see Thomas's edition of Co. Litt. i. 72, 90 b.

follows, that it must be in its nature singular and eccentric: that it can only be applied to those rights and capacities which the king enjoys alone, in contradistinction to others, and not to those which he enjoys in common with any [*286] of his *subjects; for if once any one prerogative of the crown could be held in common with the subject, it would cease to be prerogative any longer. And therefore Finch (l) lays it down as a maxim, that the prerogative is that law in case of the king, which is law in no case of the subject.

Prerogatives are either direct or incidental. The direct are such positive substantial parts of the royal character and authority, as are rooted in and spring from the sovereign's political person, considered merely by itself, without reference to any other extrinsic circumstance: as, the right of sending ambassadors, of creating peers, and of making war or peace. But such prerogatives as are incidental bear always a relation to something else, distinct from the sovereign's person; and are indeed only exceptions, in favour of the crown, to those general rules that are established for the rest of the community: such as, that an action will not lie against the king; that the king can never be a joint tenant; that his debt shall be preferred before a debt owing to any of his subjects. These and an infinite number of other instances, will better be understood, when we come regularly to consider the rules themselves, to which these incidental prerogatives are exceptions. And therefore we will at present only dwell upon the sovereign's substantive or direct prerogatives.

These substantive or direct prerogatives may again be divided into three kinds: being such as regard, first, the sovereign's royal character; secondly, his royal authority; and, lastly, his royal income. These are necessary, to secure reverence to his person, obedience to his commands, and an affluent supply for the ordinary expenses of government, without all of which it is impossible to maintain the executive power in due independence and vigour. Yet in every branch of this large and extensive dominion, our free constitution has interposed such [*287] reasonable checks *and restrictions, as may curb it from trampling on those liberties, which it was meant to secure and establish. The enormous weight of prerogative, if left to itself (as in arbitrary governments it is), threatens every moment to spread havoc and destruction among all the inferior movements; but when balanced and regulated (as with us) by its proper counterpoise, timely and judiciously applied, its operations are equable and certain; it invigorates the whole machine, and enables every part to answer the end of its construction.

In the present chapter we shall only consider the two first of these divisions, which relate to the sovereign's political character and authority; or, in other words, his dignity and regal power; to which last the name of prerogative is frequently narrowed and confined. The other division, which forms the royal revenue, will require a distinct examination; according to the known distribution of the feudal writers, who distinguish the royal prerogatives into the *majora* and *minora regalia*, in the latter of which classes the rights of the revenue are ranked. For, to use their own words, "*majora regalia imperii præ-eminentiam spectant; minora vero ad commodum pecuniarium immediate attinent; et hæc proprie fiscalia sunt, et ad jus fisci pertinent*" (m).

(l) Finch. L. 85.

(m) Peregrin. de jure fisc. l. 1, c. 1, num. 9.

First, then, of the royal dignity. Under every monarchial establishment, it is necessary to distinguish the prince from his subjects, not only by the outward pomp and decorations of majesty, but also by ascribing to him certain qualities, as inherent in his royal capacity, distinct from and superior to those of any other individual in the nation. For, though a philosophical mind will consider the royal person merely as one man appointed by mutual consent to preside over many others, and will pay him that reverence and duty which the principles of society demand, yet the mass of mankind may be apt to grow insolent and refractory, if taught to consider their prince as a man of no greater perfection than themselves. The law therefore ascribes to the sovereign, in his high political character, not only large powers and emoluments, which form his prerogative and revenue, but likewise certain attributes of a great and transcendent nature; by which the people are led to consider him with special reverence, and to pay him that respect, which may enable him with greater ease to carry on the business of government. This is what I understand by the royal dignity, the several branches of which we will now proceed to examine.

I. The law ascribes to the wearer of the crown the attribute of sovereignty or pre-eminence. "*Rex est vicarius*," says Bracton(n), "*et minister Dei in terrâ: omnis quidem sub eo est, et ipse sub nullo, nisi tantum sub Deo*"(o). He is said to have imperial dignity; and in charters before the Conquest is frequently styled *basileus* and *imperator*, the titles respectively assumed by the emperors of the east and west(p). His realm is declared to be an empire, and his crown imperial, by many acts of parliament, particularly the statutes 24 Hen. 8, c. 12, and 25 Hen. 8, c. 28(q); which at the same time declare the king to be the supreme head of the realm in matters both civil and ecclesiastical, and of consequence inferior to no man upon earth, dependent on no man, accountable to no man. Formerly there prevailed a ridiculous notion, propagated by the German and Italian civilians, that an emperor could do some things which a king could not (as the creation of notaries and the like), and that all kings were in some degree subordinate and subject to the emperor of Germany or Rome. The meaning therefore of the legislature, when it uses these terms "empire" and "imperial," and applies them to the realm and crown of England, is only to assert that our monarch is equally sovereign and independent within these his dominions, as any emperor is in his empire(r), and owes no kind of subjection to any other potentate upon earth(s). Hence it is, that no suit or action can be brought against the sovereign, even in civil matters, because no court can have jurisdiction over him. For all jurisdiction implies superiority of power: authority to try would be vain and idle, without an authority to redress; and the sentence of a court will be contemptible, unless that court has power to command the execution of it: but who, says Finch(t), shall command the king? Hence it is, likewise, that by law the person of the king is sacred, even though the measures pursued in his reign be completely tyrannical and arbitrary: for no jurisdiction upon earth has power to try him in a crim-

(n) L. 1, c. 8.

(o) *Ante*, p. 279.

(p) Seld. Tit. of Hon. I. 2.

(q) See also 24 Geo. 2, c. 24; 5 Geo. 3, c. 27.

(r) *Rex allegavit, quod ipse omnes libertates*

haberet in regno suo, quas imperator vindicabat in imperio. M. Paris, A. D. 1095.

(s) *Vide per Sir O. Bridgman, The Trials of the Regicides*, 5 St. Tr. 990.

(t) Finch. L. 83.

inal way; much less to condemn him to punishment. If any foreign jurisdiction had this power, as was formerly claimed by the pope, the independence of the kingdom would be no more: and if such a power were vested in any domestic tribunal, there would soon be an end of the constitution, by destroying the free agency of one of the constituent parts of the sovereign legislative power.(78)

Are then, it may be asked, the subjects of England totally destitute of remedy, in case the crown should invade their rights, either by private injuries, or public oppressions? To this we may answer, that the law has provided remedy in both cases.

And, first, as to private injuries: if any person has, in point of property or contract, a just demand upon the sovereign, such person must petition him in a superior court of law or in his court of chancery, where right (as a *matter of grace, though not upon compulsion(u)) will be done.(79) And this is entirely consonant to what is laid down by writers on natural law. "A subject," says Puffendorf(x), "so long as he continues a subject, hath no way to oblige his prince to give him his due, when he refuses it, though no wise prince will ever refuse to stand to a lawful contract." If, however, the sovereign gives his subject leave to bring an action against him, upon such contract, in his own court, the action itself proceeds in accordance with the rules of our municipal law, and has by a recent statute(y) been very closely assimilated to an ordinary suit. Although the end of such action is in theory not to compel the prince to observe the contract, but to persuade him to do so. As to personal wrongs; it is well observed by Mr. Locke(z)—"the harm which the sovereign can do in his own person not being likely to happen often, nor to extend itself far; nor being able, by his single strength, to subvert the laws, nor oppress the body of the people (should any prince have so much weakness and ill-nature as to endeavour to do it),—the inconveniency therefore of some particular mischiefs, that may happen sometimes, when a heady prince comes to the throne, are well recompensed by the peace of the public and security of the government, in the person of the chief magistrate being thus set out of the reach of danger."

Next, in cases of ordinary public oppression, where the vitals of the constitution are not attacked, the law has also assigned a remedy. For as a king cannot misuse his power, without the advice of evil counsellors, and the assistance of wicked ministers, these men

(u) Finch. L. 255.

(x) Law of N. and N. b. 8, c. 10.

(y) 23 & 24 Vict. c. 84. See further as to

the procedure by petition of right, *post*, vol. iii.

(z) On Gov. pt. 2, s. 205.

(78) "The president, vice-president, and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors." U. S. Const., art. 2, § 4. As to the mode of trial, and the judgment in such cases, *Ib.*, art. 1, § 3.

(79) A sovereign state, in its political capacity, cannot be sued in the courts of another state or nation for the purpose of enforcing any remedy against it. *Manning v. State of Nicaragua and the Accessory Transit Co.*, 14 How. Pr. 517; *Duke of Brunswick v. King of Hanover*, 2 H. L. Cas. 1; *Wadsworth v. Queen of Spain*; *De Haber v. Queen of Portugal*, 17 Q. B. 171; *Cohens v. Virginia*, 6 Wheat. 264, 411; *United States v. Clarke*, 8 Pet. 436, 444; *The Treasurer v. Cleary*, 3 Rich. So. Car. Law, 372, 374. As to liability of public agents, 1 Wait's Law & Pr. 282.

may be examined and punished. The constitution has therefore provided, by means of indictments, and parliamentary impeachments, that no man shall dare to assist the crown *in contradiction to the laws of the land. [*291] But it is at the same time a maxim in those laws, that the king himself can do no wrong: since it would be a great weakness and absurdity in any system of positive law to define any possible wrong, without any possible redress.

For, as to such public oppressions as tend to dissolve the constitution, and subvert the fundamentals of government, they are cases which the law will not, out of decency, suppose: being incapable of distrusting those, whom it has invested with any part of the supreme power; since such distrust would render the exercise of that power precarious and impracticable(*a*). For wherever the law expresses its distrust of abuse of power, it always vests a superior coercive authority in some other hand to correct it; the very notion of which destroys the idea of sovereignty. If therefore (for example) the two houses of parliament, or either of them, had avowedly a right to animadvert on the sovereign, or each other, or if the sovereign had a right to animadvert on either of the houses, that branch of the legislature, so subject to animadversion, would soon cease to be part of the supreme power; the balance of the constitution would be overturned; and the branch or branches, in which this jurisdiction resided, would become completely paramount. The supposition of law therefore is, that neither the sovereign nor either house of parliament is (subject to some former observations(*b*)) capable of doing any wrong; since in such a case the law might feel itself incapable of furnishing any adequate and satisfactory remedy. For which reason all oppressions, which may happen to spring from any branch of the sovereign power, must necessarily be out of the reach of any stated rule or express legal provision; but, if ever they unfortunately happen, the prudence of the times must provide new remedies upon new emergencies.

*Indeed, it is found, by experience, that whenever unconstitutional oppressions, even of the sovereign power, advance with gigantic [*292] strides, and threaten desolation to a state, mankind will not be reasoned out of the feelings of humanity; nor will sacrifice their liberty by a scrupulous adherence to those political maxims, which were originally established to preserve it. And therefore, though the positive laws are silent upon this subject, experience will furnish us with a very remarkable case pertinent to it, wherein nature and reason prevailed. When king James II. invaded the fundamental constitution of the realm, the convention declared an abdication, whereby the throne was rendered vacant, which induced a new settlement of the crown. And irrespective of this precedent(*c*), if any prince should hereafter endeavour to subvert the constitution by breaking the original contract between sovereign and people, and by violating the fundamental laws, we cannot doubt that future generations, necessity, and the safety of the body politic thus requiring it, will exert those inherent (though latent) powers of society, which no climate, no time, no constitution, no contract can ever destroy or diminish.

II. Besides the attribute of sovereignty, the law also ascribes to the sovereign, in his or her political capacity, absolute perfection. "The king can do no wrong." Which ancient and fundamental maxim is

(*a*) See these points more fully discussed in the *Considerations of the Law of Feudure*, 3rd edit. pp. 109—126.

(*b*) *Ante*, pp. 192, 248, 279.

(*c*) *Ante*, p. 250.

not to be understood, as if everything transacted by the government was of course just and lawful, but means only two things. First, that whatever is exceptionable in the conduct of public affairs is not to be imputed to the king, nor is he answerable for it personally to his people: for this doctrine would totally destroy that constitutional independence of the crown, which is necessary for the balance of power in our free and active, and therefore compounded, constitution. And, secondly, it means that the *prerogative [*293] of the crown extends not to do any injury; it was created for the benefit of the people, and therefore cannot be exerted to their prejudice(*d*).

The sovereign, moreover, is not only incapable of doing wrong, but even of thinking wrong; he can never mean to do an improper thing: in him is no folly or weakness. And therefore if the crown should be induced to grant any franchise or privilege to a subject contrary to reason, or in any wise prejudicial to the commonwealth, or to a private person, the law will not suppose the sovereign to have meant either an unwise or an injurious action, but declares that he was deceived in his grant; and thereupon such grant is rendered void, merely upon the foundation of fraud and deception either by or upon those agents whom the crown has thought proper to employ. For the law will not cast an imputation on that magistrate whom it intrusts with the executive power, as if he was capable of intentionally disregarding his trust: but attributes to mere imposition (to which the most perfect of sublunary beings must still continue liable) these little inadvertencies, which, if charged on the will of the prince, might lessen him in the eyes of his subjects.

Yet still, notwithstanding this personal perfection which the law attributes to the sovereign, the constitution has allowed a latitude of supposing the contrary, in respect to both houses of parliament: each of which, in its turn, has exerted the right of remonstrating and complaining to the sovereign even of those acts of royalty, which are most properly and personally his own; such as messages signed by himself, and speeches delivered from the throne. And yet, such is the reverence which is paid to the royal person, that though the two houses have an undoubted right to consider these acts of state in any light whatever, and accordingly treat them in their [*294] addresses as personally proceeding from the prince, yet *among themselves (to preserve the more perfect decency, and for the greater freedom of debate) they usually suppose them to flow from the advice of the administration. But the privilege of canvassing thus freely the personal acts of the sovereign (either directly, or even through the medium of his reputed advisers) belongs to no individual, but is confined to those august assemblies; and there too the objections must be proposed with the utmost respect and deference. One member was sent to the tower(*e*), for suggesting that his majesty's answer to the address of the commons contained "high words to fright the members out of their duty;" and another(*f*), for saying that a part of the king's speech "seemed rather to be calculated for the meridian of Germany than Great Britain, and that the king was a stranger to our language and constitution."

In further pursuance of this principle, the law also determines that in the sovereign can be no negligence, or laches, and therefore no delay will bar his

(*d*) Plowd. 487.

(*e*) Com. Journ. 18 Nov. 1685.

(*f*) Com. Journ. 4 Dec. 1717.

right. *Nullum tempus occurrit regi* has (with certain exceptions^(g)) been the standing maxim: for the law intends that the king is always busied for the public good, and therefore has not leisure to assert his right within the times limited to subjects^(h).⁽⁸⁰⁾ In the king also can be no stain or corruption of blood: for if the heir to the crown were attainted of treason or felony, and afterwards the crown should descend to him, this would purge the attainder *ipso facto*⁽ⁱ⁾. And therefore when Henry VII., who as earl of Richmond stood attainted, came to the crown, it was not thought necessary to pass an act of parliament to reverse this attainder; because, as Lord Bacon^(k) *informs us, it was agreed that the assumption of the crown had at once purged all attainders. Neither can the king in judgment of law, as king, ever be a minor or under age; and therefore his royal grants and assents to acts of parliament are good, though he has not in his natural capacity attained the legal age of twenty-one^(l). By a statute indeed, 28 Hen. 8, c. 17, power was given to future kings to rescind and revoke all acts of parliament made while they were under the age of twenty-four: but this was repealed by the statute 1 Edw. 6, c. 11, so far as related to that prince; and both statutes are declared to be determined by 24 Geo. 2, c. 24. It has also been usually thought prudent when the heir apparent has been very young, to appoint a protector, guardian, or regent, for a limited time: but the very necessity of such extraordinary provision is sufficient to demonstrate the truth of the maxim of the common law, that in the king is no minority: he has therefore no legal guardian^(m).

(g) Of which the more important will be noticed as opportunity offers in the course of these Commentaries. See also Broom's Leg. Max. 4th ed. pp. 66—69.

(h) Finch. L. 82; Co. Litt. 90.

(i) Finch. L. 82.

(k) Hist. Henry VII. (ed. 1825), iii. p. 119.

(l) Co. Litt. 43; 2 Inst. pref. 3.

(m) The methods of appointing this guardian or regent have been so various, and the duration of his power so uncertain, that from hence alone it may be collected that his office is unknown to the common law; and therefore (as sir Edward Coke says, 4 Inst. 58) the surest way is to have him made by authority of the great council in parliament. The earl of Pembroke, by his own authority, assumed in very troublesome times the regency of Henry III., who was then only nine years old; but was declared of full age by the pope at seventeen, confirmed the great charter at eighteen, and took upon him the ad-

ministration of the government at twenty. A guardian and council of regency were named for Edward III. by the parliament, which deposed his father; the young king being then fifteen, and not assuming the government till three years after. When Richard II. succeeded at the age of eleven, the duke of Lancaster took upon him the management of the kingdom, till the parliament met, which appointed a nominal council to assist him. Henry V. on his death-bed named a regent and a guardian for his infant son Henry VI., then nine months old; but the parliament altered his disposition, and appointed a protector and council, with a special limited authority. Both these last-named princes remained in a state of pupillage till the age of twenty-three. Edward V. at the age of thirteen was recommended by his father to the care of the duke of Gloucester; who was declared protector by the privy council. The statutes 25 Hen. 8, c. 12, and 28 Hen. 8, c. 7,

(80) In the United States the principle is settled that the government is not bound by the statute of limitations unless it is expressly so provided in the statute. *Lindsey v. Miller*, 6 Pet. 666; *People v. Gilbert*, 18 Johns. 228; *Kemp v. Commonwealth*, 1 Hen. & M. 85; *Hardin v. Taylor*, 4 T. B. Monr. 516; *Johnston v. Irvin*, 3 S. & R. 291; *United States v. White*, 2 Hill, 59; *People v. Arnold*, 4 N. Y. (4 Comst.) 508.

But where the government takes the claim by assignment from an individual, it will be taken subject to such defenses as would be available against any other assignee. *United States v. Buford*, 8 Pet. 12, 30; *United States v. White*, 2 Hill, 59. The statute will run against municipal corporations of an inferior character. *Pella v. Scholte*, 24 Iowa, 383; *Cincinnati v. First Presb. Church*, 8 Ohio (Ham.), 298; *Armstrong v. Dalton*, 4 Dev. 566; *Cincinnati v. Evans*, 5 Ohio St. 594.

[*296] *III. A third attribute of regal majesty is perpetuity. The law ascribes to the sovereign, in his political capacity, an absolute immortality. *Rex nunquam moritur*, "The king never dies." Henry, Edward, or George may die; but the king survives them all. For immediately upon the decease of the reigning prince in his natural capacity, his kingship or imperial dignity by act of law, without any *interregnum* or interval, is vested at once in his heir; who is, *eo instante*, king to all intents and purposes. And so tender is the law of supposing even a possibility of his death, that his natural dissolution is generally called his "demise;"

[*297] *demissio regis, vel coronæ*; an expression which signifies merely a transfer of property; for, as observed in Plowden(n), when we say the demise of the crown, we mean only that, in consequence of the disunion of the king's natural body from his body politic, the kingdom is transferred or demised to his successor; and so the royal dignity remains perpetual. Thus, too, when Edward IV., in the tenth year of his reign, was driven from his throne for a few months by the house of Lancaster, this temporary transfer of his dignity was denominated his "demise;" and all process was held to be discontinued, as upon a natural death of the king(o). (81)

Secondly, we are to consider those branches of the royal prerogative, which invest our sovereign, thus all-perfect and immortal in his monarchical capacity,

provided that the successor, if a male and under eighteen, or if a female and under sixteen, should be till such age in the government of his or her natural mother (if approved by the king), and such other counsellors as his majesty should by will or otherwise appoint: and he accordingly appointed his sixteen executors to have the government of his son Edward VI., and the kingdom, which executors elected the earl of Hertford protector. The statute 24 Geo. 2, c. 24, in case the crown should descend to any of the children of Frederick late prince of Wales under the age of eighteen, appointed the princess dowager—and the statute 5 Geo. 3, c. 27, in case of a like descent to any of George III.'s children, empowered him to name either the queen, the princess dowager, or any descendant of king George II. residing in this kingdom—to be guardian and regent till the successor attained such age of eighteen years, assisted by a council of regency; the powers of them all being expressly defined and set down in the several acts. Further, on the alienation

of mind of George III., his son, the prince of Wales (afterwards George IV.), was declared regent by statute 51 Geo. 3, c. 1, but with certain restrictions, which in the following year were removed by 52 Geo. 3, c. 8. (See the debates on these statutes, Parl. Deb. vols. 18, 20, and on the Regency Bill of 1789, Parl. Hist. vol. 27.) By the 1 Will. 4, c. 2, the late Duchess of Kent was appointed the guardian of her daughter (her present Majesty), until she attained the age of eighteen years; and it was also declared that the duchess should be the regent during the queen's minority; but her Majesty having attained the age of eighteen before the death of William IV., no regency took place. (See also 1 & 2 Vict. c. 24.) Lastly, by 8 & 4 Vict. c. 52, his late royal highness prince Albert was appointed guardian of any issue of queen Victoria becoming king or queen of these realms, and regent so long as such king or queen should remain under the age of eighteen years.

(n) Com. 177, 234.

(o) M. 49 Hen. 6, pl. 1—8.

(81) "In case of the removal of the president from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the vice-president, and the congress may by law provide for the case of removal, death, resignation or inability, both of the president and vice-president, declaring what officer shall then act as president, and such officer shall act accordingly, until the disability be removed, or a president shall be elected." U. S. Const., art. 2, § 1.

"In case of removal, death, resignation or inability, both of the president and vice-president of the United States, the president of the senate *pro tempore*, and in case there shall be no president of the senate, then the speaker of the house of representatives, for the time being, shall act as president of the United States until the disability be removed, or a president shall be elected." Act of Congress, March 1, 1792, 1 Stat. at Large, 239, ch. 8, § 9.

with a number of authorities and powers; in the exercise whereof consists the executive part of government. This is wisely placed in a single hand by the British constitution, for the sake of unanimity, strength, and dispatch. Were it placed in many hands, it would be subject to many wills: many wills, if disunited and drawing different ways, create weakness in a government; and to unite those several wills, and reduce them to one, is a work of more time and delay than the exigencies of state will afford. The sovereign of England is therefore not only the chief, but properly the sole, magistrate of the nation; all others acting by commission from, and in due subordination to him: in like manner, as upon the great revolution of the Roman state, all the powers of the ancient magistracy of the commonwealth were concentrated in the new emperor: so that, as Gravina(*p*) expresses it, "*in ejus unius personâ veteris reipublicæ vis atque majestas per cumulas magistratuum potestates exprimebatur.*"

*After what has been premised in this chapter, I shall not (I trust) be considered as an advocate for arbitrary power, when I lay it down as a principle, that, in the exercise of lawful prerogative, the sovereign is and ought to be absolute; that is, so far absolute, that there is no legal authority which can either delay or resist him. He may reject what bills, may make what treaties, may coin what money, may create what peers, may pardon what offences he pleases, may in short discharge any functions vested exclusively in him as sovereign; unless where the constitution has expressly, or by evident consequence, laid down some exception or boundary: declaring, that thus far the prerogative shall go, and no farther. For otherwise the power of the crown would indeed be but a name and a shadow, insufficient for the ends of government, if, where its jurisdiction is clearly established and allowed, any man or body of men were permitted to disobey it, in the ordinary course of law: I say, in the ordinary course of law; for I do not now speak of those extraordinary recourses to first principles, which are necessary when the contracts of society are in danger of dissolution, and the law proves too weak a defence against the violence of fraud or oppression. And yet the want of attending to so obvious a distinction has occasioned these doctrines, of absolute power in the prince and of national resistance by the people, to be much misunderstood and perverted, by the advocates for slavery on the one hand, and the demagogues of faction on the other. The former observing the absolute sovereignty and transcendent dominion of the crown laid down (as it certainly is) most strongly and emphatically in some of our law books, as well as in our homilies, have denied that any case can be excepted from so general and positive a rule, forgetting how impossible it is, in any practical system of laws, to point out beforehand those eccentric remedies, which the sudden emergence of national distress may dictate, and which that alone can justify. On the other hand, over-zealous republicans, feeling the absurdity of unlimited passive obedience, have fancifully (or sometimes factiously) gone over to the other extreme: and, because resistance is justifiable to the person of the prince when the being of the state is endangered, and the public voice proclaims such resistance necessary, they have therefore allowed to every individual the right of determining this expedience, and of employing private force to resist even private oppression. A doctrine produc-

tive of anarchy, and (in consequence) equally fatal to civil liberty as tyranny itself. For civil liberty, rightly understood, can exist only where the rights of individuals are protected by the united force of society: society cannot be maintained, and of course can exert no protection, without obedience to some sovereign power: and obedience is an empty name, if every individual has a right to decide how far he himself shall obey.

In the exercise therefore of those prerogatives, which the law has given him, the sovereign is irresistible and absolute, according to the forms of the constitution. And yet, if the consequence of that exertion be manifestly to the grievance or dishonour of the kingdom, the parliament will call his advisers to a just and severe account. For prerogative consisting (as Mr. Locke(*g*) has well defined it) in the discretionary power of acting for the public good, where the positive laws are silent; if that discretionary power be abused to the public detriment, such prerogative is exerted in an unconstitutional manner. Thus the sovereign may make a treaty with a foreign state, which shall irrevocably bind the nation; and yet when such treaties have been judged pernicious, impeachments have pursued those ministers, by whose agency or advice they were concluded.

The prerogatives of the crown (in the sense under which we are now considering them) respect either this nation's *intercourse with foreign nations, or its own domestic government and civil polity.

With regard to foreign concerns, the sovereign is the delegate or representative of his people. It is impossible that the individuals of a state, in their collective capacity, can transact the affairs of that state with another community equally numerous as themselves. Unanimity must be wanting to their measures, and strength to the execution of their counsels. In the sovereign therefore, as in a centre, all the rays of his people are united, and form by that union a consistency, splendour, and power, making him feared and respected by foreign potentates; who might scruple to enter into an engagement which must afterwards need to be revised and ratified by a popular assembly. What is done by the royal authority, with regard to foreign powers, is the act of the whole nation: what is done without the sovereign's concurrence, is the act only of private men. And so far is this point carried by our law, that it has been held(*r*), that should all the subjects of England make war with a king in league with the king of England, without the royal assent, such war is no breach of the league. Also, by the statute 2 Hen. 5, c. 6, a subject committing acts of hostility upon any nation in league with the king was declared to be guilty of high treason: and though that act was repealed by statute 20 Hen. 6, c. 11, so far as relates to the making this offence high treason, yet still it remains a very great offence against the law of nations, and punishable by our laws.

I. The sovereign, therefore, considered as the representative of his people, has the sole power of sending ambassadors to foreign states, and receiving ambassadors at home(*s*). This may lead us into a short digression, *by way of inquiry, how far the municipal

(*l*.) In sending and receiving ambassadors.

[* 301]

(*g*) On Gov. pt. 2, s. 166.

(*r*) 4 Inst. 152.

(*s*) In connection with the proposition stated in the text, see the statute 11 & 12 Vict. c.

108, entitled "An act for enabling her Majesty to establish and maintain diplomatic relations with the sovereign of the Roman states."

laws of England intermeddle with or protect the rights of these messengers from one potentate to another, whom we call ambassadors.

The rights, the powers, the duties, and the privileges of ambassadors are determined by the law of nature and nations, not by any municipal constitutions. For, as ambassadors represent the persons of their

Their privileges.

respective masters, who can owe no subjection to any laws but those of their own country, their actions are not subject to the control of the private law of that state wherein they are appointed to reside. He who is subject to the coercion of laws is necessarily dependent on that power by which those laws were made: but an ambassador ought to be independent of every power, except that by which he is sent; and of consequence ought not to be subject to the mere municipal laws of that nation wherein he is to exercise his functions. If he grossly offends, or makes an ill use of his character, he may be sent home and accused before his master(*t*), who is bound either to do justice upon him, or to avow himself the accomplice of his crimes(*u*). But there is great dispute among writers on the laws of nations, whether this exemption of ambassadors extends to all crimes, as well natural as positive; or whether it only extends to such as are *mala prohibita*, as coining, and not to those that are *mala in se*, as murder(*x*). Our law seems to have formerly taken in the restriction, as well as the general exemption. For it has been held, both by our common lawyers and civilians(*y*), that an ambassador is privileged by the law of nature and nations; and yet, if he commits any offence against the law of *reason and nature, he shall lose his privilege(*z*): and that therefore, [*302] if an ambassador conspires the death of the king in whose land he is, he may be condemned and executed for treason; but if he commits any other species of treason, it is otherwise, and he must be sent to his own kingdom(*a*). And these propositions might seem to be built upon good appearance of reason. For since all municipal laws act in subordination to the primary law of nature, and, where they annex a punishment to natural crimes, are declaratory of and auxiliary to that law; therefore to this natural universal rule of justice ambassadors, as well as other men, are subject in all countries: and of consequence it might appear reasonable that, wherever they transgress it, they should be liable to make atonement(*b*). But, however these principles might formerly obtain, the general practice of this country, as well as of the rest of Europe, seems now to pursue the sentiments of the learned Grotius, that the security of ambassadors is of more importance than the punishment of a particular crime(*c*). And therefore few, if any, examples have happened within two centuries past, where an ambassador has been punished for any offence, however atrocious in its nature(*d*).

In respect to civil suits, jurists agree, that neither an ambassador, nor any of his train or *comites*, can be prosecuted for a debt or contract in the courts of

(*t*) As was done with Count Gyllenberg, the Swedish minister to Great Britain, A. D. 1717; Phillimore Internat. L. ii. 181.

(*u*) Sp. L. 26, 21.

(*x*) Van Leeuwen in Dig. 50. 7, 17; Barbeyrac's Puff. l. 8, c. 9. § 9 and 17; Bynkershoek de Foro Legator. cc. 17, 18, 19.

(*y*) 1 Roll. Rep. 175.

(*z*) 4 Inst. 153.

(*a*) 1 Roll. Rep. 185.

(*b*) Foster Rep. 188.

(*c*) *Securitas legatorum utilitati, qua ea pend est, præponderat.* (de jure b. & p. l. 2, c. 18, § 4).

(*d*) In the year 1654, Don Pataleon Sa, brother of the Portuguese ambassador at our court, but not himself clothed with the *status* of ambassador, was here tried, convicted, and executed for murder. 15 St. Tr. 464; 1 Hale, P. C. 99; Foster, 188. The cases concerning the inviolability of ambassadors are collected in Phillimore Internat. L. ii. pp. 173, *et seq.*

that kingdom wherein he is sent to reside. Yet sir Edward Coke maintains, that if an ambassador make a contract which is good, *jure gentium*, he shall answer for it here(e). But the truth is, so few cases (if any) had arisen, wherein [* 303] *the privilege was either claimed or disputed, even with regard to civil suits, that our law-books are (in general) quite silent upon it previous to the reign of queen Anne; when an ambassador from Peter the Great, czar of Muscovy, was actually arrested and taken out of his coach in London(f), for a debt of fifty pounds which he had there contracted. Instead of applying to be discharged upon his privilege, he gave bail to the action, and the next day complained to the queen. The persons who were concerned in the arrest were examined before the privy council (of which the lord chief justice Holt was at the same time sworn a member(g)), and seventeen were committed to prison(h); most of whom were prosecuted by information in the court of queen's bench, at the suit of the attorney-general(i), and at their trial before the lord chief justice were convicted of the facts by the jury(k), the question of law, how far those facts were criminal, being reserved, to be afterwards argued before the judges; which question was never formally determined(l). In the mean time the czar resented this affront very highly, and demanded that the sheriff of Middlesex and all others concerned in the arrest should be punished with instant death(m). But the queen (to the amazement of that despotic sovereign) directed her secretary to inform him, "that she could inflict no punishment upon any, the meanest, of her subjects, unless warranted by the law of the land; and therefore was persuaded that he would not insist upon *impos- [* 304] sibilities"(n). To satisfy however the clamours of the foreign ministers (who made it a common cause) as well as to appease the wrath of Peter, a bill was brought into parliament(o), and afterwards passed into a law(p), to prevent and punish such outrageous insolence for the future. And with a copy of this act, elegantly engrossed and illuminated, accompanied by a letter from the queen, an ambassador extraordinary(q) was commissioned to appear at Moscow(r), who declared, "that though her majesty could not inflict such a punishment as was required, because of the defect in that particular of the former established constitutions of her kingdom, yet with the unanimous consent of the parliament, she had caused a new act to be passed, to serve as a law for the future." This humiliating step was accepted as a full satisfaction by the czar: and the offenders, at his request, were discharged from all further prosecution.

The statute(s) passed on the above occasion recites the arrest which had been made, "in contempt of the protection granted by her majesty, contrary to the law of nations, and in prejudice of the rights and privileges, which ambassadors and other public ministers, authorized and received as such, have at all

(e) 4 Inst. 158.

(f) 21 July, 1708. Boyer's Annals of queen Anne.

(g) 25 July, 1708. *Ibid.*

(h) 25, 29 July, 1708. *Ibid.*

(i) 23 Oct. 1708. *Ibid.*

(k) 14 Feb. 1708. *Ibid.*

(l) An infraction of the law of nations being a misdemeanor, was punishable at the discretion of the court at most only by fine, imprisonment, and the pillory; and, since the czar might have regarded these punishments as a fresh insult, the offenders mentioned in

the text were never brought up to receive judgment. See per Lord Mansfield, *Triquet v. Bath*, 8 Burr. 1480.

(m) 17 Sept. 1708. Boyer's Annals of queen Anne.

(n) 11 Jan. 1708. Boyer's Annals of queen Anne. Mod. Un. Hist. xxxv. 454.

(o) Com. Journ. 23 Dec. 1708.

(p) 21 Apr. 1709. Boyer, *ibid.*

(q) Mr. Whitworth.

(r) 8 Jan. 1709. Boyer, *ibid.*

(s) 7 Ann. c. 12.

times been thereby possessed of, and ought to be kept sacred and inviolable:" wherefore it enacts, that for the future all process whereby the person of any ambassador, or of his "domestic or domestic servant" may be arrested, or his goods distrained or seized, shall be utterly null and void: and the persons prosecuting, soliciting, or executing such process, shall be deemed violators of the law of nations, and disturbers of the public repose; and shall suffer such penalties and corporal punishment as the lord chancellor and the chief justices, or any two of them, shall judge fit to be *imposed(t). But it is expressly [* 305] provided, that no trader within the bankrupt laws, who shall be in the service of any ambassador, shall be privileged or protected by this act; nor shall any one be punished for arresting an ambassador's servant, unless his name be registered with the secretary of state, and by him transmitted to the sheriffs of London and Middlesex(u). Exceptions that are strictly conformable to the rights of ambassadors(x), as observed in the most civilized countries. And, in consequence of this statute, thus declaring and enforcing the law of nations, these privileges are now held to be part of the law of the land, and are allowed in the courts of common law(y).(82)

(t) This statute is declaratory of the law of nations except in so far as a summary jurisdiction for the punishment of offenders is conferred by it, per Lord Mansfield, 8 Burr. 1480.

(u) Nor, to entitle persons to the privilege, is it necessary, that their names should have been registered in the secretary of state's office, and transmitted to the sheriff's office; though unless they have been so registered and transmitted the sheriff or his officers cannot be proceeded against under the statute for the unlawful arrest. *Seacomb v. Boulney*, 1 Wils. 20; *Hopkins v. De Robeck*, 8 T. R. 79.

(x) *Sæpe quæsitum est an comitum numero et jure habendi sunt, qui legatum comitantur, non ut instructor fiat legatio, sed unice ut lucro suo consulant, insitiores forte et merca-*

tores. Et, quævis hos sæpe defenderint et comitum loco habere voluerint legati, apparet tamen satis eo non pertinere, qui in legati legationis officio non sunt. Quum autem ea res nonnunquam turbas dederit, optimo exemplo in quibusdam aulis olim receptum fuit, ut legatus teneretur exhibere nomenclaturam comitum suorum. Bynkersh. c. 15, *prope finem*.

(y) Fitzg. 200; Stra. 797. *Magdalena Steam Nav. Co. v. Martin*, 28 L. J. Q. B. 310.

A secretary of legation accredited to this court by a foreign sovereign and acting in the absence of his ambassador as *chargé d'affaires*, is entitled to all the privileges of an ambassador, and does not, by engaging in mercantile transactions, forfeit his personal privilege. *Taylor v. Best*, 14 C. B. 487.

See also *Viceash v. Bicker*, 3 M. & S. 284.

(82) By an act of congress passed April 30, 1790, 1 Stat. at Large, 117, § 25, it is provided "That if any writ or process shall at any time hereafter be sued forth or prosecuted by any person or persons, in any of the courts of the United States, or in any of the courts of a particular state, or by any judge or justice therein respectively, whereby the person of any ambassador or other public minister of any foreign prince or state, authorized and received as such by the president of the United States, or any domestic or domestic servant of any such ambassador or other public minister, may be arrested or imprisoned, or his or their goods or chattels be distrained, seized or attached, such writ or process shall be deemed and adjudged to be utterly null and void to all intents, constructions and purposes whatever."

"That in case any person or persons shall sue forth or prosecute any such writ or process, such person or persons, and all attorneys or solicitors prosecuting or soliciting in such case, and all officers executing any such writ or process, being thereof convicted, shall be deemed violators of the laws of nations, and disturbers of the public repose, and imprisoned not exceeding three years, and fined at the discretion of the court. *Ib.*, § 26.

"Provided, nevertheless, that no citizen or inhabitant of the United States, who shall have contracted debts prior to his entering into the service of any ambassador or other public minister, which debts shall be still due and unpaid, shall have, take or receive any benefit of this act; nor shall any person be proceeded against by virtue of this act, for having arrested or sued any other domestic servant of any ambassador or other public minister, unless the name of such servant be first registered in the office of the secretary of state, and by such secretary transmitted to the marshal of the district in which congress shall reside,

II. It is also the sovereign's prerogative to make treaties, leagues, and alliances with foreign states and princes. For it is by the law of nations (II.) In making treaties and alliances. [* 306] essential to the goodness of *a league, that it be made by the sovereign power(z): and then it is binding upon the whole community: and in England the sovereign power, *quoad hoc*, is vested in the person of the monarch. Whatever contracts therefore he engages in, no other power in the kingdom can legally delay, resist, or annul. And yet, lest this plenitude of authority should be abused to the detriment of the public, the constitution (as was hinted before) has here interposed a check, by the means of parliamentary impeachment, for the punishment of such ministers as from criminal motives advise or conclude any treaty, which shall afterwards be judged to derogate from the honour and interest of the nation. (83)

III. Upon the same principle the sovereign has also the sole prerogative of making war and peace. (84) For it is held by writers on the law of nature and (III.) In making war and peace. nations, that the right of making war, which by nature subsisted in every individual, is given up by all private persons who enter into society, and is vested in the sovereign power(a): and this right is given up, not only by individuals, but even by the entire body of people, who are

(z) Puff. L. of N. b. 8, c. 9, s. 6.

(a) Puff. b. 8, c. 6, s. 8, and Barbeyr. in loc.

who shall upon receipt thereof affix the same in some public place in his office, whereto all persons may resort and take copies without fee or reward." *Ib.*, § 27.

This statute is substantially a re-enactment of 7 Anne, ch. 12, and is considered as merely declaratory of the law of nations. *Triquet v. Bath*, 8 Burr. 1478; *Viveash v. Becker*, 3 Maule & Selw. 284; *Holbrook v. Henderson*, 4 Sandf. 619; *Valarino v. Thompson*, 7 N. Y. (3 Seld.) 576, 578.

A secretary of legation, duly accredited by a foreign government, and acting, in the absence of his ambassador, as *chargé d'affaires*, is entitled to all the privileges of an ambassador. *Taylor v. Best*, 14 C. B. 487; S. C., 25 Eng. Law & Eq. 383; *Ex parte Cabrera*, 1 Wash. C. C. 232; *United States v. Benner*, Baldw. 234, 240.

The evidence requisite to establish the official character of an ambassador or foreign minister is a recognition as such by the chief executive officer of the nation. *United States v. Ortega*, 4 Wash. C. C. 531; *United States v. Benner*, Baldw. 234, 240; *Taylor v. Best*, 14 C. B. 487; S. C., 25 Eng. Law & Eq. 383.

(83) The president "shall have power, by and with the advice and consent of the senate, to make treaties, provided two-thirds of the senators then present concur." U. S. Const., art. 2, § 2.

"This constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the constitution or laws of any state to the contrary notwithstanding." *Ib.*, art. 6. The power to enter into treaties with foreign governments is vested exclusively in the United States government; and the several states are expressly forbidden to enter into such treaties. "No state shall, without the consent of congress, lay any duty of tonnage, keep troops or ships of war in time of peace, enter into any agreement or compact with another state, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay." U. S. Const., art. 1, § 10.

(84) While the English sovereign is vested with the power of declaring war, the constitution of the United States confides that power to congress, as follows: "The congress shall have power * * * to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water." U. S. Const., art. 1, § 8. The same section contains other provisions relating to the exercise of the war power.

under the dominion of a sovereign. It would indeed be extremely improper, that any number of subjects should have the power of binding the supreme magistrate, and putting him against his will in a state of war. Whatever hostilities therefore may be committed by private citizens, the state ought not to be affected thereby; unless it should justify their proceedings, and thereby become partner in their guilt. Such unauthorized volunteers in violence are not ranked among open enemies, but are treated like pirates and robbers: according to that rule of the civil law(b): *hostes hi sunt qui nobis, aut quibus nos, publice bellum decrevimus: ceteri latrones aut prædones sunt*. And the reason why a formal *declaration of war usually, though not necessarily, precedes the actual commencement of hostilities, is not so much [* 307] that the enemy may be put upon his guard (which is matter rather of magnanimity than right), as that it may be certainly clear that the war is undertaken not by private persons, but by the will of the whole community; whose right of willing is in this case transferred to the supreme magistrate by the fundamental laws of society. And wherever the right resides of beginning a national war, there also must reside the right of ending it, or the power of making peace. And the same check of parliamentary impeachment, for improper or inglorious conduct, in beginning, conducting, or concluding a national war, is in general sufficient to restrain the ministers of the crown from a wanton or injurious exertion of this great prerogative.

IV. But as delay in making war may sometimes be detrimental to individuals who have suffered by depredations from foreign potentates, our laws have in some respects armed the subjects with powers to impel the prerogative; by directing the ministers of the crown to issue letters of marque and reprisal upon due demand: the prerogative of granting which is nearly related to, and plainly derived from, that other of making war; this being indeed only an incomplete state of hostilities, and generally ending in a formal denunciation of war. These letters are grantable by the law of nations(c), whenever the subjects of one state are oppressed and injured by those of another; and justice is denied by that state to which the oppressor belongs. In this case letters of marque and reprisals (words used as synonymous; and signifying, the latter, a taking in return, the former, the passing the frontiers in order to such taking(d)) may be obtained, in order to seize the bodies or goods of the *subjects of the offending [* 308] state, until satisfaction be made, wherever they happen to be found. And indeed this custom of reprisal seems dictated by nature herself; for which reason we find in the most ancient times very notable instances of it(e). But here the necessity is obvious of calling in the sovereign power, to determine when reprisals may be made(f); else every private sufferer would be a judge

(b) Dig. 50, 16, 118.

(c) De Jure B. & P. l. 3, c. 2, ss. 4 & 5.

(d) Dufresne, tit. Marca.

(e) See the account given by Nestor, in the eleventh book of the Iliad, of the reprisals made by himself on the Epeian nation; from whom he took a multitude of cattle, as a satisfaction for a prize won at the Elian games by his father Neleus, and for debts due to many private subjects of the Pylian kingdom, out of which booty the king took three hundred head of cattle for his own demand, and

the rest were equitably divided among the other creditors.

(f) "An injury committed upon one of his subjects for which justice has been plainly denied or unreasonably delayed, warrants a sovereign in issuing letters of marque or reprisal, which may either constitute the commission of a privateer, or the reprisals may be committed to a king's ship." Phillimore, Internat. L. iii. 13.

During the late war with Russia general reprisals were granted. See 17 & 18 Vict. c. 18.

in his own cause. In pursuance of which principle, it was declared by statute 4 Hen. 5, c. 7, that if subjects of the realm are oppressed in the time of truce by foreigners, the king will grant *marque* in due form, to all who feel themselves aggrieved. Which form is thus directed to be observed: the sufferer must first apply to the lord privy-seal: and he shall make out letters of request under the privy-seal: and if, after such request of satisfaction made, the party required do not within a convenient time make due satisfaction or restitution to the party grieved, the lord chancellor shall make him out letters of *marque* under the great seal; and by virtue of these he may attack and seize the property of the aggressor nation, without hazard of being condemned as a robber or pirate.

The granting of letters of *marque*, however, under the above statute of Henry V. was limited to persons actually aggrieved, and has long been discontinued.

[* 309] Letters of **marque* are now issued under the provisions of various acts of parliament or in virtue of a royal proclamation. If during war a subject without any commission from the crown effect the capture of an enemy's ship, the prize belongs not to the captor but to the sovereign(*g*); wherefore, with a view to encourage merchants and others to fit out armed ships in time of war, the admiralty has been empowered(*h*) to grant commissions to private persons, fitting out such ships called privateers, entitling them to special advantages. Under these commissions all the prizes captured are to be divided according to the contract entered into between the owners and the master and the crew of the privateer. But the owners, before such commissions are granted, are required to give security to the admiralty to make compensation for injuries committed against those powers with whom the nation is at peace(*i*); and are also required to give security that such ships shall not be employed in smuggling(*k*). Letters of *marque* or general reprisals thus constituted are valid only during the war, and may be vacated either by express revocation, or by the misconduct of the parties, as, for example, by their cruelty(*l*).

V. Upon exactly the same reason stands the prerogative of granting safe-conducts, without which, by the law of nations, no member of one society has a right to intrude into another.(85) And therefore, as Puffendorf resolves(*m*), it is left in the power of all states, to take such

(V.) In granting passports.

(*g*) *Per Cur.* Carth. 399.

(*h*) See statutes 29 Geo. 2, c. 84; 19 Geo. 3, c. 67; 24 Geo. 3, c. 47.

(*i*) See 2 Vern. 592.

(*k*) 24 Geo. 3, c. 47. The crown has the right

of releasing prizes captured by such ships at any time previously to condemnation. *Stirling v. Vaughan*, 11 East, 619.

(*l*) *The Mariamne*, 5 Robins. R. 9.

(*m*) Law of N. and N. b. 3, c. 3, s. 9.

(85) Congress has regulated the issuing of passports, by act of Aug. 18th, 1856, ch. 127, § 23; 11 Stat. at Large, 60, 61, as follows: "That the secretary of state shall be authorized to grant and issue passports, and cause passports to be granted, issued, and verified in foreign countries by such diplomatic or consular officers of the United States, and under such rules as the president shall designate and prescribe for and on behalf of the United States, and no other person shall grant, issue, or verify any such passport; nor shall any passport be granted or issued to, or verified for, any other persons than citizens of the United States; nor shall any charge be made for granting, issuing, or verifying any passport, except in a foreign country; and in any case the fee allowed therefor shall not exceed the sum of one dollar, nor shall any such charge be made for more than one such verification in any foreign country; and if any person acting, or claiming to act, in any office or capacity, under the United States, or any of the states of the United States, who shall not be lawfully authorized so to do, shall grant, issue, or verify any passport, or other instrument in the nature of

measures about the admission of strangers, as they think convenient; those being ever excepted who are driven on the coast by necessity, or by any cause that deserves pity *or compassion. Great tenderness is shown by our [* 310] laws, not only to foreigners in distress (as will appear when we come to speak of shipwrecks), but with regard also to the admission into the realm of strangers who come hither spontaneously. For so long as their nation continues at peace with ours, and they themselves behave peaceably, they are under the sovereign's protection; though liable to be sent home if occasion for thus exerting the prerogative should arise. But no subject of a nation at war with us can, by the law of nations, come into the realm, nor travel upon the high seas, nor send his goods and merchandize from one place to another, without danger of being seized by our subjects, unless he has letters of safe-conduct; which under divers ancient statutes(n) were granted by the king's seal and enrolled in chancery, or else were of no effect: the king being supposed the best judge of such emergencies, as may deserve exemption from the general law of arms. But passports under the sovereign's sign-manual, or licences from his ambassadors abroad, are now more usually obtained, and are allowed to be of equal validity. The residence of aliens in this country is regulated by the statute law(o).

The law of England, as a commercial country, pays a very particular regard to foreign merchants, in innumerable instances, of which one especially deserves notice. By *magna carta*(p) it is provided that all merchants (unless publicly prohibited beforehand) shall have safe-conduct to depart from, to come into, to tarry in, and to go through England, for the exercise of merchandize, without any unreasonable imposts, except in time of war: and if a war breaks out between us and their country, they shall be attached (if in England) without

(n) 15 Hen. 6, c. 8; 18 Hen. 6, c. 8; 29 Hen. 6, c. 2.

(o) *Post*, chap. x.
(p) C. 30.

a passport, to or for any citizen of the United States, or to or for any person claiming to be or designated as such in such passport or verification, or if any consular officer who shall be authorized to grant, issue, or verify passports, shall knowingly and willfully grant, issue, or verify any such passport to or for any person not a citizen of the United States, the person so offending shall be deemed and be taken to be guilty of a misdemeanor, and on conviction thereof shall be imprisoned not exceeding one year, or fined in a sum not to exceed five hundred dollars, or both, and may be charged, proceeded against, tried, convicted, and dealt with therefor in the district where he may be arrested or in custody; and it shall be the duty of all persons who shall be authorized, pursuant to the provisions of this act, to grant, issue, or verify passports, to make return of the same to the secretary of state, in such manner and as often as he shall require; and such returns shall specify the names and all other particulars of the persons to whom the same shall be granted, issued, or verified, as embraced in such passport; *Provided*, that in any country where a legation of the United States is established, no other person than the diplomatic representatives at such place shall be permitted to grant or issue any passport, except in the absence therefrom of such representative." See 12 Stat. at Large, 754, § 28; 14 Stat. at Large, 54, ch. 102.

By resolution of congress No. 8, Feb. 3, 1870; 16 Stat. at Large, 868, it is declared "That the clerk in the department of state who may from time to time be assigned to the duty of examining applications for passports, is hereby authorized and empowered to receive and attest, but without charge to the affiant, all oaths, affidavits, or affirmations which are or may be required by law, or by the rules of the department of state, to be made before granting such passport or passports; and such oaths, affidavits, or affirmations shall be deemed to be made under the pains and penalties of perjury."

harm of body or goods, till the king or his chief justiciary be informed how
 [*311] our merchants are treated in the land with which we are *at war;
 and, if ours be secure in that land, they shall be secure in ours.
 This seems to have been a common rule of equity among the northern nations;
 for we learn from Stiernhook(*g*), that it was a maxim among the Goths and
 Swedes, *quam legem exteri nobis posuere, eandem illis ponemus*. But it is
 somewhat extraordinary that this rule should have found a place in *magna*
carta, a mere interior treaty between the king and his natural-born subjects:
 which occasions the learned Montesquieu to remark with a degree of admira-
 tion, "that the English have made the protection of foreign merchants one of
 the articles of their national liberty"(*r*). It well justifies indeed another
 observation which he has made(*s*), "that the English know better than any
 other people upon earth, how to value at the same time these three great
 advantages, religion, liberty, and commerce." Very different from the genius
 of the Roman people; who in their manners, their constitution, and even in
 their laws, treated commerce as a dishonourable employment, and prohibited
 the exercise thereof to persons of birth, or rank, or fortune(*t*): and equally
 different from the bigotry of the canonists, who looked on trade as inconsistent
 with christianity(*u*), and determined at the council of Melfi, under pope
 Urban II. A. D. 1090, that it was impossible with a safe conscience to exercise
 any traffic, or to follow the profession of the law(*x*).

These are the principal prerogatives of the sovereign respecting this nation's
 intercourse with foreign nations; in all of which he is considered as the dele-
 gate or *representative of his people. As regards domes-
 tic affairs he is also considered in a great variety of
 characters, and hence there arises an abundant number of other
 prerogatives.

I. The sovereign is a constituent part of the supreme legislative power; and,
 as such, has the prerogative of rejecting such provisions in parliament, as he
 judges improper to be passed. The expediency of this constitu-
 tion has already been evinced at large(*y*), and in connexion with
 it I shall only further remark, that the sovereign is not bound by
 any act of parliament, unless he be named therein by special and particular
 words. The most general words that can be devised ("any person or persons,
 bodies politic or corporate, &c.") affect not him in the least, if they may tend
 to restrain or diminish any of his rights or interests(*z*). For it would be of
 most mischievous consequence to the public, if the strength of the executive
 power were liable to be curtailed without its own express consent, by con-
 structions and implications of the subject. Yet, where an act of parliament is
 expressly made for the preservation of public rights and the suppression of
 public wrongs, and does not interfere with the established rights of the crown,

(*g*) *De jure Sueon*, l. 3, c. 4.

(*r*) *Sp. L.* 20, 18.

(*s*) *Ibid*, 20, 6.

(*t*) *Nobiles natalibus, et honorum luce conspicuos, et patrimonio ditiores, perniciosum urbibus mercimonium exercere prohibemus.* C. 4. 68. 8.

(*u*) *Homo mercator via aut nunquam potest Deo placere; et ideo nullus christianus debet*

esse mercator; aut si voluerit esse, projiciatur de ecclesiâ Dei. Decret. l. 88. 11.

(*z*) *Falsa fit penitentia [laici] cum penitus ab officio curiali vel negotiali non recedit, quâ sine peccatis agi ullâ ratione non pravalet.* Act. Concil. apud Baron. c. 16.

(*y*) *Ante*, chap. ii.

(*z*) *The Magdalen College Case*, 11 Rep. 74; Broom's *Leg. Max.*, 4th ed. pp. 73, et seq.

it is said to be binding as well upon the sovereign as upon the subject(*a*): and, likewise, the sovereign may take the benefit of any particular act, although not especially named therein(*b*).

II. The sovereign is considered, in the next place, as the generalissimo, or the first in military command, within the kingdom. The great end of society is to protect the weakness of individuals by the united strength of the community: and one principal use of government is to direct that united strength in the best and most *effectual manner, to answer the end proposed. Monarchical government [* 313] is allowed to be the fittest for this purpose: it follows therefore, from the very end of its institution, that in a monarchy the military power must be entrusted to the prince.

In this capacity therefore, of general of the kingdom, the sovereign has the sole power of raising and regulating fleets and armies. Of the manner in which they are raised and regulated, I shall speak more, when treating of the military state. We are now only to consider the prerogative of enlisting and governing our military and naval forces; this prerogative, indeed, was disputed and contrary to all precedent claimed by the long parliament of king Charles I.; but, upon the restoration of his son, was solemnly declared by statute 13 Car. 2, c. 6, to be in the king alone; for that "within all his majesty's realms and dominions the sole supreme government, command, and disposition of the militia, and of all forces by sea and land, and of all forts and places of strength, by the laws of England, ever was the undoubted right of his majesty, and his royal predecessors, kings and queens of England; and that both or either of the houses of parliament cannot, nor ought to, pretend to the same."

This statute of Charles II. obviously extends not only to fleets and armies, but also to forts and other places of strength, within the realm: the sole prerogative as well of erecting, as of manning and governing, which belongs to the sovereign in his capacity of general of the kingdom(*c*): and all lands were formerly subject to a tax, for building of castles wherever the sovereign thought proper. This was one of the three things, from contributing to the performance of which no lands were exempted; and therefore designated by our Saxon ancestors the *trinoda necessitas*: *sc. pontis reparatio, arcis constructio, et expeditio contra hostem*(*d*). And for this contribution *they were called upon so often, that as sir Edward Coke citing M. [* 314] Paris assures us(*e*), there were in the time of Henry II. 1115 castles subsisting in England. The inconveniences of which, when granted out to private subjects, the lordly barons of those times, were severely felt by the whole kingdom; for, as William of Newburg remarks in the reign of king Stephen, "*erant in Angliâ quodammodo tot reges vel potius tyranni, quot domini castellorum*." These inconveniences were felt by none more sensibly than by two succeeding princes, king John and king Henry III., and, the greatest part of these castles being demolished in the barons' wars, the sovereigns of after times were very cautious about suffering them to be rebuilt in a fortified manner: sir

(*a*) 11 Rep. 71.

(*b*) 7 Rep. 82.

(*c*) 2 Inst. 80.

(*d*) Cowel's Interp. tit. Castellorum Operatio. Seld. Jan. Ang. 1, 42.

(*e*) 2 Inst. 81.

Edward Coke indeed lays it down(*f*), that no subject can build a castle, or house of strength, imbattled, or other fortress defensible, without the licence of the crown; by reason of the danger which would ensue, if every man at his pleasure might do it.

Measures for defence of the realm, which necessarily involve a large expenditure of the public money are now exclusively undertaken by the legislature(*g*).

Partly upon the theory of our constitution that the sovereign is general of the kingdom, and partly upon a fiscal foundation, to secure his marine revenue, is based the royal prerogative of appointing ports and havens, or *appoint ports and havens*; such places only at which persons and merchandize may pass into and out of the realm, as the sovereign in his wisdom sees proper. By the [* 315] feudal law all navigable *rivers and havens were computed among the regalia(*h*), and were subject to the sovereign of the state. And in England it has always been held, that the sovereign is lord of the whole shore(*i*), and particularly is the guardian of the ports and havens, which are the inlets and gates of the realm(*k*): and therefore, so early as the reign of king John, we find ships seized by the king's officers for putting in at places which were not legal ports(*l*). These legal ports(*m*) were undoubtedly at first assigned by the crown; since to each of them a court of port-mote was incident(*n*), the jurisdiction of which must have flowed from the royal authority: the great ports of the sea are also referred to, as well known and established, by statute 4 Hen. 4, c. 20, which prohibits the landing elsewhere under pain of confiscation; and the statute 1 Eliz. c. 11, recites, that the franchise of lading and discharging had been frequently granted by the crown.

But though the sovereign had a power of granting the franchise of havens and ports, yet he had not the power of resumption, or of narrowing and confining their limits when once established; but any person had a *assign wharves and quays* right to load or discharge his merchandize in any part of the haven; whereby the revenue of the customs was much impaired and diminished, by fraudulent landings in obscure and private corners. This occasioned the statutes 1 Eliz. c. 11, and 13 & 14 Car. 2, c. 11, s. 14, which enabled the crown by commission to ascertain the limits of all ports, and to assign proper wharves and quays in each port, for the exclusive landing and loading of merchandize.(86)

These statutes indeed were repealed by the 6 Geo. 4, c. 105. And now by [* 316] statute 16 & 17 Vict. c. 107, s. 9, the *commissioners of the treasury are empowered by their warrant to appoint any port in the United Kingdom or Channel Islands, to declare the limits thereof, and to appoint

(*f*) 1 Inst. 5.

(*g*) See, for instance, the following recent statutes, 23 & 24 Vict. c. 112 ("An act to make better provision for acquiring lands for the defence of the realm," explained by stat. 28 & 29 Vict. c. 65; 23 & 24 Vict. c. 109 ("An act for defraying the expenses of constructing fortifications for the protection of the royal arsenals and dockyards," &c.); in connection

with which see 25 & 26 Vict. c. 78; 27 & 28 Vict. c. 57; 27 & 28 Vict. c. 109 ("The Admiralty Lands and Works Act, 1864").

(*h*) 2 Feud. t. 56; Crag. 1, 15, 15.

(*i*) F. N. B. 118.

(*k*) Dav. 9, 56.

(*l*) Madox. Exch. 530.

(*m*) As to the cinque ports, *post*, vol. iii.

(*n*) 4 Inst. 148.

(86) Congress has power to lay and collect taxes, duties, imports—to regulate commerce with foreign nations, and among the several states, and with the Indian tribes—; and the powers so conferred carry with them the right to declare what ports shall be ports of entry, and to erect and maintain beacons, light-houses, etc. U. S. Const., art. 1, § 8.

proper places within the same to be legal quays for the lading and unlading of goods, and by other sections(o) of the act the commissioners of the treasury and customs are empowered to appoint warehousing ports and sufferance wharves. Also by the 28 & 29 Vict. c. 125(p) (an Act for the regulation of dockyard ports), "It shall be lawful for her Majesty in council, from time to time, by order in council to define the limits of a dockyard port" for the purposes of the act.

Some further statutory provisions bearing upon the subject before us can have but the briefest notice. By 46 Geo. 3, c. 153, as amended by 25 & 26 Vict. c. 69, ss. 15, 16, no pier, quay, wharf, jetty, or embankment, shall, under a penalty, be erected in or near to any public harbour, so far as the tide flows up the same, without giving one month's notice to the Board of Trade; saving, however, the rights and privileges of the city of London, and of the lord mayor as conservator of the Thames and Medway. And by "The General Pier and Harbour Act, 1861," (which was passed to "facilitate the formation, management, and maintenance of piers and harbours in Great Britain,") persons desirous of obtaining authority to construct any works under it must (s. 3) make application by memorial to the Board of Trade to grant provisional orders for constructing such works, which orders (s. 16) are afterwards to be confirmed by parliament(q).

The erection of beacons, light-houses, and sea-marks, is also a branch of the royal prerogative: whereof the first was anciently used [317] ^{erect beacons, light-houses, and sea-marks;} in order to alarm the country, in case of the approach of an enemy, and all are signally useful in guiding and preserving vessels at sea by night as well as by day. For this purpose the sovereign may, by commission under his great seal(r), cause them to be erected in fit and convenient places(s), as well upon the lands of the subject as upon the demesnes of the crown, which power is usually vested by letters patent in the office of lord high admiral(t). By statute 8 Eliz. c. 13(u), the corporation of the Trinity-house were empowered to set up any beacons or sea-marks wherever they should think them necessary. And, in this same body, by s. 389 of "The Merchant Shipping Act, 1854"(x), the general superintendence and management of all light-houses, buoys, and beacons in England, Wales, and the Channel Islands is, with certain reservations, likewise vested.

To the branches of the royal prerogative latterly enumerated—which respectively concern the building and maintaining of fortresses, the appointing of ports and havens, the erecting of beacons and light-houses—reference is often made in the older cases. The ports are there denominated "the king's gates,"—harbours for merchants, "for whose better security the king is compelled to provide fortresses"(y). The erecting of beacons and landmarks was vested in the sovereign for the benefit of commerce, of which he was the supreme arbiter(z). In modern times, however, (as shown in the preceding

(o) Es. 10, 13.

(p) S. 8.

(q) The reader is also referred to the following statutes: 10 & 11 Vict. c. 27 ("An Act for Consolidating in one Act certain provisions usually contained in Acts authorising the making and improving of Harbours, Docks, and Piers"); 24 & 25 Vict. c. 45 ("The General Pier and Harbour Act, 1861"), as to which see 25 & 26 Vict. cc. 19, 69; 24 & 25 Vict. c. 47 (amended by 29 & 30 Vict. c. 30); 28 & 29 Vict. c. 100 ("An Act to transfer from the Admiralty to the Board of Trade powers

and duties relative to certain harbours"); 25 & 26 Vict. c. 69.

(r) 8 Inst. 204; 4 Inst. 148.

(s) Rot. Claus. 1 Ric. II. m. 42; Pryn. on 4 Inst. 136.

(t) Sid. 158; 4 Inst. 149.

(u) See, also, 52 Geo. 3, c. 115.

(x) 17 & 18 Vict. c. 104.

(y) See *Bates's Case & The Case of Ship-money*; Broom's Constit. I. pp. 249, 258, 300, 325, 337.

(z) *Post*.

pages,) the general superintendence of the matters specified has been assumed by parliament.

[* 318] *To the branch of prerogative which has latterly been noticed may also be referred the power vested in the crown, by statute 16 and 17 Vict. c. 107, whereof, by s. 45, "the importation of arms, ammunition, gunpowder, or any other goods may be prohibited by proclamation or order in council;" and by s. 150, the exportation or carriage coastwise of military and naval stores and provisions may in like manner be prohibited.

To the same branch of the prerogative may likewise be referred the right which the sovereign has, whenever he sees proper, of confining his subjects to stay within the realm, or of recalling them when beyond the seas. By the common law(*a*), every man may go out of the realm for whatever cause he pleases, without obtaining the sovereign's leave; provided he is under no injunction of staying at home (which liberty was expressly declared in king John's great charter(*b*), though left out in that of Henry III.); but, because every man ought of right to defend the sovereign and his realm, therefore the sovereign at his pleasure may, by writ, command him that he go not beyond the seas, or out of the realm, without licence; and, if he do the contrary, he shall be punished for disobeying the royal mandate. Some persons there anciently were, who were under a perpetual prohibition of going abroad without licence obtained; *sc.* all peers, on account of their being counsellors of the crown; all knights, who were bound to defend the kingdom from invasion; and all ecclesiastics, who were expressly restrained by the fourth chapter of the constitutions of Clarendon, on account of their attachment in the times of popery to the see of Rome. This was law in the time of Britton(*c*), who wrote in the reign of Edward I.: and sir Edward Coke(*d*) gives us many instances to the same effect in the time of Edward III. In the succeeding reign the affair of travelling wore a very different aspect; an act of parliament *being made(*e*),

[* 319] forbidding all persons whatever to go abroad without licence; except only the lords and other great men of the realm; and true and notable merchants; and the king's soldiers. But this act was repealed by the statute 4 Jac. 1, c. 1. And at present everybody has, or at least assumes, the liberty of going abroad when he pleases.

There is indeed a writ of *ne exeat regno* issuing out of chancery, and founded upon that which in former times emanated directly from the crown, the office of which is to prevent the subterfuge from justice of a debtor, and to compel the giving of security for the debt(*f*); and it is laid down by competent authority that if the sovereign sends a writ to any man, when abroad, commanding his return, and the subject disobeys, that is a high contempt and punishable accordingly(*g*). This especial exercise of the prerogative(*h*), however, has long been disused, and is not likely to be re-asserted.(87)

(*a*) F. N. B. 85.

(*b*) C. 42.

(*c*) C. 123.

(*d*) 3 Inst. 179.

(*e*) 5 Ric. II. st. 1, c. 2.

(*f*) Beames on Writ of Ne Exeat Regno, 11, 16, 33, 96.

(*g*) 1 Hawk. P. C. 22.

(*h*) As to which, see 3 Inst. 84.

(87) The writ of *ne exeat* has been very generally in use in the United States in civil suits and proceedings in equity. It is issued in equity suits commenced in the courts of the

III. The sovereign is considered in relation to domestic affairs as the fountain of justice and general conservator of the peace of the kingdom. By the fountain of justice the law does not mean its author or origin, but only its distributor. Justice is not derived from the sovereign, as from his free gift; but he is the steward of the public, to dispense it to whom it is due(i). He is not the spring, but the reservoir; whence right and equity are conducted, by a thousand channels, to individual members of the community. As it would be impracticable for complete justice to be rendered to every individual, by the people in their collective capacity, therefore every nation has committed the power of dispensing justice to certain select magistrates, who with more ease and expedition can hear and *determine [* 320] complaints; and in England this authority has immemorially been exercised, according to the theory of our constitution, by the sovereign or his substitutes. He has the right of erecting courts of judicature: for, though the constitution of the kingdom has intrusted him with the whole executive power of the laws, it is impossible, as it would be improper, that he should personally carry into execution this great and extensive trust: it is consequently necessary, that courts should be erected, to assist him in executing this power: and equally necessary, that, if erected, they should be erected by his authority(k), or by the supreme authority of parliament. Hence it is, that the jurisdiction of courts is either mediately or immediately derived from the crown, their proceedings run generally in the sovereign's name, pass under his seal, and are executed by his officers.

It is possible, that in very early times, before our constitution arrived at its full perfection, our kings in person sometimes heard and determined causes between party and party(l). But at present, by the long and uniform usage of ages, our sovereigns have delegated their whole judicial power to the judges of their several courts; who are the grand depositaries of the fundamental laws of the kingdom, and have gained a known and stated jurisdiction, regulated by certain and established rules, which the crown itself cannot now alter but by act of parliament(m). Moreover, in order to maintain both the dignity and independence of the judges in the superior courts, it is enacted by the statute 13 Will. 3, c. 2, that their commissions shall be

(i) *Ad hoc autem creatus est et electus, ut justitiam faciat universis.* Bract. 1. 3, tr. 1, c. 9.

(k) See Com. Dig. Prerogative, D. 28.

(l) Broom's Const. L. pp. 145—6.

(m) 2 Hawk. P. C. 2.

United States. Act March 2, 1793, § 5; 1 Stat. at Large, 384, and is granted by a supreme court judge or a circuit court judge of that court. *Ib.* But the district court judges have no power to issue the writ. *Gernon v. Bocaline*, 2 Wash. C. C. 180.

It is a writ in common use in the several state courts. *Williams v. Williams*, 2 Green's Ch. 130; *Cox v. Scott*, 5 Har. & J. 384; *Johnson v. Clendenin*, 5 Gill. & J. 463; *Rhodes v. Cousins*, 6 Rand. 188; *Edwards v. Massey*, 1 Hawks, 359; *Ancrum v. Dawson*, 1 McMullan, Ch. 405; *Lucas v. Hickman*, 2 Stew. 111; *Crocker v. Dunkin*, 6 Blackf. 535; *Fisher v. Stone*, 3 Scam. 68; *Dean v. Smith*, 23 Wis. 433; *Gresham v. Peterson*, 25 Ark. 377; *Orms v. McPherson*, 36 Ga. 571; *Rice v. Hale*, 5 Cush. 238; *Lyon v. Lyon*, 21 Conn. 199, note a; *Smith v. Koontz*, 4 Hay. 189.

The object of the writ is to prevent the defendant from leaving the jurisdiction of the court, and to secure bail in an equitable suit, and to render such defendant amenable to the decree of the court. *Ib.* See 2 Wait's Pract. 272 to 284.

The practice in each of the several states must be sought in its statutes, decisions and rules of practice.

made (not, as formerly, *durante bene placito*, but) *quamdiu bene se gesserint*, and their salaries ascertained and established; but that it may be lawful to remove them on the address of both houses of parliament. And by the statute 1 Geo. 3, c. 23, the judges are continued in their offices during their good [* 321] behaviour, *notwithstanding any demise of the crown (which was formerly held(n) immediately to vacate their seats), and their full salaries are absolutely secured to them during the continuance of their commissions.(88)

In criminal proceedings, or prosecutions for offences, it would be a still higher absurdity, if the sovereign personally sat in judgment; because in regard to these he appears in another capacity, that of prosecutor. All offences are either against the king's peace, or against his crown and dignity: and are so laid in an indictment. For though in their consequences they generally seem (except in the case of treason, and a few other cases) to be rather offences against the kingdom than the king; yet, as the public, which is an invisible body, has delegated all its power and rights, with regard to the execution of the laws, to one visible magistrate, all affronts to that power, and breaches of those rights, are immediately offences against him, to whom they are so delegated by the public. The sovereign therefore is the proper person to prosecute for public offences and breaches of the peace, being the person injured in the eye of the law. And this notion was carried so far in the old Gothic constitution (wherein the king was bound by his coronation oath to conserve the peace), that in case of any forcible injury offered to the person of a fellow-subject, the offender was accused of a kind of perjury, in having violated the king's coronation oath; *dicebatur fregisse juramentum regis juratum(o)*.

Closely connected with the above branch of the prerogative is that of pardoning offences; it is reasonable that he only who is injured should have the power of forgiving; and to the head of the executive, more fitly than to any other power in the state, has been accorded the privilege [* 322] of dispensing grace and mercy. Of prosecutions and pardons I shall treat more at large hereafter; and only mention them here, in this cursory manner, to show the constitutional grounds of this power of the crown, and how regularly connected all the links are in this vast chain of prerogative.

In the distinct and separate existence of judicial functions in a peculiar body

(n) 2 Lord Raym. 747.

(o) Stiernh. de jure Goth. l. 8, c. 8. A notion somewhat similar to this may be found

in the Mirror, c. 1, § 5. And see Rot. Parl. 25 Edw. 3.

(88) "The judicial power of the United States shall be vested in one supreme court, and in such inferior courts as the congress may from time to time establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation, which shall not be diminished during their continuance in office." U. S. Const., art. 3, § 1.

The judges are appointed by the president, by and with the advice and consent of the senate. U. S. Const., art. 2, § 2.

By act of congress, April 10, 1869, ch. 20, § 5, it is provided "That any judge of any court of the United States, who, having held his commission as such at least ten years, shall, after having attained to the age of seventy years, resign his office, shall thereafter, during the residue of his natural life, receive the same salary which was by law payable to him at the time of his resignation."

of men, nominated indeed, but not removeable at pleasure, by the crown, consists one main preservative of the public liberty; which cannot subsist long in any state, unless the administration of common justice be in some degree separated as well from the legislative as from the executive power. Were such functions joined with the legislative, the life, liberty, and property of the subject would be in the hands of arbitrary judges, whose decisions might be regulated only by their own opinions, not by any fundamental principles of law; which, though legislators may depart from, yet judges are bound to observe. Were it joined with the executive, this union might soon be an overbalance for the legislative. For which reason, by the statute 16 Car. 1, c. 10, which abolished the court of star-chamber, effectual care is taken to remove all judicial power out of the hands of the king's privy council; who, as then was evident from recent instances, might soon be inclined to pronounce that for law, which was most agreeable to the prince or his officers. Nothing is more to be avoided, in a free constitution, than uniting the province of a judge with that of a minister of state.

A consequence of the prerogative latterly adverted to is the legal ubiquity of the sovereign, who, in the eye of the law, is always present in all his courts, in law is always present in court; though he cannot personally distribute justice(*p*). His judges are the mirror by which his own image is reflected. It is the regal office, not the royal person, that is always present ^{*}in court, always ready to undertake prosecutions, or to pronounce judgment, [**323*] for the benefit and protection of the subject. And from this ubiquity it technically follows, that the sovereign cannot be nonsuit(*q*); for a nonsuit is the desertion of the suit or action by the non-appearance of the plaintiff in court(*r*). For the same reason also, in the forms of legal proceedings, the sovereign is not said to appear by his attorney, as other men do; for in contemplation of law he is always present in court(*s*).

From the same origin—the sovereign being the fountain of justice—we may also deduce the prerogative of issuing proclamations, which is vested in and can issue proclamations for enforcing laws. him alone. These proclamations have then a binding force, when (as sir Edward Coke observes(*t*)) they are grounded upon and enforce the laws of the realm. For though the making of laws is entirely the work of a distinct part, the legislative branch, of the sovereign power, yet the manner, time, and circumstances of putting those laws in execution must frequently be left to the discretion of the executive magistrate. And therefore his constitutions or edicts concerning these points, which we call proclamations, are binding upon the subject, where they do not either contradict the old laws or tend to establish new ones: but only enforce the execution of such laws as are already in being, in such manner as the sovereign shall judge necessary. Thus the established law is, that the king may prohibit any of his subjects from leaving the realm: a proclamation, therefore, forbidding this in general for three weeks, by laying an embargo upon all shipping in time of war(*u*), will be equally binding as an act of parliament, because founded upon a prior law. But a proclamation to lay an embargo in time of

(*p*) Fortesc. c. 8; 2 Inst. 186.

(*q*) Co. Lit. 189.

(*r*) The attorney-general may however enter a *non vult prosecui*, which has the effect of a nonsuit. (Co. Lit. 189).

(*s*) Finch. L. 81.

(*t*) 3 Inst. 163.

(*u*) 4 Mod. 177, 179.

[*324] peace upon *all vessels laden with wheat (although in a time of public scarcity) being contrary to law, and particularly to statute 22 Car. 2, c. 13, the advisers of such a proclamation, and all persons acting under it, found it necessary to be indemnified by a special act of parliament, 7 Geo. 3, c. 7. It was indeed enacted by the statute 31 Hen. 8, c. 8, that the king's proclamations should have the force of acts of parliament(x); a statute, which was calculated to introduce the most despotic tyranny; and which might have proved fatal to the liberties of this kingdom, had it not been luckily repealed(y), in the minority of his successor, about five years after it had been passed.

IV. The sovereign is likewise the fountain of honour, of office, and of privilege: and this in a different sense from that wherein he is styled the fountain of justice. A due subordination of rank is essential for the maintenance of government; the people must know and distinguish such as are set over them, in order to yield them a due respect and obedience; the officials themselves, if encouraged by emulation and the hopes of preferment will the better discharge their functions, and the law supposes that no one can be so good a judge of their several merits and services, as the sovereign who employs them. It has therefore entrusted him with the sole power of conferring dignities and honours, in confidence that he will bestow them upon none but such as deserve them. And therefore all degrees of nobility, of knighthood, and other titles, are received by immediate grant from the crown: either expressed in writing, by writ or letters patent, or by corporeal investiture.(89)

[*325] From the same principle also arises the prerogative of *erecting and disposing of offices: for honours and offices are in their nature convertible and synonymous. All offices under the crown carry in the eye of the law honour along with them; because they imply superiority of parts and abilities, being supposed to be always filled by those who are most able to execute them. And, on the other hand, all honours had originally duties or offices annexed to them: an earl, *comes*, was the conservator or governor of a county; and a knight, *miles*, was bound to attend the king in his wars. For the same reason, therefore, that honours are at the disposal of the sovereign, offices ought to be so likewise; and as the sovereign may create new titles, so may he create new offices: but with this restriction, that he cannot create new offices, with new fees annexed to them, nor annex new fees to old offices; for this would be a tax upon the subject, which cannot be imposed but by act of parliament(z). Wherefore, in 13 Hen. IV., a new office being created by the king's letters patent for measuring cloths, with a new fee for the same, the letters patent were, on account of the new fee, revoked and declared void in parliament(a).

(x) But with a proviso, that such proclamations should not be prejudicial to any person's inheritance, offices, liberties, goods, and chattels, or infringe the established laws.

(y) Stat. 1 Edw. 6, c. 13.

(z) 2 Inst. 533.

(a) *Ibid.*

(89) "No title of nobility shall be granted by the United States; and no person holding any office of profit or trust under them, shall, without the consent of congress, accept of any present, emolument, office, or title, of any kind whatever, from any king, prince, or foreign state." U. S. Const., art. 1, § 9.

States are also prohibited from granting any titles of nobility. *Ib.*, § 10.

Upon the same, or a like reason, the sovereign has also the prerogative of conferring privileges upon private persons; such as granting place or precedence to any subject(b), though this particular branch of the prerogative has been to some extent restrained by statute(c).

grant precedence, make denizens, and erect corporations.

It is within the power of the sovereign also to convert aliens, or persons born out of the dominions of the crown into denizens; whereby some very considerable privileges of *natural-born subjects are conferred upon them.(90) Such also is the prerogative of erecting [*326] corporations; whereby a number of private persons are united and knit together and enjoy many liberties, powers, and immunities in their political capacity, which they were utterly incapable of in their natural.(91) Of aliens, denizens, natural-born, and naturalized subjects, I shall speak more largely in a subsequent chapter(d); as also of corporations at the close of this Book of our Commentaries(e). I now only mention them incidentally, in order to remark the royal

(b) 4 Inst. 361. This prerogative her present majesty was pleased to exercise, by ordaining that his late royal highness prince Albert, should, except where otherwise provided by Act of Parliament, have place, pre-eminence, and precedence next to her majesty.

(Gaz. March 5, 1840; see also Parl. Deb. li. pp. 575, 923, 1079.)

(c) 31 Hen. 8, c. 10; 39 & 40 Geo. 3, c. 67, art. 4.

(d) *Post*, chap. x.

(e) *Post*, chap. xvii.

(90) "The congress shall have power * * * To establish a uniform rule of naturalization." U. S. Const., art. 1 § 8.

Congress by act of 14 April, 1802, § 1; 2 Stat. at Large, 153, provides that aliens may, upon certain conditions, be admitted to citizenship, by the supreme, superior, district or circuit courts of some one of the states, or of the territorial districts of the United States, or a circuit or district court of the United States. And every court of record in any individual state, having common-law jurisdiction, and a seal and clerk or prothonotary, is considered a district court within the meaning of the act. *Ib.*, § 2. Minor children of naturalized persons become citizens. *Ib.*, § 3. By act of congress 17 July, 1862, § 11; 12 Stat. at Large, 597, aliens of the age of twenty-one years and upward who enlist in the armies of the United States, either of the regular or volunteer forces, and who have been honorably discharged, are admitted without previous declaration of intention, etc., and need not prove more than one year's residence.

As to the authority under which the state courts act in naturalization cases, see *Ramaden's Case*, 18 How. Pr. 429; *Morgan v. Dudley*, 18 B. Monr. 693, 714; *Rump v. Commonwealth*, 30 Penn. St. 475; *People v. Sweetman*, 3 Park. Cr. 358; *People v. Pease*, 30 Barb. 588, 603; S. C., 27 N. Y. (13 Smith) 45; *Stephens' petition*, 4 Gray (Mass.), 559; *Chirac v. Chirac*, 2 Wheat. (U. S.) 259, 269; *Matter of Conner*, 39 Cal. 98.

The United States courts have jurisdiction of offenses against the naturalization laws. Act of July 14, 1870; 16 Stat. at Large, 255, § 4.

(91) The constitution of the United States does not in express terms confer upon congress the power to create corporations. But the incidental power, as auxiliary to other powers expressly given, in the creation of corporations, was sustained when the constitutionality of the old United States bank was questioned. *McCullough v. Maryland*, 4 Wheat. 316.

By the act of June 3, 1864, 13 Stat. at Large, 99, congress provided for a system of national banks; and these corporations are numerous, and exist in every part of the country.

The legislatures of the several states also provide for the creation and organization of corporations. And it may be said generally that the power to create and organize corporations in this country is conferred by the state legislatures or by congress, and that neither the president, nor the governors of the several states have any power in this respect, except that of signing such laws as the state legislatures or congress may enact. This power to create corporations is conferred upon the legislatures by the constitutions of many if not all the states. And it is a rule of very extensive application, that corporations shall be organized under the provisions of general laws, instead of special enactments.

prerogative of making them; which is grounded upon this foundation, that the sovereign having the sole administration of the government in his hands, is the supreme and only judge, in what capacities, with what privileges, and under what distinctions, his people are best qualified to serve, and to act under him. A principle, which was carried so far by the imperial law, that it was held sacrilegious even to doubt whether the prince had appointed proper officers in the state(*f*).

V. Another light, in which the laws of England have considered the sovereign with regard to domestic concerns, is as the arbiter of commerce. By commerce, I at present mean domestic commerce only. It would lead me into too large a field, if I were to attempt to enter upon the nature of foreign trade, its privileges, regulations and restrictions; and would also be quite beside the purpose of these Commentaries, which are confined to the laws of England: whereas no municipal laws can be sufficient to order and determine the very extensive and complicated affairs of traffic and merchandize; neither can they have a proper authority for this purpose. For, as these are transactions carried on between subjects of independent states, the municipal laws of one country will not be *exclusively regarded by another, although a certain deference will be paid to them in virtue of the comity of nations. And hence the affairs of commerce are in part regulated by a law of their own, called the law merchant or *lex mercatoria*, the leading principles of which all nations agree in and take notice of. And in particular it is held to be part of the law of England, which in deciding the causes of merchants will take notice of the rules which obtain in other commercial countries; and that often even in matters relating to domestic trade, as for instance with regard to the usance of a bill of exchange.

With us in England, the royal prerogative, so far as it relates to mere domestic commerce, will fall principally under the following heads:—

First, the establishment of public marts, or places of buying and selling; such as markets and fairs, with the tolls thereunto belonging. These were originally set up by virtue of a grant from the crown, or have become established by long and immemorial usage and prescription, which presupposes such a grant(*g*). The limitation of these public resorts, to such time and such place as might be most convenient for the neighbourhood, forming a part of domestic polity, was under the disposition of the sovereign; and is sometimes regulated by parliament(*h*).

Secondly, the regulation of weights and measures. These, for the advantage of the public, ought to be uniform throughout the kingdom, and being the general criterions of value, should be reduced to some rule or standard: which, however, it is impossible to fix by any written law or oral proclamation; for no man can, by words only, give another an adequate idea of a foot rule, or of a pound weight. It is therefore necessary to have recourse to some visible, palpable, material standard; by forming a comparison with which, all weights and measures may be reduced to one uniform size: and

(*f*) *Disputare de principali judicio non oportet; sacrilegii enim instar est, dubitare an is dignus sit, quem elegerit imperator.* Cod. 9, 29, 8.

(*g*) 2 Inst. 220.

(*h*) See 31 & 32 Vict. c. 106.

the *prerogative of fixing this standard our ancient law vested in the crown, as in Normandy it belonged to the duke(i). This standard was [*328] originally kept at Winchester: and we find in the laws of king Edgar(j), near a century before the Conquest, an injunction that the one measure, which was kept at Winchester, should be observed throughout the realm. Most nations have regulated the standard of measures of length by comparison with the parts of the human body; as the palm, the hand, the span, the foot, the cubit, the ell, (*ulna*, or arm), the pace, and the fathom. But as these are of different dimensions in men of different proportions, or ancient historians(k) inform us, that a new standard of longitudinal measure was ascertained by king Henry I., who commanded that the *ulna* or ancient ell, which answers to the modern yard, should be made of the exact length of his own arm. And, one standard of measures of length being gained, all others were thence easily derivable; those of greater length by multiplying, those of less by subdividing, that original standard. Thus, by the statute called *compositio ulnarum et perticarum*(l), five yards and a half make a perch; and the yard is subdivided into three feet, and each foot into twelve inches: an inch being of the length of three grains of barley. Superficial measures were derived by squaring those of length; and measures of capacity by cubing them. The standard of weights was originally taken from corns of wheat, whence the lowest denomination of weights was called a grain; twenty-two of which are directed, by the statute called *compositio mensurarum*(m), to compose a pennyweight, of pennyweights, twenty make an ounce, twelve ounces a pound, and so upwards. And upon these principles the first *standards were made; which, being originally so fixed by the [*329] crown, were subsequently regulated by the sovereign in parliament. Thus, under king Richard I., in his parliament held at Westminster, A. D. 1197, it was ordained that there should be only one weight and one measure throughout the kingdom, and that the custody of the assize or standard of weights and measures should be committed to certain persons in every city and borough(n); and hence the ancient office of the king's aulnager seems to have been derived, whose duty it was, for a certain fee, to measure all cloth made for sale, till the aulnage duties were abolished by the statute 11 & 12 Will. 3, c. 20. In king John's time this ordinance of king Richard was frequently dispensed with for money(o), which occasioned a provision to be made for enforcing it, in the great charters of king John and his son(p). These original standards were called *pondus regis*(q), and *mensuri domini regis*(r); and were directed by various subsequent statutes to be kept in the exchequer, and all weights and measures to be made conformable thereto(s). But, as sir Edward Coke observes(t), though this had often by authority of parliament been enacted, yet it could never be effected; so forcible is custom with the multitude.(92)

(i) Gr. Constum. c. 16.

(j) Anc. Laws and Inst. Eng. p. 114.

(k) Will. Melmsb. in *vitiâ* Hen. 1, Spelm. tit. *pondus regis*.Hen. *apud* Wilkins, 299.

(l) Stat. at Large (edit. by Pickering) I. 400.

(m) *Id.* I. 406.

(n) Hoved; Matth. Paris.

(o) Hoved. A. D. 1201.

(p) 9 Hen. 3, c. 25.

(q) Plac. 35 Edw. 1 *apud* Cowel's Interp.

(r) Flet. 2, 12.

(s) 14 Edw. 3, st. 1, c. 12; 25 Edw. 3, st. 5, cc. 9 & 10; 16 Rich. 2, c. 8; 8 Hen. 6, c. 5; 11 Hen. 6, c. 8; 11 Hen. 7, c. 4; 23 Car. 2, c. 8.

(t) 2 Inst. 41.

(92) In the United States, congress has the power to fix the standard of weights and measures. U. S. Const., art. 1, § 8.

In 1836 congress provided, by resolution No. 7, "That the secretary of the treasury be

The regulation of weights and measures has, indeed, from Magna Carta downwards, frequently occupied the attention of parliament, and cannot now be referred simply to the prerogative. The objects aimed at by the legislature having been to establish an uniformity of weights and measures throughout the kingdom(*u*); and *to establish on scientific principles the proper standards(*v*).

Accordingly the construction of contracts of sale is to be governed by these standards, unless where an express agreement has been made to the contrary; and in such case the proportion of the local or special measure to the standard must be specified therein, otherwise it is null and void. However, by the 5 & 6 Will. 4, c. 63, weights and measures properly verified and stamped, are declared legal although not similar in shape to those required(*w*), but all local and customary measures, and also heaped measures are abolished(*x*). Further, by the 27 & 28 Vict. c. 117, it is enacted (s. 2), that "no contract or dealing shall be deemed to be invalid or open to objection on the ground that the weights or measures expressed or referred to in such contract or dealing, are weights or measures of the metric system, or on the ground that decimal subdivisions of legal weights and measures, whether metric or otherwise, are used in such contract or dealing;" *and in the schedule to the act the equivalents of the weights and measures in force throughout the country are set forth in terms of the metric system.

Thirdly, since money is the medium of trade, it is a prerogative of the sovereign, as arbiter of domestic commerce, to give it authority, or make it current.

Money is a common standard, by comparison with which the value of all merchandise may be ascertained: it is a sign, which represents the respective values or prices of commodities. Metals are well calculated for this sign, because they are durable, and are capable of subdivision; and gold, silver, and copper are especially calculated for this purpose, because they are very portable and comparatively scarce. A metal moreover is *prima*

(*u*) All articles sold by weight must be sold by averdupois weight, except gold, silver, platina, diamonds, or other precious stones, which may be sold by troy weight; drugs may be sold by apothecaries' weight, if sold by retail. 5 & 6 Will. 4, c. 63, s. 10. Coals are to be sold by weight. *Id.* s. 9. The 22 & 23 Vict. c. 66 regulates the measures used in the sale of gas.

(*v*) By stats. 5 Geo. 4, c. 74; 6 Geo. 4, c. 12; 5 & 6 Will. 4, c. 63, amended by 22 & 23 Vict. c. 56, the imperial standard yard, pound, gallon, and bushel, were fixed and rendered uniform throughout the kingdom. The 18 & 19 Vict. c. 72, ss. 2 & 3, establishes the restored standard yard and standard pound averdupois, the originals of which had been destroyed in the fire at the houses of parliament.

By 29 & 30 Vict. c. 82, s. 1, the imperial standards of length and weight, and all secondary standards of weights and measures were committed to the custody of the Board of Trade; and by s. 18 of the same statute the custody of the standard trial pieces of gold and silver used for determining the justness of the gold and silver coins of the realm issued from the royal mint, was assigned to the commissioners of the Treasury. The weights used in sales of bullion are regulated by stat. 16 & 17 Vict. c. 29.

(*w*) Sect. 4.

(*x*) Sects. 6, 7. The former of these sections applies only to sales by measure of capacity, not to sales by weight estimated in pounds. *Hughes v. Humphreys*, 3 E. & B. 954.

and he hereby is directed to cause a complete set of all the weights and measures adopted as standards, and now either made or in progress of manufacture for the use of the several custom-houses, and for other purposes, to be delivered to the governor of each state in the Union, or such person as he may appoint, for the use of the states respectively, to the end that an uniform standard of weights and measures may be established throughout the United States." 5 Stat. at Large, 133.

facie most proper for a common measure, because it can easily be reduced to the same unit of value in all nations: and every particular nation fixes on it its own impression, so that the weight and purity (wherein consists the intrinsic value) of coin may be known by mere inspection.(93)

As the quantity of precious metals increases, that is, the more of them there is extracted from the mine, this universal medium or common sign would obviously sink in value, and grow less precious if its tendency to do so were not by other circumstances more or less materially counteracted.

Above a thousand millions of bullion are calculated to have been imported into Europe from America within less than three centuries after the discovery of this latter continent: and of gold a large additional quantity has recently been obtained from Australia and California. The great increase thus caused in our metallic circulating medium has, doubtless to an extent,

(93) "The congress shall have power * * * To coin money, regulate the value thereof, and of foreign coin." U. S. Const., art. 1, § 8. No state is permitted to coin money, emit bills of credit, or make any thing but gold and silver coin a tender in payment of debts. *Ib.*, § 10.

Congress by act of Feb. 25, 1862, 12 Stat. at Large, 845, § 1, provided for the issue of United States treasury notes, and declared that they should "be receivable in payment of all taxes, internal duties, excises, debts, and demands of every kind due to the United States, except duties on imports, and of all claims and demands against the United States of every kind whatsoever, except for interest upon bonds and notes, which shall be paid in coin, and shall also be a lawful money and a legal tender in payment of all debts, public and private, within the United States, except duties on imports and interest as aforesaid."

The questions which have frequently arisen under this statute are, 1. Can congress make any thing but gold and silver coin a valid tender; 2. Are treasury notes a valid tender in payment of debts contracted before the statute was enacted; and 3. Are such notes a good tender in payment of debts expressly payable in gold and silver coin. Upon the first question the cases are numerous, that treasury notes are a legal tender in payment of debts. *Hague v. Powers*, 39 Barb. 427; *Reynolds v. Bank of the State*, 18 Ind. 467; *People v. Meyhew*, 26 Cal. 655; *Carpenter v. Northfield Bank*, 39 Vt. 46; *Davis v. Burton*, 52 Penn. St. 9, 22; *Johnson v. Ivey*, 4 Cold. (Tenn.) 608; *Belloc v. Davis*, 58 Cal. 242; *Fosdick v. Van Huesen*, 21 Mich. 567.

Upon the question whether a tender in such notes would be valid where the debt was contracted before the enactment of the statute, the authorities are conflicting. That such a tender would not be good is held in *Hepburn v. Griswold*, 8 Wall. (U. S.) 608; *Martin v. Martin*, 20 N. J. Eq. (5 C. E. Gr.) 421.

That such a tender is good as to prior debts is held in *Knox v. Lee*; *Parker v. Davis*, 12 Wall. (U. S.) 457 (overruling *Hepburn v. Griswold*); *Verges v. Giboney*, 38 Mo. 458; *O'Neil v. McKewn*, 1 S. C. 147; *Higgins v. Bear River Co.*, 27 Cal. 153.

That a debt expressly payable in coin may be tendered in treasury notes instead of coin is held in *George v. Concord*, 45 N. H. 434; *Graham v. Marshall*, *Laughlin v. Harvey*, 53 Penn. St. 9; *Appel v. Woltman*, 38 Mo. 458; *Jones v. Smith*, 48 Barb. 552; *Wilson v. Morgan*, 4 Rob. 58; *Wilson v. Triblecock*, 23 Iowa, 381; *Killough v. Alford*, 32 Tex. 457; *Gilman v. Douglas*, 6 Nev. 27; *Cary v. Courtenay*, 108 Mass. 316. See *Murray v. Gale*, 5 Abb. (N. S.) Pr. 236; 52 Barb. 429.

That a debt expressly payable in coin cannot be paid in any thing but coin or its equivalent in value is held in *Bronson v. Rhodes*, 7 Wall. (U. S.) 229; *Trebilecock v. Wilson*, 12 id. 687 (reversing S. C., 23 Iowa, 381); *Galland v. Lewis*, 26 Cal. 46; *Vilhac v. Beven*, 28 id. 410; *Rankin v. Demott*, 61 Penn. St. 263; *Frank v. Colhoun*, 59 id. 381; *Bobo v. Goss*, 1 S. C. 262; *Hill v. Trustees*, 7 Phil. (Pa.) 28. See *Murray v. Gale*, 5 Abb. (N. S.) Pr. 236; 52 Barb. 427, which settle the question that debts in terms payable in coin must be so paid, and that legal tender notes are not sufficient, if of less value than coin.

which it might be impossible precisely to indicate(*y*), diminished or lowered its value.

[*332] The coining of money is in civilized states the act of *the sovereign power(*z*). And with respect to coinage in general, there are three things to be considered therein; the materials, the impression, and the denomination.

With regard to its materials, sir Edward Coke lays it down(*a*), that the money of England must either be of gold or silver(*b*): and none other was ever issued by the royal authority till 1672, when copper farthings and halfpence were coined by king Charles II., and ordered by proclamation to be current in all payments, under the value of sixpence, and not otherwise. But this copper coin is not quite upon the same footing with the other, particularly as regards the offence of counterfeiting it(*c*). And in regard to the silver coin, it is enacted by statute 56 Geo. 3, c. 68, s. 12, that no tender of silver money, exceeding forty shillings at one time, shall be a sufficient tender in law.

As to the impressing or stamping of coin — this is the unquestionable prerogative of the crown: for though divers bishops and monasteries had formerly the privilege of coining money, yet, as sir Matthew Hale observes(*d*), this was usually done by special grant from the crown or by prescription which supposes one: and therefore was derived from, and not in derogation of, the royal prerogative(*e*). And, besides, such grantees had only the profit of the coinage, [*333] and not the power of instituting either *the impression or denomination; having usually had the stamp for impressing coin sent them from the exchequer.

The denomination, or value for which the coin is to pass current, is likewise in the breast of the sovereign; and, if any unusual pieces are coined, their value must be ascertained by proclamation or by act of parliament(*f*). In order to fix the value, the weight and the fineness of the metal are to be taken into consideration together. When a given weight of gold or silver is of a given fineness, it is then of the true standard(*g*), and called "esterling" or "sterling" metal; a name for which various reasons have been given(*h*). And of this sterling or esterling metal all the coin of the kingdom must be made, by the statute 25 Edw. 3, c. 13. So that the royal prerogative seems

(*y*) Inasmuch as there is no fixed standard available for this purpose.

(*z*) In the stat. 24 & 25 Vict. c. 99, the royal prerogative of regulating the coinage is thus recognised; sect. 1 sets forth that the expression "the queen's current gold or silver coin," shall include any gold or silver coined in any of her majesty's mints, or lawfully current by virtue of any proclamation or otherwise.

(*a*) 3 Inst. 577.

(*b*) The comparative values of gold and silver have during the last few centuries (preceding 1855) not varied in any very material degree, because the proportion between the demand and supply of the two metals has not materially varied. Macleod on Banking, i. 116.

(*c*) See 24 & 25 Vict. c. 99, ss. 9, 15, 18, 22.

(*d*) 1 Hist. P. C. 191.

(*e*) This privilege was not wholly abolished till the middle of the 16th century. Macleod on Banking, i. 149.

(*f*) See stat. 12 & 13 Vict. c. 41.

(*g*) This standard has frequently varied, but since 1816, the pound troy of standard gold has been coined into 46 89-129 sovereigns, or 46*l.* 14*s.* 6*d.* And since the same date the pound troy of silver has been coined into sixty-six shillings. M'Culloch's Dict. Com. *sub voce*, Coins.

(*h*) Spelm. Gloss. 208; Dufresne, iii. 165. According to these two etymologists, the name was derived from the *Esterlingt*, or Esterlings; as those Saxons were anciently called, who inhabited that district of Germany now occupied by the Hanse-towns and their appendages; the earliest traders in modern Europe. The word "sterling" has also been derived from the festival of Easter, when certain officials visited the mint and examined the coinage. Macleod on Banking, i. 148. See further as to the derivation of this word Ducange Gloss. *sub verb.* "*esterlingus*."

not to extend to the debasing or enhancing the value of the coin below or above the sterling value(i); though sir Matthew Hale(j) appears to be of another opinion. The sovereign may also, by proclamation legitimate foreign coin, and make it current here(k); declaring at what value it shall be taken in payments(l). By stat. 29 & 30 Vict. c. 65, s. 1, her majesty is empowered to proclaim gold coins made at the colonial *branch mints to be a legal tender for payments in the United Kingdom and Colonies(l). The [*334] sovereign may also at any time call in, decay, or cry down, any coin of the kingdom, and make it no longer current(m).

Upon the metallic currency of the country and bullion which is convertible into it, our paper currency is based; a bank note expressing on the face of it a promise to pay on demand such or such an amount of metallic currency. This paper currency is issued subject to certain restrictions contained in the Bank Charter Acts, and in the statutes regulating banks of issue. It represents *pro tanto* the current coin of the realm, and circulates by reason of the confidence reposed in the bank — whether national, joint stock, or private which has issued it(n).

VI. Lastly, the sovereign is considered by the laws of England as the head and supreme governor of the national church.

(VI.) Is head of the church. To enter into the reasons upon which this prerogative is founded would be more proper for a writer on divinity than for a legal commentator. I shall therefore only observe that by 26 Hen. 8, c. 1, (reciting that the king's majesty justly and rightfully is and ought to be the supreme head of the church of England; and so had been recognised by the clergy of this kingdom in their convocation) it was enacted, that the king should be reputed the only supreme head of the church of England, and should have annexed to the imperial crown of this realm, as well the title and style thereof, as all jurisdictions, authorities, and commodities, to the said dignity of supreme head of the church appertaining. And another statute to the same purport was made, 1 Eliz. c. 1.

*In virtue of this authority the sovereign convenes, prorogues, restrains, regulates, and dissolves all ecclesiastical synods or convocations. This was an inherent prerogative of the crown, long before the time of Henry VIII, as appears by the statute 8 Hen. 6, c. 1, and the many authors, both lawyers and historians, vouched by sir Edward Coke(o). So that the statute 25 Hen. 8, c. 19, which restrains the convocation from making or putting in execution any canons repugnant to the royal prerogative, or to the laws, customs, and statutes of the realm, was declaratory of the old common law(p): that part of it only being new, which makes the assent of the sovereign actually necessary to the validity of every canon. The convocation or ecclesiastical synod in England, differs considerably in its constitution from the synods of other christian kingdoms: those consisting wholly of bishops;

(i) 2 Inst. 577.

(j) 1 Hale, P. C. 194.

(k) *Wade's Case*, 5 Rep. 114.

(l) 1 Hale, P. C. 197.

(i) By 26 & 27 Vict. c. 74, s. 1, her majesty is empowered by proclamation to declare that gold coins issued from the mint at Syd-

ney shall be a legal tender within the United Kingdom.

(m) 1 Hale, P. C. 197.

(n) A note of the Bank of England is, except by the bank or any of its branches, a legal tender, 8 & 4 Will. 4, c. 98, s. 6.

(o) 4 Inst. 322, 323.

(p) 12 Rep. 72.

whereas with us the convocation, whether for the province of Canterbury or for that of York(*q*), is in some sort the miniature of a parliament, over which the archbishop presides in the upper house of bishops representing the house of lords; and the lower house, composed of representatives of the several dioceses at large, and of each particular chapter therein, resembling the house of commons with its knights of the shire and burgesses. This constitution is said to be owing to the policy of Edward I.: who thereby at one and the same time let in the inferior clergy to the privileges of framing ecclesiastical canons (which before they had not), and also introduced a method of taxing ecclesiastical benefices, by consent of convocation(*r*). The functions of [*336] *convocation are now practically limited to the discussion of questions affecting the ecclesiastical polity without legislative power.

From this prerogative of being the head of the church, arises the sovereign's right of nomination to vacant bishoprics, and certain other ecclesiastical preferments; which will more properly be considered hereafter(*s*).

As head of the church, the sovereign is likewise, in theory, the *dernier ressort* in ecclesiastical causes; an appeal lying therein to the judicial committee of the privy council.

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*CHAPTER VIII.

THE ROYAL REVENUE.

HAVING, in the preceding Chapter, considered at large those branches of the prerogative, which contribute to the royal dignity, and constitute the executive power of the government, we proceed now to examine the fiscal prerogatives of the sovereign, or such as regard the royal revenue; which the British constitution has vested in the crown, in order to support its dignity and maintain its power: being a portion which each subject contributes of his property, in order to render more secure the remainder.

The hereditary revenue of the crown was anciently derivable from various sources, which will be specified in the ensuing pages. To prevent misconception, however, upon this subject, two preliminary remarks are needed. In the first place, much of the ancient hereditary revenue of the crown long since passed to, and is at this day vested in, the hands of subjects, to whom it was granted out from time to time by the kings of England, which rendered the crown in some measure dependent on the people for its ordinary support and subsistence. So that we shall be obliged to recount, as part of the royal revenue, what lords of manors and others frequently look upon as their own absolute inherent rights; because they are and have been vested in them and their ancestors for ages, though in reality originally derived from the grants of

(*q*) Hume, Hist. Eng. (ed. 1802), ii. 279. But see Trevor, On Conv. pp. 120, *et seq.*

(*r*) Gilb. Hist. of Exch. c. 4.

After the Reformation subsidies granted by the convocation were always confirmed by parliament; an intimation to the convocation

that the legislature did not acquiesce in their power of binding even the clergy in a matter of property. But this mode of ecclesiastical taxation was discontinued in 1664. Hallam, Const. Hist. iii. 325.

(*s*) *Post*, chap. xi.

our ancient princes. Secondly, since the revolution of 1688, the royal revenue has in this country been from *time to time fixed and ascertained in virtue of an arrangement entered into upon the accession of each successive sovereign between the parliament and the crown. The separate pecuniary items which in the aggregate formerly constituted this revenue, except only the income derivable from the private estates of the sovereign(a), and the proceeds of property vested in or appurtenant to the crown, being now paid over directly or indirectly to the nation, and made applicable to public purposes(b). And, in consideration of the hereditary rights and revenues thus relinquished by the sovereign, a yearly sum is directed to be paid out of the consolidated fund, which is available for the support of the royal household, and for upholding the honour and dignity of the crown(c).

Subject to the preceding remarks the royal revenue may be described as either ordinary or extraordinary. The sovereign's ordinary revenue having either subsisted time out of mind in the crown; or else having been granted by parliament, by way of purchase or exchange for such of its inherent hereditary revenues as were found inconvenient to the subject; this ordinary revenue we will in the first place consider.

I. The first of the sovereign's ordinary revenues to be noticed is of an ecclesiastical kind (as are also the three succeeding ones); viz. the custody of the temporalities of bishops: by which are meant all the lay revenues, lands, and tenements (in which is included his barony) which belong to an archbishop's or bishop's see. And these upon the vacancy of the see are immediately vested in the sovereign as a consequence of his prerogative in church matters; for the sovereign being considered as the founder of all archbishoprics and bishoprics, to him during vacancy *they revert. And for the same reason, before the dissolution of [* 339] abbeys, the sovereign had the custody of the temporalities of all such abbeys and priories as were of royal foundation (but not of those founded by subjects) on the death of the abbot or prior(d). Another reason may also be given, why the policy of the law vested this custody in the crown; because the lands and possessions of a see, as the successor is not known, would be liable to spoil and devastation, if no one had a property therein. Therefore the law has given to the crown, not the temporalities themselves, but the custody of the temporalities, till such time as a successor is appointed, with power of taking to itself all the intermediate profits, without any account of the successor; and with the right of presenting to such benefices and other preferments as fall within the time of vacancy(e). This revenue is of so high a nature, that it could not be granted out to a subject, before, or even after it accrued: but now by the statute 15 Edw. 3, st. 4, c. 4 & c. 5, the crown may, after the vacancy, lease the temporalities to the dean and chapter; saving to itself all advowsons, escheats, and the like. Our ancient kings, and particularly William Rufus, were not only remarkable for keeping the bishoprics a long time vacant, for the sake of enjoying the temporalities, but also committed horrible waste on the woods and other parts of the estate; and, to crown all, would never, when

(a) 25 & 26 Vict. c. 87.

(b) The receipt, custody, and issue of the public monies is now mainly regulated by the stat. 29 & 30 Vict. c. 89.

(c) *Post.*

(d) 2 Inst. 15.

(e) Stat. 17 Edw. 2, st. 1, c. 14; F. N. B. 82.

a see was filled up, restore to the bishop his temporalities again, unless he purchased them at an exorbitant price. To remedy which, king Henry I.(f) granted a charter at the beginning of his reign, promising neither to sell, nor let to farm, nor take anything from the domains of the church, till the successor was installed. And it was made one of the articles of the great charter(g), [*340] that no waste should be *committed in the temporalities of bishoprics, neither should the custody of them be sold. The same is ordained by the statute of Westminster I.(h); and the statute 14 Edw. 3, st. 4, c. 4, is still more explicit in prohibiting the other exactions. Formerly also it was a frequent abuse, that the crown would, for trifling or no causes, seize the temporalities of bishops, even during their lives, into its own hands: but this was guarded against by statute 1 Edw. 3, st. 2, c. 2(i).

This branch of the royal revenue, once very considerable, is now by a customary indulgence reduced to nothing: for at present, as soon as a new bishop is consecrated and confirmed, he receives the restitution of his temporalities quite entire, and untouched, from the crown: and at the same time does homage to his sovereign: and then, but not sooner, he has a fee simple in his bishopric, and may maintain an action for the profits(k).

II. The sovereign is entitled to a corody, as the law calls it, out of every bishopric, that is, to send one of his chaplains to be maintained by the bishop, or to have a pension allowed him till the bishop promotes him to
(II.) Corodies. a benefice(l). This was in the nature of an acknowledgment to the sovereign, as founder of the see, since he had formerly the same corody or pension from every abbey or priory of royal foundation. The prerogative right now mentioned is fallen into total disuse: though sir Matthew Hale says(m), that no prescription will discharge it.

[*341] *III. The crown also (as formerly observed(n)) is entitled to the
(III.) Tithes extra-parochial. tithes arising in extra-parochial places(o), or to the rentcharge substituted in lieu thereof(p).

IV. The next branch of the royal revenue consists in the first fruits, and tenths, of all spiritual preferments in the kingdom.

(IV.) First fruits and tenths. These were originally a part of the papal usurpations over our clergy; first introduced by Pandulph the pope's legate, during the reigns of king John and Henry III. in the see of Norwich; and afterwards attempted to be made universal by popes Clement V. and John XXII. about the beginning of the fourteenth century. The first fruits, *primata* or *annates*, were the first year's whole profits of the spiritual preferment, according to a rate or *valor* made in this wise: A. D. 1253, pope Innocent IV. granted

(f) Mat. Paris.

(g) 9 Hen. 8, c. 5.

(h) 3 Edw. 1, c. 21.

(i) Both before and after the Reformation the episcopal revenues were much impoverished by the bishops themselves. (See Hallam, Const. Hist. i. 303—305.) The statutes restraining these alienations by the bishops (1 Eliz. c. 19, s. 5; 18 Eliz. c. 10); came too late to prevent many valuable possessions being granted away by the bishops; more es-

pecially since the exception contained in the first-mentioned statute in favour of alienation to the crown remained unrepealed until 1 Jac. 1, c. 8.

(k) Co. Litt. 67, 341.

(l) F. N. B. 230; Cowell, Law Dict. tit. Corody.

(m) Notes on F. N. B. above cited.

(n) *Ante*, p. 134.

(o) 2 Inst. 647.

(p) 6 & 7 Will. 4, c. 71.

all the first fruits and tenths to Henry III. for three years, which occasioned a taxation in the following year, sometimes called the Norwich taxation, and sometimes Innocent's valuation. In 1288, Nicholas IV. granted the tenths to Edward I. for six years, and a new valuation was commenced in the same year by the king's precept, which valuation was, so far as it extended over the province of Canterbury, finished in 1291, and as to York also in the following year. By this assessment the amounts of all taxes, as well those paid to the king as to the pope, were regulated until the 26 Hen. 8(*q*).

The tenths, or *decimæ*, were the tenth part of the annual profits of each living by the same valuation, which was *also claimed by the holy see, under no better pretence than a strange misapplication of that [*342] precept of the Levitical law, which directed(*r*), that the Levites "should offer the tenth part of their tithes as a heave-offering to the Lord, and give it to Aaron the high priest." This claim of the pope met however with a vigorous resistance from the English parliament; and various acts were passed to prevent and restrain it, particularly the statute 6 Hen. 4, c. 1, which calls it a horrible mischief, and damnable custom. But the popish clergy, blindly devoted to the will of a foreign master, still kept it on foot; sometimes more secretly, sometimes more openly and avowedly: so that in the reign of Henry VIII., it was computed, that in the compass of fifty years 800,000 ducats had been sent to Rome for first fruits only. And, as the clergy expressed this willingness to contribute so much of their income to the head of the church, it was thought proper (when in the same reign the papal power was abolished, and the king was declared the head of the church of England) to annex this revenue to the crown; which was done by statute 26 Hen. 8, c. 3, (confirmed by statute 1 Eliz. c. 4.) and a new *valor beneficiorum* was then made, by which the clergy are at present rated(*s*).

By these last-mentioned statutes all vicarages under ten pounds a year, and all rectories under ten marks, are discharged from the payment of first fruits: and if, in such livings as continue chargeable with this payment, the incumbent lives but half a year, he shall pay only one quarter of his first fruits; if but one whole year, then half of them; if a year and a half, three quarters; and if two years, then the whole; and not otherwise(*t*). *Likewise [*343] by the statute 27 Hen. 8, c. 8, no tenths are to be paid for the first year, for then the first fruits are due: and by other statutes of queen Anne, in the fifth and sixth years of her reign, if a benefice be under fifty pounds per annum clear yearly value, it shall be discharged from the payment of first fruits and tenths.

Thus the richer clergy, having been subjected at first to a foreign exaction, were afterwards, when that yoke was shaken off, liable to a like misapplication of their revenues, through the rapacious disposition of the then reigning

(*q*) In the year 1818, indeed, a third taxation, entitled *Nova Taxatio*, was made, but this only extended over some part of the province of York. It became necessary chiefly in consequence of the Scottish invasion of the border counties, which rendered the clergy of those districts unable to pay tenths and first fruits according to the higher valuation. It was made by virtue of royal mandate directed to the bishop of Carlisle.

(*r*) Numb. xviii. 26.

(*s*) This *valor beneficiorum* is commonly called the "King's Books," a transcript of which is given in Ecton's *Thesaurus* and Bacon's *Liber Regis*.

(*t*) By the 6 Ann. c. 27, s. 5, four years are allowed to an archbishop or bishop for the payment of first fruits by equal instalments; by s. 6, deans, archdeacons, prebendaries, and other dignitaries compound for their respective first fruits in the same manner and form as rectors and vicars.

monarch: till at length the piety of queen Anne restored to the church what had been thus indirectly taken from it. This she did, not by remitting the tenths and first fruits entirely: but by applying these superfluities of the larger benefices to make up the deficiencies of the smaller. And to this end she granted her royal charter, which was confirmed by the statute 2 Anne, c. 11, whereby the revenue of first fruits and tenths is vested in trustees for ever, to form a perpetual fund for the augmentation of poor livings. This is usually called queen Anne's bounty; which has been further regulated by statute(u), and the general object for which it was instituted has by numerous enactments been sedulously promoted by the legislature(x).

V. The next branch of the ordinary revenue of the sovereign (which, as well as the subsequent branches, is of a lay or temporal nature) consists in the rents and profits of the demesne lands of the crown. These (V.) Profits of crown lands. demesne lands, *terre dominicales regis*, being either the [* 344] *share reserved to the crown at the original distribution of landed property, or such as came to it afterwards by forfeitures or other means, were formerly much more extensive than at present, having been in great part granted away to private persons. This caused parliament frequently to interpose; and particularly, after king William III. had greatly impoverished the crown, an act passed(y) to place restrictions upon further alienation by the crown of its possessions. The revenue under our notice is now derivable in England from the ancient manors and demesnes of the crown(z), from lands which have from time to time been purchased for the crown, with the produce of the sales of other portions of its property, and from the fee farm rents reserved in ancient grants by the crown.

The crown also derives a revenue(a) from the minerals within its properties, or within lands wherein the minerals have been reserved to it, as also from minerals underneath the fore shore and bed of the sea.

The royal forests have, with the exceptions below mentioned(b), been dis-

(u) By 1 & 2 Vict. c. 20, the offices of first fruits, tenths, and queen Anne's bounty, were consolidated and regulated.

(x) 5 Ann. c. 24; 6 Ann. c. 27; 1 Geo. 1, st. 2, c. 10; 3 Geo. 1, c. 10; 1 & 2 Vict. c. 106, ss. 72, 119, and c. 107, s. 10; 2 & 3 Vict. c. 49; 3 & 4 Vict. c. 20; 4 & 5 Vict. c. 39, s. 4; 6 & 7 Vict. c. 37; 9 & 10 Vict. c. 88; 17 & 18 Vict. c. 84; 23 & 24 Vict. c. 59, s. 11; 26 & 27 Vict. c. 120.

(y) 1 Ann. st. 1, c. 7; 1 & 2 Vict. c. 95, s. 4.

(z) A considerable revenue is derivable from house property in London, amounting in the year 1867 to 148,000*l*.

(a) About 85,000*l*. per annum, net, from this source in great Britain and the Isle of Man.

(b) In the New Forest the crown possesses the soil and freehold of the unenclosed wastes subject to the rights of common exercisable over them. It also has forestal rights not only over the wastes, but over the private lands within the boundaries of the forest where those rights have not been granted away. Under the 9 & 10 Will. 3, c. 38, the crown acquired the right to enclose 6000 acres of the wastes as a nursery for the

growth of navy timber, and from time to time as the trees became past danger from the browsing of deer and cattle to throw open the enclosures, and to enclose a like quantity in lieu thereof. By the 14 & 15 Vict. c. 76, the crown relinquished the right to keep deer in the forest, and as a compensation for so doing was authorised to enclose and keep enclosed 10,000 acres of the waste land for the growth of timber in addition to the 6000 previously authorised.

In Dean Forest the crown also possesses the soil and freehold of the wastes including the timber growing thereon, and by the 20 Charles 2, c. 3, it acquired the right to enclose for the growth of timber 11,000 acres of the waste and to enclose fresh portions as the original enclosures were thrown open to the forest. Extensive beds of coal and iron exist underneath this forest, which are worked subject to peculiar customs. Every person who has worked for a year and a day in one of the mines is entitled to be registered as a free miner, and to have a grant of a certain area of mineral ground, locally termed a gale. The rights of the free miners and the working of the mines are now regu-

afforested, and the crown now possesses *only the allotments which [*345] were set out to it in satisfaction of its forestal and other rights. Some of these are still occupied as nurseries for the growth of timber, whilst others have been cleared, and converted into farms.

The branch of revenue now treated of is in Wales derived from the seigniorial possessions which came into the hands of the crown on the conquest of the principality. These possessions consist of lordships and manors containing tracts of unenclosed wastes, and of wastes which have been from time to time enclosed under acts of parliament, with a reservation to the crown of the mines, minerals, and quarries therein. Of such unenclosed wastes, the soil and freehold subject to the exercise of commonable rights are vested in the crown. The items of this portion of revenue consist of chief or quit rents, payable by the tenants of the lordships and manors, of the rents of encroachments made upon the waste, of the rents of shootings and fisheries, and of the profits of mines and minerals; a considerable additional revenue being furnished by the fee farm rents reserved in grants of land made anciently by the crown.

In Scotland the feudal tenure of land is still preserved, and titles to heritable property are framed in accordance with strict feudal principles, all land being there held *directly or indirectly under charters, which are [*346] renewable on change of ownership, granted by the crown. Such charters are granted, subject to the payment of annual duties either in money or kind, sometimes only nominal in amount(c), but more frequently of substantial value. These are called feu duties, and from them a considerable revenue is derived. Composition duties are also payable on the renewal of charters.

On the abolition of episcopacy in Scotland, A. D. 1690, the revenues of the bishoprics fell to the crown, and such of them as were not sold now form part of its revenue. They consist of the landed property and duties belonging to the bishoprics, and the tithes, or teinds, which were enjoyed by the bishops. These teinds have in many cases been valued and are payable in money or kind, according to the valuations. In some cases, however, they are still unvalued, and then are estimated at one-fifth of the stock and crop. The stipends of parish ministers are, however, a first charge upon the teinds, the ministers, moreover, being entitled to augmentations of their stipends at stated intervals. The amount of the augmentations, and the manner in which they are apportioned upon the teinds of each property are regulated by the teind court; a considerable revenue being derived by the crown from its surplus teinds.

The salmon fishings round the coast of Scotland likewise belong to the crown in right of its prerogative, but an *ex adverso* proprietor may possess the salmon fishing by the terms of his charter, or the charter may be held to pass the right in question if forty years' enjoyment of it be proved.

The crown also has right to the tenth of all mines in Scotland; but this right is not enforced to its full extent, and only a small revenue is derived from it(d).

lated by the stats. 1 & 2 Vict. c. 43, and 24 & 25 Vict. c. 40.

Alice Holt Forest is practically, though not legally, disafforested, as by the act 53 Geo. 3, c. 72, the crown obtained an allotment of 1600 acres in severalty in satisfaction of its rights in and over the forest. The allotment is now occupied by plantations of timber.

Epping Forest has been partially disafforested.

(c) In which case the holding is termed a "blench" holding.

(d) By the stats. 2 & 3 Will. 4, c. 113, and 3 & 4 Will. 4, c. 69, the land revenues in Scotland were placed under the commissioners of woods, &c., *post*.

[*347] *The crown revenue in Ireland is derived principally from the ancient rents reserved in grants made by the crown of demesne lands and ecclesiastical property formerly belonging to the monasteries, as also from the quit rents arising from estates forfeited to the crown by persons implicated in the rebellions of 1641 and 1688. The estates thus forfeited in 1641 were by the Act of Settlement and Explanation, 14 & 15 Car. 2, c. 2, and 17 & 18 Car. 2, c. 2, vested in the crown, and directed to be disposed of for the satisfaction of the claims of the adventurers and soldiers who had advanced money during the rebellion. In a few years they were thus nearly all distributed, with reservation to the crown of an acreable quit rent. The estates forfeited in 1688, were also mostly sold by the trustees in whom they were vested, and at the present time the crown possesses little, if any, landed property in Ireland(e).

The Isle of Man, as formerly stated(f), is a manor or lordship of itself, the sovereignty of which was granted in the 15th century to the Stanley family, but resumed by the crown in 1765. The manorial possessions included in the original grant of the island were, in the year 1826, likewise purchased by the crown from the duke of Atholl, in whom they had become vested, and the land revenues of the crown, derivable from this portion of its dominions, now consist of rents and services in the nature of quit rents, alienation fines, payable on descent of property, rents of unappropriated lands and foreshore, and the profits of mines and quarries(g).

[*348] *The crown revenues in the island of Alderney were granted on lease in the year 1683 for a term of 99 years, and in 1763 a fresh lease of them for a like term was granted. In the year 1824, however, the lessee's interest was purchased, and the revenues have since been administered on behalf of the crown. They consist of harbour dues, tithes, alienation fines, and the rents of certain land and premises belonging to the crown.

The management of the lands including the woods, forests(h), parks(i), and chases belonging to the crown, has by various statutes passed during the present century been readjusted(k). The above-mentioned sources of *revenue [*349] having previously been managed by surveyors-general, have at length

(e) The land revenue in Ireland was locally administered till the year 1827, when by stat. 7 & 8 Geo. 4, c. 68, it was placed under the management of the then commissioners of woods, &c.

(f) *Ante*, vol. i. pp. 117, 118.

(g) A large extent of unenclosed mountain land (about 25,000 acres), known as the Lord's Forest, was by an act of the local legislature passed in the year 1860 disafforested, an allotment of about 8000 acres being set out to the crown in satisfaction of its rights. This allotment with about 5700 acres of land purchased by the crown from the disafforesting commissioners is now in process of being disposed of as sheep farms.

(h) Royal forests have been defined to be waste grounds belonging to the crown replenished with beasts of chase or venery; which are under the king's protection, for his royal recreation and delight. (Manwood For. L. ch. 1.)

Lord Coke says that the number of royal forests in England in his time was sixty-nine (4 Inst. 819, 298). Such as still exist are man-

aged by the commissioners of crown lands but are governed by peculiar laws.

(i) The royal parks (except that of Windsor) are under the management of the commissioners of works and public buildings, who have also charge of the other crown properties mentioned in the 14 & 15 Vict. c. 42, s. 22.

(k) The changes above alluded to may be thus epitomised:—

By stat. 50 Geo. 3, c. 65, the office of surveyor-general of the land revenue was united with that of the office of surveyor-general of woods, forests, parks, and chases. By the 7 & 8 Geo. 4, c. 68, the office of surveyor-general was abolished, and the woods, forests, and land revenues were placed under the management of commissioners. In 1833 the department of works and public buildings was united to that of the woods, forests, and land revenues, but the results of this union not having been satisfactory the two departments were by the 14 & 15 Vict. c. 42 again divided. The general principle upon which the crown lands were by this latter statute respectively

been placed under the control of two commissioners, who are appointed by letters patent of the crown, and, subject to statutory provisions⁽¹⁾, act under the directions of the treasury. Of these commissioners, one has, under the 14 & 15 Vict. c. 42, s. 5, the management of the land revenues in England, excepting the fee farm rents, the forests, and some of the allotments awarded to the crown on the disafforestation of royal forests, the matters thus excepted being under the management of the other commissioner, together with the land revenues in Scotland, Ireland, and the Isles of Man and Alderney.

The commissioners have power subject to the authority of the board of treasury to grant leases of crown property for terms not exceeding 31 years, and leases of building land for terms not exceeding 99 years. In the latter case fines, subject to certain conditions, may be taken.

The commissioners are also empowered to sell or exchange the possessions and land revenues of the crown, to purchase lands, tenements, and hereditaments, and to redeem the land tax on crown property. No sale or purchase where the consideration exceeds 100*l.*, and no exchange or lease is to be made without a warrant from the commissioners of the treasury, nor until the report of a surveyor has been obtained certifying the value of the premises. The surveyor's declaration may, however, be dispensed with in cases where the value of the property is inconsiderable.

Grants to a limited extent may be made by the sovereign as sites for churches, schools, parsonages, &c. Conveyances and leases by the commissioners of woods, &c., are free of stamp duty, but require to be inrolled in the office of land revenue, records, and inrolments, and any such inrolment may be effected by the deposit of a duplicate of the deed. [**350*]

The land revenues of the crown in England, Scotland, Ireland, and the Isles of Man and Alderney are superintended and collected by receivers who in England and Wales are required to be surveyors. In Ireland the land revenue is collected by the collectors of excise under the superintendence of a branch office of the department of woods, &c., called the quit rent office. The forests and plantations are locally superintended by deputy surveyors, and the mines in Dean Forest by a deputy gaveller.

The receivers are required to give security for the faithful discharge of their duties, and they are bound to account to the commissioners of woods, &c., and to transmit all monies, from time to time received by them to the commissioners, being chargeable with interest on any sum retained by them exceeding 500*l.* They are empowered to distrain for rents.

The commissioners of woods, &c., are empowered to authorise entries for breaches of covenant, but subject to the approval of the commissioners of the treasury, they may release covenants, and grant waivers of breaches. They may also compound for arrears of rent, and, subject to the same authority, they may

allotted to the management of the commissioners of woods, forests, and land revenues, and the commissioners of works and public buildings was this—all the estates and lands producing or capable of producing revenue and not dedicated (as are the London parks) to the enjoyment of the public, were placed under the charge of the commissioners of woods, &c., whilst all lands so dedicated were placed under the charge of the commissioners of works.

(1) The woods, forests, and land revenues of the crown in the United Kingdom are now administered and managed under the provisions of the statutes below specified:—10 Geo. 4, c. 50; 2 Will. 4, c. 1; 3 & 4 Will. 4, c. 69; 8 & 9 Vict. c. 99; 11 & 12 Vict. c. 102; 14 & 15 Vict. c. 42; 15 & 16 Vict. c. 62; 16 & 17 Vict. c. 56; 29 & 30 Vict. c. 62.

settle disputed boundaries and compromise disputed claims. The general powers of leasing and sale do not extend to the royal forests, but the commissioners may sell small parcels of the wastes of the forests when intermixed with other lands or not fitted for the growth of timber(*m*).

The monies arising from sales in the royal forests are directed to be applied first of all in the purchase of common, fuel, and other rights, and of land and [*351] hereditaments *in the forests, in the payment of monies in equality of exchange, and as compensation for the relinquishment of encroachments—and subject thereto to the payment of the expenses attending the management of the forests.

The monies arising from all other sales of the land revenues are applied in the purchase of other property, in payments for equality of exchange of land, &c., in the redemption of the land tax on crown property, and in the payment of the expenses relating to such purchases, exchanges, or redemptions; and until so applied the capital of the land revenues is invested in the three per cent. consols—the dividends being applied as part of the income of the land revenue.

The income of the land revenue is applied in payment of the expenses of management, and of any charges upon the land revenues—the surplus being paid into the exchequer and carried to the consolidated fund.

The commissioners of woods are required to report to parliament every year, giving full particulars of all leases, sales, exchanges, and grants made during the preceding year, and an account of the income and expenditure relating to the property under their management.

The accounts of the commissioners of woods, &c., are audited by the exchequer and audit department, and the business of the land revenue record office is conducted by a keeper, whose duties are specified by stat. 2 Will. 4, c. 1(*n*).

By the 29 & 30 Vict. c. 62, entitled “The Crown Lands Act, 1866,” the management of the crown’s rights of property in the foreshore and bed of the sea was (subject to certain exceptions and reservations) transferred from [*352] *the commissioners of woods, &c., to the board of trade, and it was directed that compensation should be made to the land revenue of the crown for the transfer, such compensation to be settled by arbitration.

By the same act the cost of permanent improvements upon the crown possessions was authorised to be charged to the capital of the land revenue and to be repaid out of the income thereof within a period not exceeding thirty years.

The same act directs that one moiety of the net annual income from crown mines and quarries shall be carried to the capital account of the land revenue, and authorises the commissioners of woods to take fines on the grant of leases of mines and quarries or on the grant of licences to assign such leases(*n*).

(*m*) They are also empowered to grant licences to shoot and fish, and to let certain portions of the forests which are not subject to rights of common.

(*n*) Ss. 16—29.

All sales, leases, exchanges and grants relating to the land revenues of the crown are inrolled by the keeper of records and inrolments, office copies of the inrolments thus made being receivable in evidence. It is the

duty of the keeper to place all rents reserved to the crown by leases, &c., inrolled in his office in charge with the receivers, &c., and he is also required to make searches and to furnish reports respecting the title of the crown to property in dispute.

(*n*) By the same act the management of Epping Forest was transferred to the commissioners of works and public buildings.

Inasmuch as the land revenues of the crown were surrendered by the reigning sovereign to the public in consideration of the civil list, and on the demise of the reigning sovereign will revert to the crown(o), it is rightly esteemed the duty of the commissioners of woods, &c. who represent both the crown and the public to preserve those revenues intact. The capital of the land revenue is the reversion of the crown; the income belongs for the time to the public. The commissioners of woods are therefore bound to take care that the one is not sacrificed to the other. On behalf of the public it is their duty to obtain as large an annual income as possible from the crown property. On behalf of the crown it is their duty to see that no part of the capital is sacrificed, in order to increase the immediate income(p).

*VI. A sixth branch of the royal revenue, the right to mines, had [*353] its origin from the regal prerogative of coinage, in order to supply (VI.) Mines of the crown with materials for it; and therefore those mines, which silver and gold. are properly royal, and to which the sovereign is entitled when found, are those only of silver and gold(q). By the old common law, if gold or silver were found in a mine of base metal, according to the opinion of some the whole was a royal mine, and belonged to the king; though others held that it only did so, if the quantity of gold or silver was of greater value than the quantity of base metal(r).(94) But now by the statutes 1 Will. & M. st. 1, c. 30, and 5 Will. & M. c. 6, this difference is made immaterial so far as regards mines of copper, tin, iron, or lead, it being enacted that no such mines shall be looked upon as royal mines, notwithstanding gold or silver be extracted from them in any quantities: but that the crown or persons claiming under it may have the ore (other than tin ore in the counties of Devon and Cornwall(s)), paying for the same a price stated in the act and since increased by the 55 Geo. 3, c. 134. The change thus effected was extremely reasonable: for now private owners need not be discouraged from working mines, through a fear that they may be claimed as royal ones; neither does the crown depart from the just rights of its revenue, since it may have all the precious metals contained in the ore, paying no more for the same than the value of the base metal which it is supposed to be; to which base metal the land-owner is clearly entitled.

*By reason however of the difficulties attendant on effectually [*354] asserting a right to the gold and silver found in mines worked by pri-

(o) *Ante*, p. 837.

(p) In the year ending 31st March, 1853, the gross income of the woods, forests, and land revenues of the crown derived from Scotland, Ireland, the Isle of Man, and Alderney, as well as England and Wales, was 852,397*l.*, in the year ending 31st March, 1868, the gross income was 449,252*l.* In the first-mentioned year the net sum paid into the exchequer was 252,000*l.*, in the last it was 345,000*l.*, showing a net increase of 93,000*l.*, or 37 per cent. in 15 years.

(q) 2 Inst. 577.

(r) *Case of Mines*, Plowd. 836. Judgm. *Rogers v. Brenton*, 10 Q. B. 48.

(s) The respective rights of the crown and the Duke of Cornwall to mines and minerals in or under land lying below high-water mark within and adjacent to the county of Cornwall, are declared and defined by the 21 & 22 Vict. c. 109. As to the rights of the crown and the duchy generally to gold and silver, see *Rogers on Mines*, 128 *et seq.*

(94) As to the supervision of the mines of the United States, by the secretary of the interior. Act March 3, 1849, § 8; 9 Stat. at Large, 395.

vate owners and adventurers, the revenue thence derived to the crown is inconsiderable(*t*).

VII. To the general head under our consideration might formerly have been referred the advantages which arose to the sovereign from the profits of his (VII.) Profits of military tenures. military tenures, to which most lands in the kingdom were subject until the statute 12 Car. 2, c. 24, in great measure abolished them: the explication of the nature of these tenures must be postponed to the second Book of these Commentaries. Hither also might have been referred the profitable prerogative of purveyance and pre-emption: which was a right enjoyed by the crown of buying up provisions and other necessities, by the intervention of the king's purveyors, for the use of his royal household, at an appraised valuation, in preference to all others, and even without consent of the owner: and also of forcibly impressing the carriages and horses of the subject, to do the king's business on the public roads, in the conveyance of timber, baggage, and the like, however inconvenient to the proprietor, upon paying him a settled price(*u*). A prerogative which prevailed pretty generally throughout Europe, during the scarcity of gold and silver, and the high valuation of money consequent thereupon. In early times the king's household was supported by specific renders of corn, and other victuals, from the tenants of the respective demesnes; and there was also a continual market kept at the palace gate to furnish viands for the royal use(*x*). And this answered all purposes, in those ages of simplicity, so long as the king's court continued [*355] *in any certain place. But when it removed from one part of the kingdom to another (as frequently happened), it was found necessary to send purveyors beforehand to get together a sufficient quantity of provisions and other necessities for the king's household; and, lest such unusual demand should raise them to an exorbitant price, the powers before mentioned were vested in these purveyors; who, in process of time, very greatly abused their authority, and became oppressive to the subject, though of little advantage to the crown; ready money in open market (when the royal residence was more permanent, and specie began to be plentiful) being found upon experience to be the best provider of any. Wherefore by degrees the powers of purveyance declined, and having fallen into disuse during the suspension of monarchy, king Charles II. at his restoration consented, by the statute above cited, to resign entirely these branches of his revenue and power(*y*): and the parliament, in part of recompense, settled on him and his successors the excise on beer and other liquors, the nature of which will be explained in a subsequent part of this chapter.

VIII. The profits arising from courts of justice may be specified as constituting an eighth branch of the ordinary revenue of the crown, and consist in (VIII.) Profits of fines imposed upon offenders, forfeitures of recognizances, and courts of law. certain fees due to the crown in respect of various legal matters. Of these, in process of time, some were granted out to private persons, or

(*t*) A royalty is, however, sometimes demanded on behalf of the crown, and paid to it by the adventurers.

(*u*) Against purveyance not less than thirty-six statutes had been directed before

the reign of James I. Hallam, Const. Hist. i. 414.

(*x*) 4 Inst. 273.

(*y*) As to the prerogative of purveyance see further Broom's Const. L. 398—6.

appropriated to particular uses, and the residue are now available for public purposes. Moreover, by the stat. 3 & 4 Will. 4, c. 99, s. 29, it was enacted, that accurate returns of all fines, penalties, and recognizances, should be sent to the treasury and to the commissioners of audit; and various other clauses were enacted in the *same statute for their more speedy recovery and [*356] for the correct ascertaining of the amount of this branch of the royal revenue.

IX. To the next branch of the ordinary revenue of the crown may be referred forfeitures for offences, as to which we shall speak at the end of our fourth Volume(z), deodands(a) which have been recently abolished(b), and escheats of land upon defect of heirs to succeed to the *inheritance. But the discussion of this topic [*357] more properly belongs to the second Book of these Commentaries, wherein we shall particularly consider the manner in which lands may be acquired or lost by escheat.

X. The next item of revenue to be noticed is that derivable from treasure-trove (deduced from the French word *trouver*, to find), called in Latin *thesaurus* (X.) Treasure-trove. *inventus*, which is where any money, coin, gold, silver, plate, or bullion is found hidden in the earth, or other private place, the owner thereof being unknown; in which case the treasure belongs to the crown or rather to the public(c); but if he that hid it be known, or afterwards found out, the owner, not the crown, is entitled to it(d). Also if it be found in the sea, or upon the earth, it belongs not to the queen, but to the finder, if no owner appears(e). So that it seems it is the hiding, not the abandoning of the chattel, that gives the crown a property in it: Bracton(f), defining treasure-

(z) See vol. iv. chap. 20.

(a) Any personal chattel being the immediate cause of the death of a reasonable creature, was called a deodand, and was forfeited to the crown, to be applied to pious uses, and distributed in alms by the high almoner (1 Hale, P. C. 419; Fleta, l. 1, c. 25); though it seems to have been originally designed, in Catholic times, as an expiation for the souls of such as were snatched away by sudden death; and for that purpose ought properly to have been given to holy church (Fitzh. Abr. tit. Enditement, pl. 27; Staunf. P. C. 20, 21); in the same manner as the apparel of a stranger, found dead, was applied to purchase masses for the good of his soul. If a horse, an ox, or other animal, of his own motion, killed as well an infant as an adult, or if a cart ran over him, it would in either case have been forfeited as a deodand, in accordance with the maxim, *Omnia quæ movent ad mortem sunt Deo danda* (Bracton, l. 8, c. 5), which was grounded upon this additional reason, that such a misfortune is in part ascribable to the negligence of the owner, and therefore he was deemed to have been properly punished by such forfeiture. A like punishment was in like cases inflicted by the Mosais law: "If an ox gore a man that he die, the ox shall be stoned, and his flesh shall not be eaten" (Exod. xxi. 28).

Where a thing not in motion was the cause of a man's death, that part only which was the immediate cause of death was forfeited; as if a man climbing up the wheel of a cart, was killed by falling from it, the wheel alone was a deodand, but, wherever the thing was in motion, not only that part which immediately gave the wound (as the wheel, which ran over his body), but all things which moved with it, and helped to make the wound more dangerous (as the cart and loading, which increased the pressure of the wheel), were forfeited. It mattered not whether the owner was concerned in the killing or not: for, if a man killed another with my sword, the sword was forfeited as an accursed thing. (1 Hale, P. C. 422; 1 Hawk. P. C. c. 26; Dr. & St. D. 2, c. 51.)

(b) By the stat. 9 & 10 Vict. c. 62, enacting that "there shall be no forfeiture of any chattel for or in respect of the same having moved to or caused the death of man."

(c) It may be claimed by the solicitor to the treasury.

(d) 8 Inst. 182; Dalt. Sher. c. 16.

(e) Britt. c. 17; Finch. 177. See *Armory v. Delamirie*, Str. 505; *Merry v. Green*, 7 M. & W. 623.

(f) L. 3, c. 3, s. 4.

trove in the words of the civilians, to be "*vetus depositio pecuniarum*." This difference clearly arises from the different intentions which the law implies in the owner. A man, who hides his treasure in a secret place, evidently does not mean to relinquish his property in it; but reserves a right of claiming it again, when he sees occasion; and if he dies, and the secret also dies with him, the law gives such treasure to the sovereign as part of the royal revenue. But a man who casts his treasure into the sea, or scatters it upon the public surface of the earth, is construed to have absolutely abandoned his property, and returned it into the common stock, without any intention of reclaiming it: and therefore it belongs, as in a state of nature, to the first occupant or finder; unless the owner appear and assert his right, thus proving that the loss was by accident merely.

Formerly all treasure-trove belonged to the finder(*g*); as was also the rule of the civil law(*h*). Afterwards it was judged expedient for the purposes of the state, and particularly for the coinage, to allow part of what was so found to the crown: which part was assigned to be all hidden treasure; such as is casually lost and unclaimed, and also such as is designedly abandoned, still remaining the right of the fortunate finder. And that the prince shall be entitled to this hidden treasure is now grown to be, according to Grotius(*i*), "*jus commune et quasi gentium*." The finding of deposited treasure was much more frequent, and the treasures themselves were more considerable, in the infancy of our constitution, than at present. When the Romans, and other inhabitants of the countries which composed their empire, were driven out by the northern tribes, they concealed their money under ground; with a view of resorting to it again when the heat of the irruption should be over, and the invaders driven back to their deserts. But, as this never happened, the treasures were never claimed; and on the death of the owner of treasure thus concealed the secret also died with him. The conquering generals, being aware of the value of these hidden mines, made it highly penal to secrete them from the public service. In England therefore, as among the feudists(*k*), the punishment of such as kept secret the finding of hidden treasure was formerly no less than death; but now it is only fine and imprisonment(*l*).

[*359] XI. Waifs, *bona waviata*, are goods stolen, and waived or thrown away by the thief in his flight, for fear of being apprehended.

These are given to the crown by the law, as a punishment upon the owner, for not himself pursuing the felon, and taking away the goods from him(*m*).⁽⁹⁵⁾ And therefore if the party robbed do his diligence

(*g*) Bracton, l. 3, c. 8; 3 Inst. 133.

(*h*) Dig. 41, l. 31.

(*i*) De Jure Bell. et Pac. l. 2, c. 8, s. 7.

(*k*) Glanv. l. 1, c. 2; Crag. 1, 16, 40.

(*l*) 3 Inst. 133; see *Reg. v. Thomas*, L. & C. 813.

(*m*) Cro. Eliz. 694.

(95) The finder of personal property which has been casually lost by the true owner can hold it as against every person but such owner; and he may maintain an action for its recovery, or for its conversion, by a third person who wrongfully detains, or has unlawfully converted it. *Armory v. Delamirie*, 1 Stra. 505; 1 Smith's Lead. Cas. 470, and notes; *Matheus v. Harsell*, 1 E. D. Smith, 393; *McLaughlin v. Waite*, 9 Cow. 670; 5 Wend. 404; *Ellery v. Cunningham*, 1 Metc. 112; *Clark v. Malony*, 3 Harr. 68; *Bridges v. Hawkesworth*, 7 Eng. Law & Eq. 424; 15 Jur. 1079; 21 L. J. Q. B. 75; see *Hendricks v. Decker*, 35 Barb. 298.

The place of finding is of no importance, for the finder is entitled to the property as to

immediately to follow and apprehend the thief (which is called making fresh suit), or convict him afterwards, or procure evidence to convict him, he shall have his goods again⁽ⁿ⁾. Waived goods moreover do not belong to the sovereign, till seized by somebody for his use; for if the party robbed can seize them first, though at the distance of twenty years, the crown shall never have them^(o). If the goods are hid by the thief, or left any where by him, so that he had not them about him, when he fled, and therefore did not throw them away in his flight, these are not *bona waviata*, but the owner may have them again when he pleases^(p). The goods of a foreign merchant, though stolen and thrown away in flight, shall never be waifs^(q); the reason whereof may be, not only for the encouragement of trade, but also because there is no wilful default in the foreign merchant's not pursuing the thief; he being generally a stranger to our laws, our usages, and our language.

XII. Estrays are such valuable animals as are found wandering in any manor or lordship, and no man knoweth the owner of them, in which case the law gives

them to the sovereign as the general owner, and lord paramount
(XII.) Estrays.

of the soil, in recompense for the damage which they may have done therein: though they now most commonly belong to the lord of the manor by special grant from the crown^(r). But, in order to vest an absolute property in *the sovereign or his grantees, the animals thus found [*360] straying must be proclaimed in the church and two market towns next

adjoining to the place where they are found; and then, if no man claims them, after proclamation and a year and a day passed, they belong to the crown or its substitute without redemption^(s); even though the owner were a minor, or were under any legal incapacity^(t). If the owner claims an estray within the year and day, he must pay the charges of finding, keeping, and proclaiming it^(u). (96) The king or lord has no property in it till the year and day passed:

(n) Finch. L. 212.

(o) *Id.*

(p) *Constable's Case*, 5 Rep. 109.

(q) Fitzh. Abr. tit. Estray, 1; 3 Bulstr. 19.

(r) It is confirmatory of this origin of the right of taking estrays, that the king's cattle

are not liable to be taken as estrays. 1 Roll. Abr. 878.

(s) *Mirr.* c. 8, s. 19.

(t) *Constable's Case*, 5 Rep. 108; Bro. Abr. tit. Estray; *Brownlow v. Lambert*, Cro. Eliz. 716.

(u) Dalt. Sher. 79.

all but the true owner, even though he found it upon the land or in the store or shop of another person. *Bridges v. Hawkensorth*, 7 Eng. Law & Eq. 424; 15 Jur. 1079; 21 L. J. Q. B. 75; *Mathews v. Harsell*, 1 E. D. Smith, 398; see *Hendricks v. Decker*, 85 Barb. 298.

(96) In many, and probably in most, of the states, there are statutes which provide for the care and disposition of estrays. One who finds a horse, takes possession of, and uses him, so that he is injured, is liable to the owner for such injury. *Murgoo v. Cogswell*, 1 E. D. Smith, 359. To divest the title of the owner of an estray under the provisions of a statute, such statute must be strictly pursued. *McMillan v. Andrew*, 50 Ill. 282; *Hyde v. Pryor*, 18 id. 64; *Smith v. Boers*, 21 Ala. 88; *Harryman v. Titus*, 3 Mis. 302; *Crook v. Peebly*, 8 id. 344; *Newsom v. Hart*, 14 Mich. 233.

If horses or cattle stray upon the lands of a person not their owner, he need not take them up nor impound them, but may turn them loose into the highway, and he will not be liable for a conversion of them, though they be afterward lost to the owner. *Stevens v. Curtis*, 18 Pick. 227; *Humphrey v. Douglass*, 10 Vt. 71; 11 id. 22.

One who takes up and properly provides for an estray is entitled to a compensation which will indemnify him. *Amory v. Flynn*, 10 Johns. 102; *Rice v. Underwood*, 27 Mis. 551; *Mahler v. Holden*, 20 Ill. 363; *Ford v. Ford*, 3 Wis. 399; *Garabrant v. Vaughn*, 2 B. Monr.

for if a lord keepeth an estray three quarters of a year, and within the year it strayeth again, and another lord getteth it, the other lord cannot take it again(x). Any beasts may be estrays, that are by nature tame or reclaimable, and in which there is a valuable property as sheep, oxen, swine, and horses, which we in general call cattle; and so Fleta(y) defines them, *pecus vagans, quod nullus petit, sequitur vel advocat*. For animals upon which the law sets no value, as a dog or cat, and animals *feræ naturæ*, as a bear or wolf, cannot be considered as estrays. So swans may be estrays, but not any other fowl(z); whence swans are said to be royal fowl. The reason of which distinction seems to be, that cattle and swans being of a reclaimed nature, the owner's property in them is not lost merely by their temporary escape; and they also, from their intrinsic value, are a sufficient pledge for the expense of the lord of the franchise in keeping them the year and day. For he who takes an estray is bound, so long as he keeps it, to find it in provisions, and preserve it from damage(a); and may not use it by way of labour, but is liable to an action for so [* 361] doing(b). Yet he may milk a *cow, or the like; for that tends to the preservation, and is for the benefit of the animal(c).

XIII. A thirteenth branch of the ordinary revenue of the sovereign, said to be grounded on the consideration of his guarding and protecting the seas from pirates and robbers, is the right to royal fish, which are whale (XIII.) *Royal fish.* and sturgeon: and these, when either thrown ashore, or caught near the coast, belong to the crown in virtue of their superior excellence(d). Indeed, our ancestors seem to have entertained a very high notion of the importance of this right; it being a prerogative of the kings of Denmark and the dukes of Normandy(e); and from one of these it was probably derived to our princes. It is expressly claimed and allowed in the statute *de prerogativa regis*(f); and the most ancient treatises of law make mention of it(g).

XIV. Another maritime revenue, founded partly upon the same reason, is derivable from wrecks, which are declared to belong to the crown by the same prerogative statute 17 Edw. 2, c. 11, and were so, long before, at (XIV.) *Wreck.* the common law. It is worthy of observation, how greatly the law concerning wrecks has been altered, and the rigour of it gradually softened in favour of the distressed proprietors. Wreck, by the ancient common law, was where any ship was lost at sea, and the goods or cargo were thrown upon the land; in which case these goods, so wrecked, were adjudged to belong to the crown: for it was held that, by the loss of the ship, all property was gone out of the original owner(h). But this was undoubtedly adding sorrow to

(x) Finch. L. 177.

(y) L. 1, c. 48.

(z) *Case of Swans*, 7 Rep. 17.

(a) 1 Roll. Abr. 878.

(b) Cro. Jac. 147.

(c) Cro. Jac. 148; Noy. 119.

(d) Plowd. 815.

(e) Stiernh. de jure Sueonum. l. 2, c. 8; Gr. Coustum. cap. 17.

(f) 17 Edw. II. c. 11.

(g) Bracton, l. 8, c. 3; Britton, c. 17; Fleta, l. 1, cc. 45, 46; Memorand. Scacch'. H. 24 Edw. 1, 87, prefixed to Maynard's year-book of Edward II.

(h) Dr. & St. d. 2, c. 51.

827. So where the inanimate property of one person is borne, without his fault, as by a flood, upon the lands of another, the owner may elect to abandon the property, in which case he is not liable to the owner of the lands for the injury thus occasioned; or he may reclaim it, but if he does so, he must make good the injuries so caused. *Sheldon v. Sherman*, 42 N. Y (3 Hand) 484; 42 Barb. 868.

sorrow, and was consonant neither to reason nor to humanity. Wherefore it was *first ordained by king Henry I. that if any person escaped alive [*362] out of the ship it should be no wreck(i); and afterwards king Henry II., by his charter(k), declared, that if on the coasts of either England, Poitou, Oleron, or Gascony, any ship should be distressed, and either man or beast should escape or be found therein alive, the goods should remain to the owners, if claimed by them within three months; but otherwise should be esteemed wreck, and should belong to the king, or other lord of the franchise. This was again confirmed with improvements by king Richard I., who, in the second year of his reign(l), not only established these concessions, by ordaining that the owner, if he was shipwrecked and escaped, "*omnes res suas liberas et quietas haberet*," but also, that, if he perished, his children, or in default of them his brethren and sisters, should retain the property; and, in default of brother or sister, then the goods should remain to the king(m). And the law, as laid down by Bracton in the reign of Henry III., seems still to have improved in its equity. For then, if a dog (for instance) escaped, by which the owner might be discovered, or if any mark were set on the goods, by which they might be known again, it was held to be no wreck(n). And this is certainly most agreeable to reason; the rational claim of the crown being only founded upon this, that the true owner cannot be ascertained. Afterwards, in the statute of Westminster I.(o), the time of limitation of claims, given by the charter of Henry II., is extended to a year and a day, according to the usage of Normandy(p): and it enacts, *that if a man, a dog, or a cat, escape alive, [*363] the vessel shall not be adjudged a wreck. These animals, as in Bracton, are only put for examples(q), for it was held(r), that not only if any live thing escaped, but if proof could be made of the property in any of the goods or lading which came to shore, they should not be forfeited as wreck. The statute further ordains that the sheriff of the county shall be bound to keep the goods a year and a day, so that if any man can prove a property in them, either in his own right or by right of representation(s), they may be restored to him without delay; but if no such property be proved within that time, they then shall belong to the crown. If the goods are of a perishable nature, the sheriff may sell them, and the money shall be liable in their stead(t). This revenue from wrecks was frequently granted out to lords of manors, as a royal franchise.

It is to be observed that, in order to constitute a legal wreck, the goods must come to land. If they continue at sea, the law distinguishes them by the barbarous and uncouth appellations of *jetsam*, *flotsam*, and *ligan* or *lagan*. Jetsam is where goods are cast into the sea to lighten the ship(u), and there sink and remain under water; flotsam is where they continue swimming on the surface of the waves; ligan or lagan is where they are sunk in the sea or tied to a cork or buoy, in order to be found again(x). These also belong to the crown, if no

(i) Spelm. Cod. apud Wilkins, 305.

(k) 26 May, A. D. 1174; 1 Rym. Fœd. 86.

(l) Rog. Hoved. in Ric. I.

(m) In like manner Constantine the Great, finding that by the imperial law the revenue from wrecks was given to the prince's treasury or *fiscus*, ordered by an edict (Cod. 11, 5, 1), that wreck should remain to the owner, adding this humane expostulation, "*quod enim jus habet fiscus in alienâ calamitate, ut de re sua luctuosâ compendium sectetur?*"

(n) Bract. 1. 3, c. 3.

(o) 3 Edw. I., c. 4.

(p) Gr. Coustum. c. 17.

(q) Flet. 1. 1, c. 44; 2 Inst. 167; 5 Rep. 107.

(r) *Hamilton v. Davies*, 5 Burr. 2782.

(s) 2 Inst. 168.

(t) Plowd. 485.

(u) *Per Tindal, C. J., Legge v. Boyd*, 1 C. B. 118.

(x) *Constable's Case*, 5 Rep. 106.

owner appears to claim them; but if any owner appears, he is entitled to recover the possession. For even if goods be cast overboard, without any mark or buoy, in order to lighten the ship, the owner is not by this act of necessity construed [*364] to have renounced his property in them(y); *much less can things ligan be supposed to be abandoned, since the owner has done all in his power to assert and retain his property. These three are therefore accounted so far distinct from the former, that by a grant from the crown of wrecks, things jestam, flotsam, and ligan will not pass(z).

Wrecks, in their strict legal acceptation, even formerly were not frequent, for if any goods came to land, it rarely happened that the owner was not able to assert his right to them within the year and a day limited by law. And in order to preserve this property entire for him, and if possible to prevent wrecks at all, our legislature made many humane regulations(a); in a spirit quite opposite to those savage customs which formerly prevailed in the northern regions of Europe, permitting the inhabitants to seize on whatever they could get as lawful prize: or as an author of their own expresses it, "*in naufragorum miserid et calamitate tanquam vultures ad prædam currere*"(b).

The statute now operative upon this subject—which has been amended by subsequent enactments(c)—is the 17 & 18 Vict. c. 104, by which wreck is defined to include "*jetsam, flotsam, ligan, and derelict*"(d), found in or on the shores of the sea, or any tidal water"(e). In accordance with the provisions of [*365] the principal statute(f), all *matters relating to wreck are under the general superintendence of the board of trade, who appoint district officers denominated receivers of wreck, to perform the various duties assigned to them by the legislature.(97) Amongst such duties may be specified the rendering of assistance to a vessel stranded or in distress, the taking possession of her cargo, and protecting it from plunder(g), the receiving of wreck or seizure of it if concealed(h), the giving notice of wreck to any lord of the manor, or other person who may be entitled to it if unclaimed by the owner(i), and effecting the sale of goods which are perishable or of small value(k). The proceeds of the sale of wreck which has become vested in the crown by reason of non-claim are, during the life of her majesty, to be carried to and form part of the consolidated fund, unless where they belong to the queen in right of her duchy of Lancaster, in which case they are to be paid to the receiver-general of such duchy, and to be dealt with as part of the revenue thereof, or unless

(y) *Qua enim res in tempestate, levanda navis causâ, efficiuntur, hæ dominorum permanent. Quia palam est, eas non eo animo ejici, quod quis habere nolit.* Inst. 2, 1, s. 48.

(z) 5 Rep. 108.

(a) See these statutes collected Maclachlan, Merc. Ship. 558 n. (3).

(b) Stjernh. de jure Sueon. 1. 3, c. 5.

(c) See 17 & 18 Vict. c. 120; 18 & 19 Vict. c. 91; 24 & 25 Vict. c. 10; 25 & 26 Vict. c. 63.

(d) Goods are derelict "which have been voluntarily abandoned and given up as worthless, the mind of the owner being alive

to the circumstances at the time." *Per Tindal, C. J., Legge v. Boyd*, 1 C. B. 112.

(e) Sect. 2. Timber found floating without an apparent owner at sea, having drifted from its moorings in a river, is not wreck as defined by the 17 & 18 Vict. c. 104, s. 2. *Palmer v. Rouse*, 3 H. & N. 505.

(f) 17 & 18 Vict. c. 104, s. 439.

(g) Sects. 441—447.

(h) Sects. 450, 451.

(i) Sect. 454. See also 25 & 26 Vict. c. 63, s. 52.

(k) Sect. 453.

(97) See act of congress March 3, 1825, 4 Stat. at Large, 115, providing for the punishment of offenses committed on board of vessels, or for stealing, destroying, etc., goods belonging to a vessel in distress.

where they belong to the duke of Cornwall, in which case they are to be dealt with as part of the revenues of his duchy(*l*).

Above have been set forth reasons why the crown became entitled to the several revenues derivable from royal fish, shipwrecks, treasure-trove, waifs, and estrays. Originally these things were treated as *bona vacantia*, or goods in which no one else could claim a property, wherefore by the law of nature they belonged to the first occupant or finder(*m*); and so continued under the imperial law. But in settling the modern constitutions of most of the governments of Europe, it was thought fit (to prevent that strife and contention, which the mere title of occupancy is apt to create and continue, and to provide for *the support of public authority in a manner the least burthensome [**366*] to individuals) that these rights should be annexed to the supreme power by the positive laws of the state. And so it came to pass that, as Bracton expresses it(*n*), *hæc quæ nullius in bonis sunt, et olim fuerunt inventoris de jure naturali, jam efficiuntur principis de jure gentium*. The above various items of revenue were however formerly often granted by the crown as a royal franchise to particular subjects, *ex. gr.*, the lords of manors or other liberties, to the perversion of their original design.

This may suffice for a short view of the ordinary revenue, or proper patrimony of the crown; which was very large formerly, and capable of being increased to a magnitude truly formidable: for there are few Extraordinary revenue of the crown. estates in the kingdom, which have not, at some period or other since the Norman conquest, been vested in the hands of the sovereign by forfeiture, escheat, or otherwise. But fortunately for the liberty of the subject in former times, this hereditary landed revenue, by a series of improvident management, sank almost to nothing; and the casual profits, arising from the other branches of the *census regalis*, became likewise almost all of them alienated from the crown. In order to supply the deficiencies thus caused, we are now obliged to have recourse to new methods of raising money, unknown to our early ancestors; which methods constitute the extraordinary revenue of the crown. For, the public patrimony having got into the hands of private subjects, it was but reasonable that private contributions should supply the public service.

The thing to be aimed at in this land of liberty is by no means the total abolition of taxes, which could not be effected, and the bare supposition of which might justly be deemed absurd. Our legislators should rather strive to keep in mind the soundest principles of taxation. For the true idea of government and magistracy will *be found to consist in this, that, as some few men are deputed by many others to preside over public affairs, so [**367*] that individuals may the better be enabled to attend to their private concerns, it is necessary that those individuals should be bound to contribute a portion of their private gains, in order to support that government, and reward that magistracy which protects them in the enjoyment of their respective properties. But the things to be aimed at are wisdom and moderation, not only in granting, but also in the method of raising the necessary supplies; by contriving to do both in such a manner as may be most conducive to the national welfare, and at

(*l*) 25 & 26 Vict. c. 68, s. 58.

(*m*) *Ante*, p. 168.

(*n*) L. 1, c. 12.

the same time most consistent with economy and the liberty of the subject; who, when properly taxed, contributes only some part of his property, in order to enjoy the rest.

These extraordinary grants (which were formerly called by the synonymous names of aids, subsidies, and supplies) are made, as we have seen^(o), by the commons of Great Britain in parliament assembled: who when they have voted a supply to her majesty, and settled the *quantum* of that supply, usually resolve themselves into what is called a committee of ways and means, to consider the ways and means of raising the supply so voted. And in this committee every member (though it is looked upon as the peculiar province of the chancellor of the exchequer) may propose such scheme of taxation as he thinks will be least detrimental to the public. The resolutions of this committee, when approved by a vote of the house, are in general esteemed to be (as it were) final and conclusive. For, though the supply cannot be actually raised upon the subject till directed by an act of parliament, yet the chancellor of the exchequer is practically authorised to obtain an advance of money for the use of the government, on the credit of a bare vote of the house of commons, though no law be yet passed to establish it.

[*368] *The taxes raised upon the subject are either perpetual or for a term certain, but disregarding this distinction, which for the purposes of the present chapter is immaterial, we shall proceed to consider *seriatim* the principal imposts now levied on the public.

I. The land-tax, in its modern shape, has superseded all the former methods of rating either property, or persons in respect of their property, whether by tenths or fifteenths, subsidies on land, hydages, scutages, or tallages; a short explication of which will, however, greatly assist us in understanding our ancient laws and history.⁽⁹⁸⁾

Tenths and fifteenths^(p) were temporary aids issuing out of personal property, and granted to the crown by parliament. They were formerly the actual tenth or fifteenth part of all moveables belonging to the subject; when such moveables, or personal estates, were much less considerable than they are at this day. Tenths

(o) *Ante*, p. 208.

(p) 2 Inst. 77; 4 Inst. 84.

(98) "The congress shall have power * * * To levy and collect taxes, duties, imposts and excises, to pay the debts, and provide for the common defense and general welfare of the United States, but all duties, imposts and excises shall be uniform throughout the United States." U. S. Const., art. 1, § 8.

"No tax or duty shall be laid on articles exported from any state. No preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another; nor shall vessels bound to, or from, one state be obliged to enter, clear or pay duties in another." *Ib.*, § 9.

"No state shall, without the consent of congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts, laid by any state on imports or exports, shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of congress. No state shall, without the consent of congress, lay any duty on tonnage," etc. *Ib.*, § 10. "No capitation, or other direct tax, shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken." *Ib.*, § 9.

Congress has, at various times, exercised the power thus conferred, but this is not the place to specify them, as the object is merely to show that such a power is conferred by the constitution.

are said to have been first granted under Henry II., who took advantage of the fashionable zeal for crusades to introduce this new taxation, in order to defray the expence of an expedition to Palestine, which he really or seemingly had projected against Saladin, emperor of the Saracens; whence it was denominated the Saladin tenth(*g*). But afterwards fifteenths were more often granted than tenths. Originally the amount of these taxes was uncertain, being levied by assessments newly made at every fresh grant of the commons, a commission for which is preserved by Matthew Paris(*r*): but it was at length reduced to a certainty in the eighth year of Edward III., when, by virtue of the king's commission, new taxations were made of every township, borough, and city in the kingdom, and recorded in the exchequer: which rate was, at the time, *the fifteenth part of the value of every township, the whole amounting to about [*369] 29,000*l.*, and therefore it still kept up the name of a fifteenth, when, by the alteration of the value of money and the increase of personal property, things came to be in a very different situation. So that when, of later years, the commons granted the king a fifteenth, every parish in England immediately knew the proportion of it which its inhabitants would have to pay, viz. the identical sum that was assessed by the same aid in the eighth year of Edward III.; and then raised it by a local rate, and returned it into the royal exchequer.

The other ancient levies were in the nature of a modern land-tax: for we may trace up the origin of that charge to the introduction of our military tenures(*s*); when every tenant of a knight's fee was bound, if called upon, to attend the king in his army for forty days in every year. But this personal attendance growing troublesome in many respects, the tenants found means of compounding for it, by first sending others in their stead, and in process of time by making a pecuniary satisfaction to the crown in lieu of it. This pecuniary satisfaction at last came to be levied by assessment, at so much for every knight's fee, under the name of scutage; which appears to have been levied for the first time in the fifth year of Henry II., on account of his expedition to Toulouse, and was then a mere arbitrary composition, such as the king and the subject could agree upon. But this precedent being afterwards abused into a means of oppression (in levying scutages on the landholders by the royal authority only, whenever our kings went to war, in order to hire mercenary troops, and pay their contingent expenses), it became thereupon a matter of national complaint; and king John was obliged to promise in his *magna carta*(*t*), that no scutage should be imposed without the consent of the common council of the realm. This clause was indeed *omitted in the charter [*370] of Henry III.(*u*), where we only find it stipulated, that scutages should be taken as they were used to be in the time of Henry II. Yet afterwards, by a variety of statutes under Edward I., and his grandson(*x*), it was provided that the king should not take any aids or tasks, any tallage or tax, but by the common assent of the great men and commons in parliament.

Of the same nature with scutages upon knight's fees were the assessments of hydage upon all other lands, and of tallage upon cities and boroughs(*y*). But they all gradually fell into disuse upon the introduction of subsidies, about

(*g*) Hoved. A. D. 1188; Carte, i. 719.

(*r*) A. D. 1232.

(*s*) *Post*, vol. ii.

(*t*) Cap. 14.

(*u*) 9 Hen. 3, c. 37.

(*x*) *Confirmatio Cartarum*, 25 Edw. 1, cc. 5 & 6; *Stat. de tallagio*, c. 1; 14 Edw. 3, st. 2, c. 1.

(*y*) Madox, *Hist. Exch.* 2nd. ed. vol. i. 694.

the time of Richard II. and Henry IV. These were in effect taxes, not immediately imposed upon property, but upon persons in respect of their reputed estates, after the nominal rate of 4s. in the pound for lands, and 2s. 8d. for goods; and for those of aliens in a double proportion. But this assessment was also made according to an ancient valuation; wherein the computation was so very moderate, and the rental of the kingdom was supposed to be so exceedingly low, that one subsidy of this sort did not, according to sir Edward Coke(z), amount to more than 70,000%. It was anciently the rule never to grant more than one subsidy and two fifteenths at a time: but this rule was broken through for the first time on a very pressing occasion, the Spanish invasion in 1588; when the parliament gave queen Elizabeth two subsidies and four fifteenths. Afterwards, as money sunk in value, more subsidies were given; and we have an instance in the first parliament of 1640, of the king's desiring twelve subsidies of the commons, to be levied in three years; which was looked upon as a startling proposal: though lord Clarendon says(a), that the speaker, serjeant Glanville, made it manifest to the house, how inconsiderable a [*371] *sum twelve subsidies amounted to, by telling them he had computed what he was to pay for them himself; and when he named the sum, he being known to be possessed of a great estate, it seemed not worth any further deliberation.

The grant of scutages, tallages, or subsidies by the commons did not extend to spiritual preferments; those being usually taxed at the same time by the clergy themselves in convocation: which grants of the clergy, however, unless confirmed in parliament, were not binding: as the same noble writer observes of the subsidies granted by the convocation, which continued sitting after the dissolution of the first parliament in 1640. A subsidy granted by the clergy was after the rate of 4s. in the pound according to the valuation of their livings in the king's books: and amounted, as sir Edward Coke tells us(b), to about 20,000%. While this custom continued, convocations were wont to sit as frequently as parliaments: but the last subsidies, thus given by the clergy, were those confirmed by statute 15 Car. 2, c. 10, since which another method of taxation, taking in the clergy as well as the laity, has generally prevailed.

The lay subsidy was usually raised by commissioners appointed by the crown, or the great officers of state: and therefore in the beginning of the civil wars between Charles I. and his parliament, the latter having no other sufficient revenue to support themselves and their measures, introduced the practice of laying weekly and monthly assessments(c) of a specific sum upon the several counties of the kingdom; to be levied by a pound-rate on lands and personal estates; which were occasionally continued during the conflict, sometimes at the rate of 120,000% a month, sometimes at inferior rates(d). After the Restoration the [*372] ancient method of granting subsidies, *instead of such monthly assessments, was once, and once only, renewed; viz. in 1663, when four subsidies were granted by the temporality, and four by the clergy.

The statute 22 & 23 Car. 2, c. 3, was indeed entitled "An act for granting a subsidy to his majesty for supply of his extraordinary occasions"(e), and by this act, *inter alia*, a tax of 1s. in the pound was imposed on land, but the mode of

(z) 4 Inst. 38.

(a) Hist. bk. 2.

(b) 4 Inst. 33.

(c) 29 Nov.; 4 Mar. 1642.

(d) One of these bills of assessment, in 1656, is preserved in Scobell's collection, 400.

(e) Stat. Realm.

levying it was not similar to that of levying the true subsidy. Yet a popular opinion has prevailed, that the land-tax was first introduced in the reign of William III.(f); because in the year 1692 a new assessment or valuation of estates was made throughout the kingdom: which, though by no means perfect, had this effect, that a supply of 500,000*l.* was equal to 1*s.* in the pound of the value of the estates given in. And according to this enhanced valuation, from the year 1693 to the present time, the land-tax has continued a charge upon the subject; varied in amount at different periods, but without any total intermission. The method of raising it is by charging a particular sum upon each county, according to the valuation given A.D. 1692: and this sum is assessed and raised upon individuals(g), by commissioners appointed in the act, being the principal landholders of the county, and their officers. This tax which for upwards of a century was annual, is now made perpetual, and subject to redemption(h).

*II. The income tax is an impost on individuals according to the amount of annual income which they possess, those being exempt [*373]

(II.) Income tax. whose income is under 100*l.* per annum. This tax was first introduced by Mr. Pitt in 1798 at the rate of ten per cent. to meet the expenses of the war, which he had failed to do by tripling the assessed taxes in the previous year. The tax was removed in 1802 after the peace of Amiens, and was again imposed under the name of the property tax in 1803, and remained in force till 1816. It was re-imposed by sir Robert Peel in 1842 for three years(i), and from that time to the present has been continued (though varied in amount) by numerous statutes, of which the last are the 31 & 32 Vict. cc. 2 & 28*.(99)

(f) 4 Will. 3, c. 1.

(g) Personal as well as real property was assessed, until the former was relieved from this burden by 3 & 4 Will. 4, c. 12.

(h) The last annual act for granting a land-tax, was the 38 Geo. 3, c. 5. This act was amended and extended by 38 Geo. 3, c. 48, and the tax was made perpetual and subject to redemption by 38 Geo. 3, c. 60; which last mentioned act was amended by 42 Geo. 3, c. 116. The consideration for redemption of the land-tax, is, with some exceptions, so much capital stock of the three per cent. consolidated annuities, or reduced annuities, as will yield a dividend exceeding the amount of the land-tax redeemed by one-tenth part thereof. This stock may be transferred by the purchaser at once, or by instalments, and in certain cases, the redemption may be made by payments in money. The land-tax acts were further amended by 53 Geo. 3, cc. 123 and 142, and new commissioners were appointed by

various acts, from 31 Geo. 2, c. 7, to 30 & 31 Vict. c. 51.

(i) This tax imposes (1) a duty of a certain sum in the pound, on all lands, tenements, and hereditaments, or heritages in Great Britain, in respect of the property thereof;—(2) a duty on all such lands, &c., in respect of the occupation thereof;—(3) a duty upon all profits arising from annuities, dividends, and shares of annuities payable out of any public revenue;—(4) a duty upon the annual profits or gains arising or accruing from any kind of property whatsoever, whether situate in Great Britain or elsewhere, or from any profession, trade, employment, or vocation; and—(5) a duty upon the annual amount of any public office or employment of profit, and upon every annuity or stipend payable by her majesty, or out of the public revenue, except annuities before charged under class (3).*

(99) By the act of July 1, 1862, congress provided a law for the collection of taxes, etc., for the support of the government and to pay the interest on the public debt. 12 Stat. at Large, 423; see the amendment of March 3, 1863, 12 id. 718; act of March 7, 1864, 13 id. 14; act of March 3, 1865, 13 id. 469; act of July 13, 1866, 14 id. 98; act of March 2, 1867, 14 id. 471; act of July 20, 1868, 15 id. 125; act of July 14, 1870, 16 id. 256; act of June 6, 1872, 17 id.

These various acts and the amendments to them constitute an extensive system of raising revenue, an analysis of which would be entirely impracticable in a work of this character.

*As to the income tax and licenses, see 23 & 24 Vict. c. 14.

III. Next in order are the customs, duties, toll, tribute, or tariff, levied upon merchandize exported and imported. (100) The considerations upon which this revenue (or the more ancient part of it, which arose only from exports) was vested in the sovereign, are said to have been two(*k*); 1. Because he gave the subject leave to depart the kingdom, and to carry his goods along with him(*l*). 2. Because he was bound of common right to maintain and *keep up the ports and havens, and to [*374] protect the merchants from pirates. Some have said that the duties in question were called customs, as being the inheritance of the crown by immemorial usage and the common law, and not granted to it by any statute(*m*); but sir Edward Coke has shown(*n*), that the king's first claim to them was by grant of parliament, 3 Edw. I., though the record thereof is not now extant. And indeed this is in express words confessed by statute 25 Edw. 1(*o*), c. 7, wherein the king promises to take no customs from merchants without the common assent of the realm, "saving to us and our heirs, the customs on wool, skins, and leather, formerly granted to us by the commonalty aforesaid." These were called the hereditary customs of the crown; and were due on the exportation only of the said three commodities, and of none other; which were styled the staple commodities of the kingdom, because they were obliged to be brought to those ports where the king's staple was established, in order to be there first rated, and then exported(*p*). They were denominated in the barbarous Latin of our ancient records, *customæ*(*q*); not *consuetudines*, which is the language of our law whenever it means merely usages. The duties on wool, sheep-skins, or woolfels, and leather, exported, were called *custuma antiqua sive magna*, and were payable by every merchant, as well native as stranger; with this difference, that merchant-strangers were required to pay an additional toll, viz., half as much again as was paid by natives. The *custuma parva et nova* was an impost of 3*d*. in the pound, due *from merchant-strangers [*375] only, for all commodities as well imported as exported; which was usually called the alien's duty, and was first granted in 31 Edw. I.(*r*), though abolished by the statute 24 Geo. 3, sess. 2, c. 16. But these ancient hereditary customs, especially those on wool and woolfels, were of little account, when the nation had become sensible of the advantages of home manufacture, and had prohibited the exportation of wool by statute 11 Edw. 3, c. 1(*s*). This prohibition modified and enforced by many succeeding statutes, continued till a comparatively recent period; and in the earlier part of this century, heavy duties were laid on the importation of wool, but now all these duties are repealed, and the trade is perfectly free both for exports and imports(*s*).

(*k*) Dav. 9.

(*l*) Dyer, 165.

(*m*) Dyer, 43, pl. 24.

(*n*) 2 Inst. 58, 59; 1 Hall. Const. Hist. p. 316, note.

(*o*) *Confirmatio Cartarum*.

(*p*) Dav. 9.

(*q*) Spelman, in his Glossary, says that this appellation seems to be derived from the French word *coutum*, or *coutum*, which signifies toll or tribute; and owes its own etymo-

logy to the word *coust*, which signifies price, charge, or, as we have adopted it in English, cost. See also Coke, 4th Inst. 29.

Ducange, on the other hand, derives the word from *consuetudo*. Gloss. *ad verb*.

(*r*) 4 Rym. Fœd. 361. See also Anderson's Hist. Com., ed. 1787, vol. i. p. 268; 4 Inst. 29.

(*s*) McCulloch's Com. Dict. "Wool,"—6 Geo. 4, c. 105; 7 & 8 Vict. c. 16, s. 12; 8 & 9 Vict. c. 12; 23 & 24 Vict. c. 22, s. 5.

(100) By act of July 14, 1870, ch. 255, § 6, 16 Stat. at Large, 257, the income tax provided for in the statutes cited in note 99, was repealed, to take effect at the end of the year 1871.

There was also another very ancient hereditary duty belonging to the crown, called the prisage, or butlerage of wines; which is considerably older than the customs, being taken notice of in the great roll of the exchequer, 8 Richard 1, still extant(*t*). Prisage was a right of taking two tons of wine from every ship (English or foreign) importing into England twenty tons or more, one before and one behind the mast; which by charter of Edward I. was exchanged into a duty of 2*s.* for every ton imported by merchant-strangers, and called butlerage, because paid to the king's butler(*u*).

Other customs payable upon exports and imports were distinguished into subsidies, tonnage, poundage, &c. Subsidies were such as were imposed by parliament upon any of the staple commodities before mentioned, over and above the *custuma antiqua et magna*: tonnage was a duty upon all wines imported, over and above the prisage and *butlerage aforesaid; poundage was a duty imposed *ad valorem*, at the rate of 12*d.* in the pound, on all other merchandize whatsoever; and the other imposts were such as were occasionally laid on by parliament, as circumstances and times required(*v*). These distinctions are now almost forgotten, the produce of all duties on imports being blended together, under the one denomination of the customs. [*376]

By these we understand, at present, a duty or subsidy paid by the merchant, at the quay, upon all imported as well as exported commodities, by the authority of parliament; unless where, for particular national reasons, certain rewards, bounties, or drawbacks are allowed in respect of certain exports and imports. The dues of tonnage and poundage, in particular, were at first granted, as the old statutes (and especially 1 Eliz. c. 20), express it, for the defence of the realm, and the keeping and safeguard of the seas, and for "the intercourse of merchandize" safely to come into and pass out of the same. They were at first usually granted only for a stated term of years, as for two years in 5 Ric. II.(*y*); but in Henry VI.'s time, they were granted him for life by a statute in the thirty-first year of his reign(*z*), and again to Edward IV., for the term of his life also(*a*); since which time they were regularly granted to all his successors for life, sometimes at the first, sometimes at a subsequent parliament, until the reign of Charles I.; when as lord Clarendon expresses it(*b*), his ministers were not sufficiently solicitous for a renewal of this legal grant. And yet these imposts were imprudently and unconstitutionally levied and taken, without consent of parliament, for fifteen years together, which was one of the causes of those unhappy discontents, justifiable in too many instances, but which *at last caused civil war(*c*), though in this particular case the king (previous to the commencement of hostilities) gave the nation satisfaction for the errors of his former conduct, by passing an act(*d*), whereby he renounced all power in the crown of levying the duty of tonnage and poundage, without the express consent of parliament; and also all power of imposition upon any merchandizes whatever. Upon the Restoration this duty was granted to king Charles II. for life, and so it was to his two immediate successors; but afterwards by three several statutes, 9 Ann. c. 6, 1 Geo. 1, [*377]

(*t*) Madox, Hist. Exch. 2nd ed. vol. i. pp. 766, 775.

(*u*) Dav. 8; 2 Bulstr. 254; Stat. of Estr. 16 Edw. 2; Com. Journ. 27 Apr. 1689.

(*v*) Dav. 11, 12.

(*y*) Dav. 11.

(*z*) Rot. Parl. 81 Hen. 6, No. 8.

(*a*) Rot. Parl. 8 & 4 Edw. 4, No. 24.

(*b*) Hist. Rebell. b. 8, vol. i. p. 162, Ox. ed. 1826.

(*c*) *Case of Ship Money*, and Note thereto, Broom's Const. L. pp. 306, *et seq.*

(*d*) 16 Car. 1, c. 8.

c. 12, and 3 Geo. 1, c. 7, it was made perpetual, and mortgaged for the debt of the public. The customs thus imposed by parliament were chiefly contained in two books of rates, set forth by parliamentary authority(e); one signed by sir Harbottle Grimston, speaker of the house of commons in Charles II.'s time, and the other an additional one signed by sir Spencer Compton, speaker in the reign of George I., to which also subsequent additions were made.

Until the year 1787, great confusion and perplexity prevailed in the law relating to the customs. Besides the duties enumerated in the above two books of rates, various others had been imposed from time to time, and the accumulation of these duties became at length a great embarrassment to commerce, as the merchant found considerable difficulty in ascertaining the amount to which he was liable. Under the first Customs Consolidation Act(f) the collection of the customs was in some degree improved by abolishing all the duties then subsisting, and declaring the above-mentioned two books of rates to be of no authority, and substituting in their stead one single duty on each article, amounting as nearly as possible to the aggregate of all the various duties then [*378] *payable thereupon; when any duty consisted of a fractional sum, the nearest integral number being charged. A systematic and uniform simplicity was, at the same time, introduced into the custom-house accounts, by which a more distinct view has been obtained both of the total amount of this important branch of the revenue and of the various sources from which it is derived. The act referred to regulated the customs until 1826, when all prior enactments were repealed, and the customs acts consolidated. This operation was repeated in the reign of William IV., and again by various acts in the present reign. The effect of the present legislation has been to repeal the majority of the duties formerly charged and to confine the customs to comparatively few articles, the principal of which are wines, spirits, tea, coffee, sugar, and tobacco. Aliens were formerly compelled to pay heavier duties than natural born subjects, to be exempted from which was one of the principal causes of the frequent applications to parliament for acts of naturalization; but by 24 Geo. 3, sess. 2, c. 16, all previously existing duties on the goods of aliens above those paid by natural born subjects were repealed (with the exception of the duties of package and scavage(g) payable in the City of London), the preamble of the act reciting that such duties had "become an unnecessary burden upon commerce without producing any real advantage to the public revenue." In 1833 the duties of package and scavage were purchased from the civic corporation by the government, and, the duties themselves being, at the same time, abolished(h), aliens are now called upon to pay no more than other persons.

These customs are then, we see, a tax immediately paid by the merchant, although ultimately by the consumer. And yet these are the duties felt least by the people; *and, if prudently managed, the people hardly consider [*379] that they pay them at all. For the merchant is easy, being sensible he does not pay them for himself; and the consumer, who really pays them, confounds them with the price of the commodity; in the same manner, as Tacitus observes, that the emperor Nero gained the reputation of abolishing the tax on the sale of slaves, though he only transferred it from the buyer to the seller: so that it was, as he expresses it, "*remissum magis specie, quam vi; quia cum*

(e) Stat. 12 Car. 2, c. 4; 11 Geo. 1, c. 7.

(f) 27 Geo. 3, c. 13.

(g) As to which, see the stats. 19 Hen. 7, c. 8; 22 Hen. 8, c. 8.

(h) 8 & 4 Will. 4, c. 66.

venditor pendere juberetur, in partem pretii emptoribus accrescebat"(i). But this inconvenience attends on the imposing of custom duties, that the imposts levied, if too heavy, are a check and cramp upon trade: and especially when the value of the commodity bears little or no proportion to the quantity of the duty imposed. This gives rise also to smuggling, which then becomes a very lucrative employment: and its natural and most reasonable punishment, viz., confiscation of the commodity, is in such cases quite ineffectual; the intrinsic value of the goods, which is all that the smuggler has paid, and therefore all that he can lose, being very inconsiderable when compared with his prospect of advantage in evading the duty. Recourse must therefore be had to extraordinary punishments to prevent it(k), which, besides other objections to them are apt to confound men's notions of right and wrong by visiting breaches of mere fiscal regulations, with penalties as severe as those inflicted for crimes of violence.

There is also another ill consequence attending high imposts on merchandize, not frequently considered, but indisputably certain; that the earlier any tax is laid on a commodity the heavier it falls upon the consumer in the end; for every trader through whose hands it passes must have a profit, not only upon the raw material, and his own labour and time in preparing it, but also upon the *very tax itself, which he advances to the government; otherwise he [*380] loses the use and interest of the money which he so advances. For instance, when there was an impost on foreign paper, the merchant paid a duty upon importation, which he did not receive again till he sold the commodity, perhaps at the end of three months. He was therefore equally entitled to a profit upon that duty which he paid at the custom house, as to a profit upon the original price which he paid to the manufacturer abroad: and considered it accordingly in the price he demanded of the stationer. When the stationer sold it again, he required a profit from the printer or bookseller upon the whole sum advanced by him to the merchant; and the bookseller did not forget to charge the full proportion to the student or ultimate consumer, who therefore not only paid the original duty, but the profits of these three intermediate traders, who had successively advanced it for him. This, which might be carried much farther in any mechanical or more complicated branch of trade, was a very serious inconvenience, but it has been much diminished by the introduction of the warehousing system, a great and important improvement in our commercial law. Previously to 1803, the duties on most goods imported were either paid at the moment of their importation, or a bond, with sufficient security for their future payment, was given to the revenue officers. The hardships and inconveniences of such a system are numerous and obvious(l).

Sir Robert Walpole seems to have been one of the first who had a clear perception of its injurious influence, and one object of that minister's famous excise scheme, proposed in 1733, was to oblige the importers of tobacco and wine to deposit their importations in public warehouses, relieving them, however, from the necessity of paying the duties chargeable on the importations till they *were withdrawn for home consumption(m). Sir Robert's [*381] proposed scheme, however, was met by violent popular clamour, and was therefore unavoidably dropped. However, fifty years afterwards, by 43 Geo. 3, c.

(i) Hist. l. 13.

(k) Montesq. Sp. L. b. 18, c. 8.

(l) M'Culloch's Com. Dict., art. Warehousing System.

(m) 2 Mahon's Hist. 161, 162. Gent. Mag. 1733, 561, 574, 622—624.

132, the provisions of which were improved, and extended by subsequent statutes⁽ⁿ⁾, the commissioners of customs were empowered, under the authority and direction of the lords of the treasury, to nominate the ports at which goods may be warehoused without payment of duty, and the warehouses in which particular descriptions of goods may be deposited. There are various regulations respecting the time during which goods are allowed to remain in the warehouse; their removal from port to port, their sale and stowage in the warehouses, the remission of the duties in case of loss by accident, the allowances for waste, &c. If imported goods be exported from the warehouse, without being taken out of bond, no duty is payable upon them.

IV. Directly opposite in its nature to the foregoing is the excise duty, which is an inland imposition, paid sometimes upon the consumption of a commodity, ^{(iv.) The excise duties.} or frequently upon the retail sale of it, which is the last stage before the consumption.⁽¹⁰¹⁾ This is doubtless, impartially speaking, the most economical way of taxing the subject; the charges of levying, collecting, and managing the excise duties being considerably less in proportion than in other branches of the revenue. It also renders the commodity cheaper to the consumer than charging it with customs to the same amount would do; for the reason just now given, because generally paid in a much later stage of it. But, at the same time, the rigour and arbitrary proceedings of excise laws seem hardly compatible with the temper of a free nation. For the [*382] frauds that might be *committed in this branch of the revenue, unless a strict watch is kept, make it necessary, wherever it is established, to give the officers a power of entering and searching the houses of such as deal in or manufacture excisable commodities, at any hour of the day, and, in some cases, of the night likewise. And the proceedings in case of transgressions are often summary, and in some instances held before the commissioners of excise themselves, instead of a legal tribunal^(o). For which reason, though lord Clarendon tells us^(p), that to his knowledge the earl of Bedford (who was made lord treasurer by king Charles I., to oblige his parliament) intended to have set up the excise in England, yet it never made a part of that unfortunate prince's revenue; being first introduced on the model of the Dutch prototype, by the parliament itself after its rupture with the crown. Yet such was the opinion of its general unpopularity, that when in 1642 aspersions were cast by malignant persons upon the house of commons, that they intended to introduce excises, the house for its vindication therein did declare, that these

(n) 16 & 17 Vict. c. 107; 18 & 19 Vict. c. 96; 20 & 21 Vict. c. 62; 22 & 23 Vict. c. 87; 23 & 24 Vict. c. 36; 30 & 31 Vict. c. 82.

(o) For the jurisdiction of the commissioners and justices of the peace in cases of excise, see Burn's Justice, tit. Excise. The grievances of the excise perhaps exist more in apprehension than in reality, and the prejudice in the public mind, against the excise duties, seems to have been caused more by the regulations connected with their imposition, than by the oppressive extent to which they have sometimes been carried. The great objection to them has consisted in their obscurity and complexity. Being intended for the guidance of traders, they ought to be

brief, clear, and level to the apprehension of every one; but instead of this, they were lengthy, contradictory, and unintelligible; they have, however, been simplified in modern times.

For the more easily levying the revenue of excise, England and Wales are divided into about sixty-one collections, some of which are called by the names of particular counties, others by the names of great towns. Every such collection is subdivided into several districts, in each of which there is a supervisor; and each district is again subdivided into out-rides and foot-walks, within each of which there is a surveying officer.

(p) Hist. b. 3, vol. i. p. 446, Ox. ed. 1826.

(101) The statutes cited in note 99, relating to excise duties, are still in force.

rumours were false and scandalous; and that their *authors should be apprehended and brought to condign punishment(*q*). However, its original(*r*) establishment was in 1643(*s*), and its progress was gradual; being at first laid upon those persons and commodities where it was supposed the hardship would be the least perceivable, viz., the makers and vendors of beer, ale, cider, and perry(*t*); and the royalists at Oxford soon followed the example of their brethren at Westminster by imposing a similar duty; both sides protesting that it should be continued no longer than to the end of the war, and then be utterly abolished(*u*). But the parliament at Westminster soon after imposed it on flesh, wine, tobacco, sugar, and such a multitude of other commodities, that it might fairly be denominated general: in pursuance of the plan laid down by Mr. Pym (who seems to have been the father of the excise), in his letter to sir John Hotham(*x*), signifying, "that they had proceeded in the excise to many particulars, and intended to go on further; but that it would be necessary to use the people to it by little and little." And afterwards, when the nation had been accustomed to it for a series of years, the succeeding champions of liberty boldly and openly declared "the impost of excise to be the most easy and indifferent levy that could be laid upon the *people"(*y*); and [*383] accordingly continued it during the whole usurpation. Upon king Charles's return, it having then been long established, and its produce well-known, some part of it was given to the crown in 12 Car. II., by way of purchase (as was before observed) for the feudal tenures and other oppressive parts of the hereditary revenue. But, from its origin to a comparatively recent period, it has been extremely unpopular. It was, nevertheless, imposed on many commodities other than those before mentioned in the reigns of king William III. and succeeding princes, to support the enormous expenses occasioned by our wars on the continent.

Thus excise duties were levied on spirits, hops, malt, beer, soap, glass, salt, paper, &c., indeed on nearly every article in daily use. Now, however, many of the most objectionable of these duties have been repealed, and the excise is levied in much fewer instances, the principal part of the revenue arising therefrom being derived from malt and spirits.

V. Another considerable portion of the revenue is contributed with greater cheerfulness, as, instead of being a burden, it is for the manifest advantage of (v.) Post-office. the public. I mean the duty for the carriage of letters. (102)

(*q*) Com. Journ. 8 Oct. 1643.

(*r*) The translator and continuator of Petavius's Chronological History (Lond. 1659, fol.) informs us, that it was first moved for, 28 Mar. 1643, by Mr. Prynne. And it appears from the journals of the commons, that on that day the house resolved itself into a committee to consider of raising money, in consequence of which the excise was afterwards voted. But Mr. Prynne was not a member of parliament till 7 Nov. 1643; and published in 1654 "A protestation against the illegal, detestable, and oft condemned tax and extortion of excise

in general." Mr. "Prynne" is probably a mistake of the printer for Mr. Pym, who was intended for chancellor of the exchequer under the earl of Bedford. Clar. Hist. Reb. b. 7, vol. iv. p. 438, Ox. ed. 1826.

(*s*) Husb. Orb. 287.

(*t*) Com. Journ. 17 May, 1643.

(*u*) Clar. Hist. Reb. b. 7, vol. iv. p. 418, Ox. ed. 1826.

(*x*) 30 May, 1643. Dugdale's View of the Troubles, 120.

(*y*) Ord. 14 Aug. 1649, c. 50; (Scobell, 72); Stat. 1656, c. 19; (Scobell, 468.)

(102) The power to establish post-offices and post-roads is conferred on congress by the U. S. Const., art. 1, § 8. The statutes relating to this subject provide for a very complete system of mail transportation and communication.

The postmaster-general is but a mere agent for the United States, as to all official acts

It does not appear at what precise date the crown undertook to be the regular carrier of letters for its subjects. The crown, doubtless, at a very early period, found it necessary to the functions of sovereignty, to be able to convey, with speed and security, its own despatches from one part of the realm to another, and from and to parts beyond the seas; and for that purpose it appointed certain messengers or runners called the posts. These posts were also employed for the personal convenience of the sovereign and the individuals composing the royal court. In course of time a master of the posts was appointed, [*385] *and the first of these on record was sir Brian Tuke, who held that office in 1516. His joint successors were sir William Paget and John Mason(z), and there were successive patents granting the same office to other persons *temp.* Elizabeth, James I., and Charles I. The practice probably began at an early period, and afterwards grew into a regular custom of allowing private persons to avail themselves of the royal posts for transmitting their correspondence, and this practice, besides yielding perquisites to the postmaster, gave to ministers of state the power of narrowly inspecting the written correspondence of the public.

The officer hitherto mentioned as the king's postmaster, was the master of the posts within the dominions of the crown at home or beyond the seas, and to him belonged the transmission of letters both at home and abroad. In 1619

(z) Letters patent, dated Nov. 12, 1545, granted to them, during their lives and the life of the survivor, the office of master of the messengers, runners, or posts, as well within the kingdom of England as in parts beyond the seas in the king's dominions, together with the fee of 66*l.* 13*s.* 4*d.* a year; but besides his fee, the master of the posts received from the crown the amount of his expenses for conveying letters, of which he rendered an account. (Report of Committee of H. of Com. on the Post Office, 1844.)

and contracts. *Locke v. Postmaster-General*, 3 Mason's C. C. 446. He has authority to establish post-offices, whether the commissions are more or less than \$1,000. *Ware v. United States*, 4 Wall. (U. S.) 617. He may require and take bonds from postmasters. *Postmaster-General v. Early*, 12 Wheat. 136; *Postmaster-General v. Rice*, Gilp. 554; *Attorney-General v. Reeder*, 4 Wash. C. C. 678. If a postmaster unlawfully detains mail matter from the individual to whom it is addressed, it is a conversion, for which an action of trover may be maintained against him. *Teal v. Felton*, 12 How. (U. S.) 284; affirming S. C., 1 N. Y. (1 Comst.) 587; 8 Barb. 512. And the action will lie in the state courts. *Ib.* It is the duty of postmasters to deliver letters deposited for delivery at the same office. *Nevius v. Bank of Lansingburgh*, 10 Mich. 547; *Bank of Columbia v. Lawrence*, 1 Pet. 578.

A civil action will lie in a state court against a postmaster for negligence, whereby a letter containing money was stolen from his office. *Coleman v. Frazier*, 4 Rich. (S. C.) 146; *Bolan v. Williamson*, 1 Brev. 181; S. C., 2 Bay. 551. And the postmaster is liable for the negligent acts of his assistant in the discharge of the duties of the office. *Ib.* See *Teal v. Felton*, *supra*. But see *Schroyer v. Lynch*, 8 Watts, 453, as to the purloining of a letter by a deputy.

A postmaster is liable for the acts of one whom he permits to have the care and custody of the mail in his office, not having been sworn according to law. *Bishop v. Williamson*, 11 Me. (2 Fairf.) 495. And a deputy postmaster is liable in an action to the party sustaining a loss by his negligence. *Maxwell v. M'Ilvoy*, 2 Bibb, 211.

The United States may sue a postmaster before a justice of the peace, if the amount claimed be within his jurisdiction. *McNamee v. United States*, 6 Eng. (Ark.) 148. But no action lies against a postmaster upon an unaccepted draft upon him from the post-office department in favor of the holder. *Goodwin v. Hazzard*, 1 Carter (Ind.), 514.

Nor will an action lie against him for refusing to give a newspaper the publishing of advertisements as to letters remaining in post-offices, as required by act of congress; because a private action will not lie to enforce a public duty, unless it is given by statute. *Fosters v. McKibben*, 14 Penn. St. 168; *Strong v. Campbell*, 11 Barb. 135.

however, a new patent office was established, called that of the postmaster of England for foreign parts out of the dominions of the crown, which gave rise to a protracted legal contest between rival claimants(a). During the reign of Charles I. the postmaster, Thomas Witherings, suggested improvements in the management of the post-office, which, at that time, instead of producing any revenue to the state, caused an annual burden to it of 3400*l*. His plan consisted essentially of three parts—the establishment of fixed rates of postage; the substitution of horse for foot-posts, and a concession to the public generally of the use of the post-office. The plan was adopted, and Witherings was appointed postmaster, *as well for the conveyance of inland as of foreign letters. [*386]

In 1657 a bill for the settling of the postage of England, Scotland, and Ireland, was laid by order of the Protector, before his parliament, and passed with some amendments(b).

After the Restoration, an office similar to that of postmaster was established by the 12 Car. 2, c. 35, but the rates of letters were altered, further regulations were added by various statutes, and penalties were enacted, in order to confine, except in some few cases, the carriage of letters to the public office only.

In the year 1837, the laws relating to the post-office were amended. By 7 Will. 4 & 1 Vict. c. 33, the exclusive privilege of conveying letters was, with some exceptions, vested in the postmaster-general. By statute 7 Will. 4 & 1 Vict. c. 36, the laws relating to offences against the post-office and their judicial administration were regulated. By 7 Will. 4 & 1 Vict. c. 34, the rates or duties of postage on domestic and foreign letters were adjusted. And by 2 & 3 Vict. c. 52, amended and made perpetual by 3 & 4 Vict. c. 96, the rates of inland postage on letters were reduced to one uniform rate of one penny charged on every letter not exceeding half an ounce in weight, with a proportionate increase for greater weights; the parliamentary privilege of franking being also abolished(c), and official franking strictly regulated. By *the former [*387] of these acts, parliament, moreover, pledged itself to make good any deficiency of revenue which might be occasioned by such alteration of the rates of existing duties(d), and by the latter, various provisions which have since from time to time been altered, were made regulating the postage duties on ship or foreign letters, postage stamps, money orders, the registry of letters, and the conveyance of newspapers, books, and samples.

(a) Latch. 87.

(b) The preamble of this ordinance states that the establishment of one general post-office, besides the benefiting commerce, and facilitating the conveyance of public despatches, will be the best means "to discover and prevent many dangerous and wicked designs against the commonwealth." Scobell, 511. As to the power of opening letters now possessed by a secretary of state, see *Entick v. Carrington*, and Note thereto, Broom's Const. L. 615—617.

(c) The privilege of letters coming free of postage, to and from members of parliament, was claimed by the House of Commons in 1660, when the first legal settlement of the present post-office was made, but afterwards dropped upon a private assurance from the

crown that this privilege should be allowed the members. And accordingly a warrant was constantly issued to the postmaster-general directing the allowance thereof to the extent of two ounces in weight; till at length it was expressly confirmed by statute 4 Geo. 3, c. 24; which added many new regulations, rendered necessary by the great abuses which had crept into the practice of franking; see Com. Journ. 17 Dec. 1660; *Id.* 23 Dec. 1660; *Id.* 16 Apr. 1735; *Id.* 26 Feb. 1734; *Id.* 26 Mar. 1764.

(d) The revenue which at the first introduction of the penny post sunk considerably, has since risen gradually year by year. By 31 & 32 Vict. c. 110, the postmaster-general was authorised to undertake the management of electric telegraphs.

VI. Stamp duties constitute another important branch of the revenue of the crown, being imposed upon many legal(e) and mercantile documents.(103)

(VI.) Stamp They were first instituted by 5 & 6 W. & M. c. 21, and have been duties. added to and altered by other statutes too numerous to mention. This is a tax, which, though in some instances it may be heavily felt by increasing the expense of mercantile as well as legal transactions, yet, if moderately imposed, is of service by authenticating instruments, and rendering it much more difficult than formerly to forge deeds of any standing; since, as the officers of this branch of the revenue vary their stamps frequently, a man that would forge a deed of any particular time must know and be able to counterfeit the stamp of that date also. Two other taxes may be mentioned which also

(e) By 28 & 29 Vict. c. 45, all court fees payable in the superior courts of law are to be collected by means of stamps.

(103) The statutes relating to stamps are cited in note 99. As the decisions relating to stamps are numerous, it would require more space than can here be given to notice them all, therefore some of the more important principles are all that can be stated. To render an instrument void, or inadmissible in evidence for want of a stamp, the omission to stamp must be intentional and for the purpose of evading the revenue act. *Rheinstrom v. Cone*, 26 Wis. 163; S. C., 7 Am. Rep. 48, 51 note; *Hitchcock v. Sawyer*, 39 Vt. 412; *Tobey v. Chipman*, 18 Allen, 123; *Holyoke v. Franklin Co.*, 97 Mass. 150; *New Haven & Northampton Co. v. Quintard*, 6 Abb. N. S. 128; 37 How. 29; 1 Sweeny, 89; *Vorabeck v. Roe*, 50 Barb. 802; *McGovern v. Hasbick*, 53 Penn. St. 176; *Blunt v. Bates*, 40 Ala. 470; *Dorris v. Grace*, 25 Ark. 326; *Hallock v. Jaudin*, 84 Cal. 167; *Campbell v. Wilcox*, 10 Wall. (U. S.) 421; *Hale v. Wilkinson*, 21 Grat. 75; *Atkins v. Plympton*, 44 Vt. 21; *Dailey v. Coker*, 33 Tex. 815; S. C., 7 Am. Rep. 279; *Bumpass v. Taggart*, 26 Ark. 398; S. C., 7 Am. Rep. 623.

The mere omission of a stamp, in the absence of affirmative evidence that such omission was intentional, will not render the instrument void, as a fraudulent intent will not be presumed. *Ib.*; *Green v. Holway*, 101 Mass. 243; S. C., 3 Am. Rep. 339; *Desmond v. Norris*, 10 Allen, 250; *Ritter v. Brendlinger*, 53 Penn. St. (8 Smith) 68; *Sawyer v. Parker*, 57 Me. 39; *Cooke v. England*, 27 Md. 14; *Weltner v. Riggs*, 3 W. Va. 445; *Adams v. Dale*, 29 Ind. 273; *Blunt v. Bates*, 40 Ala. 470; *Dorris v. Grace*, 25 Ark. 326; *Vaughan v. O'Brien*, 57 Barb. 491; 39 How. Pr. 515; *Mitchell v. Home Ins. Co.*, 32 Iowa, 421; *Morris v. McMorris*, 44 Miss. 441; S. C., 7 Am. Rep. 695. It has been decided by several of the state courts that the exclusion of unstamped instruments as evidence is a rule applicable to the United States courts alone; and that the statute does not apply to the state courts, which may admit unstamped instruments, and they will do so in case the omission to stamp was not fraudulent. *Dailey v. Coker*, 33 Tex. 815; S. C., 7 Am. Rep. 279; *People ex rel. Barbour v. Gates*, 43 N. Y. (4 Hand) 40; *Moore v. Moore*, 47 N. Y. (2 Sick.) 467; S. C., 7 Am. Rep. 466; *Carpenter v. Snelling*, 97 Mass. 452; *Green v. Holway*, 101 id. 242; S. C., 8 Am. Rep. 339; *Griffin v. Ranney*, 35 Conn. 339; *Sporrer v. Bister*, 1 Heisk. 633; *Clemens v. Conrad*, 19 Mich. 170; *Bowen v. Byrne*, 55 Ill. 467; *Hale v. Williamson*, 21 Grat. 75; *Atkins v. Plympton*, 44 Vt. 21; *Bumpass v. Taggart*, 26 Ark. 398; S. C., 7 Am. Rep. 623; *Duffy v. Hobson*, 40 Cal. 240; S. C., 6 Am. Rep. 617; *Sammons v. Holloway*, 21 Mich. 162; S. C., 4 Am. Rep. 465; *Davis v. Richardson*, 45 Miss. 490; S. C., 7 Am. Rep. 732; *Mitchell v. Home Ins. Co.*, 32 Iowa, 421.

If a stamp has been unintentionally omitted, the court will permit a stamp to be put on and canceled in open court, whenever the defect is objected to. *Dailey v. Coker*, 33 Tex. 815; S. C., 7 Am. Rep. 279; *Morris v. McMorris*, 44 Miss. 441; S. C., 7 Am. Rep. 695; *Tobey v. Chipman*, 18 Allen, 123; *Dorris v. Grace*, 24 Ark. 326.

It is not within the constitutional power of congress to prescribe for the states a rule for the transfer of property within them; and therefore a deed is not invalid because not duly stamped. *Moore v. Moore*, 47 N. Y. (2 Sick.) 467; S. C., 7 Am. Rep. 466; see *Sammons v. Holloway*, 21 Mich. 162; S. C., 4 Am. Rep. 465; *Duffy v. Hobson*, 40 Cal. 240; S. C., 6 Am. Rep. 617; *Moore v. Quirk*, 105 Mass. 49; S. C., 7 Am. Rep. 499.

come under our present head, viz., the legacy duty(*f*) and the succession *duty(*f*), which are regulated in amount by the relationship of the legatee or successor to the deceased; these duties are independent of, and in addition to, the stamps on probates and letters of administration. [*388]

VII. Assessed taxes are duties assessed on individuals annually, in respect of articles used by them, the principal duties leviable under this head being those on inhabited houses(*g*), servants, horses, carriages, and armorial bearings. Dogs were formerly charged for under this head, but the duty on dogs has recently been removed, and a licence imposed in lieu thereof on such as keep them(*h*).

VIII. A licence may be defined to be a legal permission obtained on payment of money, without which a person is not allowed to do a certain act or, may be, to carry on a certain trade.(104) Licences falling under this head are very numerous, comprising *inter alia* those required by auctioneers, pawnbrokers, brewers, horse-dealers, publicans, and persons who shoot and deal in game, or keep dogs. Analogous to these duties are the certificates, which must be taken out by special pleaders, conveyancers, and attorneys, before they are allowed to practise. Most of these duties are under the management of and collected by the commissioners of the excise(*i*).

*Much of the revenue derivable from the sources above enumerated is applicable to the payment of the national debt, the origin and nature whereof we will next consider. [*389]

Application of
taxes.

In order to take a clear and comprehensive view of the nature of the national debt, it must first be premised, that after the Revolution, when our new connexions with Europe introduced a new system of foreign politics, the expenses of the nation, not only in settling the new establishment, but in maintaining long wars, as principals, on the continent for the security of the Dutch barrier, reducing the French monarchy, settling the Spanish succession, supporting the house of Austria, maintaining the liberties of the Germanic body, and other purposes, increased to an unusual degree; insomuch that it was not thought advisable to raise all the expenses of any one

(*f*) The principal legacy duty acts are 36 Geo. 3, c. 52; 45 Geo. 3, c. 28; 55 Geo. 3, c. 184; 8 & 9 Vict. c. 76; and 16 & 17 Vict. c. 51.

(*g*) The succession duty was imposed by 16 & 17 Vict. c. 51.

No person is chargeable with both legacy duty and succession duty in respect of the same property.

(*g*) This duty under the name of "fumage" or "fuage" (being a tax on every chimney), was very ancient, and we read that Edward the Black Prince imposed it on his French dominions also. Spel. Gloss. Fuage. A tax of 2s. on every hearth was imposed by 18 & 14 Car. 2, c. 10, but removed by 1 W. & M. sess. 1, c. 10. In a few years afterwards a tax was imposed upon houses, which used to be assessed according to the number of windows

in the house, and was therefore usually called the window tax, but that manner of assessment being found prejudicial to the public health by inducing architects to build houses deficient in light and air; it was abolished by 14 & 15 Vict. c. 86, and the present mode of assessment instituted instead.

(*h*) 30 & 31 Vict. c. 5.

(*i*) By stat. 31 Geo. 2, c. 22,* a tax was levied upon the salaries of all officials and upon pensions payable by the crown. This was varied by many statutes (*inter alia*), 38 Geo. 3, c. 5; 49 Geo. 3, c. 32; 6 Geo. 4, c. 9; and 6 & 7 Will. 4, c. 97; and in the course of time the offices liable to it have been so much diminished in number that the revenue arising therefrom in 1867 was under 20*l*.

(104) The statutes relating to licences are cited in note 99.

* As to the income tax and licenses, see 33 & 34 Vict. c. 14.

year by taxes to be levied within that year, lest the unaccustomed weight of them should create murmurs among the people. It was therefore the policy of the times to anticipate the revenues of their posterity, by borrowing large sums for the current service of the state, and to lay no more taxes upon the subject than would suffice to pay the annual interest of the sums so borrowed, by this means converting the principal debt into a new species of property, transferable from one man to another, at any time, and in any quantity. An early instance of this system occurred at Florence, A. D. 1344, the government of that state then owing about 60,000*l.* sterling, and being unable to pay it, formed the principal into an aggregate sum, called, metaphorically, a mount or bank, the shares whereof were transferable like our stocks, with interest at 5 per cent., the prices [*390] varying according to the *exigencies of the state(*k*). This policy of the English parliament laid the foundation of what is called the national debt: for a few long annuities created in the reign of Charles II. will hardly deserve that name. And the example then set has been so closely followed during the long wars in the reign of queen Anne, and since, that the capital of the national debt (funded and unfunded) amounted in 1867 to about seven hundred and seventy-seven millions, to pay the interest of which the country has to bear an annual burden of over twenty-six millions. The system above mentioned, though recourse to it may be sometimes needed, is open to the objection that it weakens the internal strength of a state, by anticipating those resources which should be reserved to defend it in case of necessity. The interest we now pay for our debts might be nearly sufficient to maintain any war, that national motives could require.

1 The products of the several taxes imposed upon the nation were originally separate and distinct funds, being securities for the sums advanced on each several tax, and for them only. But at last it became necessary, in order to avoid confusion, as they multiplied yearly, to reduce the number of these separate funds, by uniting and blending them together, superadding the faith of parliament for the general security of the whole. They were accordingly first reduced into three capital funds: the aggregate fund, and the general fund, so called from such union and addition; and the South Sea fund, being the produce of the taxes appropriated to pay the interest of such part of the national debt as was advanced by that company and its annuitants. These separate funds were made mutual securities for each other, and the whole produce of them thus aggregated became liable to pay such interest or annuities as had been formerly charged upon each distinct fund, the faith of the legislature being pledged to [*391] *supply any casual deficiencies. Afterwards, by stat. 27 Geo. 3, c. 13, ss. 47, *et seq.*, these three funds were united together into the "consolidated fund;" and by 56 Geo. 3, c. 98, the consolidated fund of Great Britain was combined with that of Ireland, forming the consolidated fund of the United Kingdom, which is pledged for the payment of the interest of the national debt, besides being liable to the payment of the allowances to the royal family and the expenses of the civil government charged thereupon, as subsequently explained(*l*).

The customs, excise, and other taxes, which are to support these funds, depending on contingencies, must necessarily be of a very uncertain amount;

(*k*) *Pro tempore, pro spe, pro commodo, minister eorum pretium atque augescit.* Aretin.

(*l*) *Post*, p. 394.

but though some of them have proved unproductive, and others deficient, the sum total has sometimes been considerably more than was sufficient to answer the charge upon them. The surplusses therefore of the three great national funds, the aggregate, general, and South Sea funds, over and above the interest and annuities charged upon them, were directed by stat. 3 Geo. 1, c. 7, to be carried together, and to attend the disposition of parliament; and were usually denominated the sinking fund, because destined to sink and lower the national debt. To this fund were added many other duties, subsequently granted.

Further, by 26 Geo. 3, c. 31, the sum of one million annually was set apart and ordered to be laid out in the purchase of stock by commissioners appointed by the same act; it being also provided, that when this annual million should be increased to four millions by the dividends of the stock so purchased, then the dividends should no longer be paid upon the redeemed stock, and that the sinking fund should no longer accumulate. By 32 Geo. 3, c. 55, it was enacted, that when these dividends should amount to three millions, exclusive of the said annual grant, there should be no further accumulation; it being also provided, that upon every future loan *which was not to be paid off [*392] within forty-five years, one per cent. should be annually appropriated to form a sinking fund for the redemption of the loan; and by 33 Geo. 3, c. 22, an additional grant of 200,000*l.* was made for the same purpose.

At last the nation became alive to the folly of contracting debt for the purpose of paying it off (*n*), and aware of the fact that the only rational mode of forming a sinking fund was by applying to that purpose the excess of revenue over expenditure. An attempt was made in 1819 to form a sinking fund of five millions by maintaining a surplus revenue of this amount. As it was soon found that this could not be done, the whole system was ended in 1829 by 10 Geo. 4, c. 27, which enacted that the sum applicable in future to the diminution of the national debt should be a certain portion of the excess, if any, of the annual revenue. This sum is accordingly annually transferred to the commissioners for the reduction of the national debt, together with unclaimed dividends(*o*), and such sums as are from time to time bequeathed to them for that purpose(*p*). But before any part of the aggregate fund can be applied to diminish the principal of the public debt, it stands mortgaged by parliament to raise an annual sum for the maintenance of the royal household and the civil list.

Before the Revolution, the sovereign had the uncontrolled disposal of the revenues of the crown(*q*), including *both the hereditary revenues [*393] and the taxes, and whatever remained after defraying the necessary expenses of the government, was at his absolute disposal, for the maintenance of his dignity and for private purposes. Irrespective of this provision, Charles II. appropriated to his private use immense sums voted by parliament for other

(*n*) M'Culloch's Account of Brit. Emp. 8rd ed. ii. pp. 481, *et seq.*

(*o*) 56 Geo. 3, c. 60.

(*p*) The last act of any importance regulating the proceedings of these commissioners is 29 & 30 Vict. c. 11.

(*q*) The whole revenue of queen Elizabeth did not amount to more than 600,000*l.* a year (Lord Clar. Life, continuation, vol. ii. p. 158, Ox. ed. 1827); that of king Charles I. was (Com. Journ. 4 Sept. 1660) 800,000*l.*, and the revenue voted for king Charles II. was (*lb.*) 1,200,000*l.*, though complaints were made (in

the first years at least) that it did not amount to so much (*lb.* 4 June, 1668, Lord Clar. *ib.*). But it must be observed, that under these sums were included all manner of public expenses; among which lord Clarendon in his speech to the parliament computed, that the charge of the navy and land forces amounted annually to 800,000*l.* which was ten times more than before the former troubles (Lord Clar. *ib.* 159, 160). The same revenue, subject to the same charges, was settled on king James II. (Stat. 1, Jac. 2, c. 1).

purposes(*r*). To prevent such conduct being possible thereafter, a separate provision was made for the civil list at the accession of William and Mary(*s*), though this list was not only burdened with the royal expenses, but with pensions and the salaries of various officers. This system continued in succeeding reigns(*t*), the civil list being derived from the hereditary revenues and part of the excise, and being burdened with many of the expenses of the state. Queen Anne(*u*) and George I.(*x*) not only spent the whole of this civil list, but contracted considerable debts, which had to be defrayed by the country. On the accession of George II., it was arranged that he should receive the hereditary revenues, parliament undertaking to make up the amount to 800,000*l.* per annum if such revenues fell short of that sum, while he should be entitled to any surplus(*y*). When George III. came to the throne, he agreed to surrender the hereditary revenues in exchange for 800,000*l.*(*z*), which was settled upon him. This sum was increased several times in the course of his reign, yet numerous debts were incurred(*a*).

[*394] *On the accession of George IV., the hereditary revenues of the crown were(*b*) placed at the disposal of the house of commons, and carried to the consolidated fund for his life, and by the same statute a revenue of 850,000*l.* in England, and 207,000*l.* in Ireland was granted to his majesty for life. On the accession of William IV., the royal revenues were again surrendered to the nation(*c*), and the clear yearly sum of 510,000*l.* was directed to be paid out of the consolidated fund for the support of the royal household and the honour and dignity of the crown. In the next session, an act(*d*) was passed to relieve the civil list from many charges which had only a theoretical connection with the royal dignity and person, viz. the salaries of the judges and diplomatic salaries and pensions, all of which, together with the allowances to the numerous members of the royal family, as also the secret service money, are now charged by parliament upon the consolidated fund. On the accession of her present majesty, it was provided(*e*) that the hereditary revenues of the crown should, as before, be carried over to the consolidated fund during the life of her majesty; and that the consolidated fund should be charged with the payment of the yearly sum of 385,000*l.* for the support of her majesty's household, and the honour and dignity of the crown; (60,000*l.* of this amount being appropriated to her privy purse;) it was also enacted(*f*), that whenever the total charge on the civil list should in any year exceed the sum of 400,000*l.*, the particulars and cause of such excess should be laid before parliament.

The arrangement heretofore explained by which a civil list is granted to the sovereign, has proved eminently beneficial. Hereby the revenues themselves, being put under the same care and management as the other branches of the public patrimony, produce more and are *better collected than they [*395] had been; and the public is thus a gainer. And upon the whole it is doubtless much better for the crown, and also for the people, to have the

(*r*) Clarendon's Life, vol. iii. p. 131, Ox. ed. 1827. Pepy's Diary, Sep. 23, and Dec. 12, 1666.

(*s*) Parl. Hist. v. 193.

(*t*) The history of the civil list from William III. to the present time, will be found in May's Const. Hist. i. pp. 194, *et seq.*

(*u*) Burke's works, vol. ii. p. 309.

(*x*) *Ib.*

(*y*) 1 Geo. 2, stat. 1, c. 1.

(*z*) 1 Geo. 3, c. 1.

(*a*) Parl. Hist. xvi. 848, 936. Burke's Works, vol. ii. pp. 280, *et seq.*

(*b*) 1 Geo. 4, c. 1.

(*c*) 1 Will. 4, c. 25.

(*d*) 2 & 3 Will. 4, c. 116.

(*e*) 1 & 2 Vict. c. 2.

(*f*) Sect. 10.

revenue settled upon the modern rather than upon the ancient footing. For the crown, because it is more certain, and collected with greater ease; for the people, because they are now delivered from feudal hardships and other odious branches of the prerogative. Lastly, though it may not be probable that a future sovereign will elect to take the hereditary revenues instead of a civil list, the maintenance of those revenues forms a substantial security for the granting of a civil list, and if any complaint should hereafter be made as to the amount of the latter, the fact that the public will receive in exchange for it the income from the hereditary revenues would furnish a minister of the crown with a sound and intelligible answer to such a complaint.

IX. The sovereigns of England, from the accession of king Henry IV. to the present time, have enjoyed the possession of the duchy of Lancaster as an inheritance separate from the crown, and the revenue from the duchy is now received by her majesty, not having been surrendered in consideration of the civil list granted upon her accession.

The estates of the duchy of Lancaster comprise lands which were parcel of the possession of the first duke of Lancaster (*g*), lands acquired upon the disso-

(*g*) The historical account of the mode whereby the duchy lands became vested in the crown is briefly as follows:—

Edmund Plantagenet, a younger son of king Henry III., was created the first earl of Lancaster by charter, dated June 30, 1267, and the honour, county, castle, and town, of Lancaster, were thereby granted to him. He died at Bayonne on June 4, 1297; leaving by his second wife, Blanche, queen of Navarre, three sons, of whom the two elder, Thomas and Henry, were successively earls of Lancaster.

Thomas, second earl of Lancaster, having been engaged in a rebellion against king Edward II., was beheaded at Pomfret Castle, on March 23, 1322, and died without issue.

Henry, third earl of Lancaster, by a reversal of the forfeiture of the lands of earl Thomas, was restored thereto. He had been summoned to parliament as baron of Lancaster, Feb. 6, 1299, and died on Sept. 23, 1345, being succeeded by his son Henry, fourth earl of Lancaster, who, in consideration of his distinguished services as a soldier, was, on March 6th, 1351, created duke of Lancaster by a royal charter granted with the assent of parliament. By another charter of the same date, the court of chancery in the county of Lancaster, and all liberties and *jura regalia*, appertaining to a county palatine, were granted to the duke for his life.

Henry, first duke of Lancaster, died, without male issue, March 24, 1361, and the dukedom thereby became extinct. But the barony of Lancaster, created in 1299, which was a barony in fee, came into abeyance between the two daughters (Blanche and Matilda) of Henry, the first duke. The Lady Blanche Plantagenet became eventually, upon the death of her sister Matilda in 1362, the sole heir to her father. She married John of Gaunt, earl of Richmond, fourth son of king Edward III., who, in right of his

wife, succeeded to the estates of the late duke, and who on May 12, 1362, was created duke of Lancaster. By charter, dated Feb. 28, 1377, the county of Lancaster was again erected into a Palatinate, but only for the life of the then duke. In 1390, however, the grant of the Palatinate was extended to the heirs male of his body.

John, second duke of Lancaster, died Feb. 8, 1399, leaving Henry Bolingbroke (who in 1397 had been created duke of Hereford), his only son and heir.

Henry Bolingbroke, third duke of Lancaster, afterwards became king Henry IV.

By a charter sanctioned by parliament, and dated Oct. 14, 1399, the king granted and decreed, that the duchy of Lancaster should remain to him, and his heirs for ever, and be managed as if the king had never assumed the royal dignity.

By an act passed on Nov. 10, 1 Henry 4, it was enacted that the king's eldest son, Henry, should bear the title of duke of Lancaster, and that the liberties and franchises, granted to the earls and dukes of Lancaster, should remain with the king's eldest son and his heirs, dukes of Lancaster, wholly and entirely dissevered from the crown.

The duchy of Lancaster descended successively to Henry V. and Henry VI., upon whose attainder 1 Edw. 4, the duchy was forfeited to the crown, but an act was passed to vest the duchy in the king and his heirs kings of England, for ever, under a separate management from the other estates of the crown, and in the 1 Henry 7, an act was passed to resume such parts of the possessions of the duchy as had been severed from it in the reign of king Edward.

As to the origin and constitution of the duchy of Lancaster, see Plowd. 212; *Alcock v. Cooke*, 5 Bing. 340; *Jewison v. Dyson*, 9 M. & W. 540; *ante*, p. 141.

[*396] lution of the *religious houses *temp.* Henry VIII, lands annexed to the duchy in the reign of king Philip and queen Mary, and lands purchased on behalf of the duchy.

[*397] *These estates are managed under the direction of the chancellor of the duchy, who has, in certain cases the aid of a council appointed by the crown.

By the 1 Ann. st. 1, c. 7, the sovereign is restrained from alienating lands, parcel of the possessions of the duchy of Lancaster, otherwise than by lease for a term not exceeding thirty-one years or three lives, but by the 48 Geo. 3, c. 73, the crown was empowered to grant leases of land, parcel of the duchy of Lancaster, for building purposes for terms not exceeding ninety-nine years, and by various statutes the chancellor and council of the duchy have been authorized to sell land in order to raise funds for the redemption of the land tax or other property belonging to the duchy, and to effect exchanges of land(*h*); to sell stock belonging to the duchy, and to apply the proceeds thereof in the improvement of the estates of the duchy(*i*); to sell rights of forest chase and free warren to the owners of the lands over which such rights extend(*k*); to contract for the sale of any land belonging to her majesty in right of her duchy, which in their judgment shall not be convenient to be held with the other possessions of the duchy (with provisions for carrying the sales into effect), and to apply the purchase monies either in the improvement of the estates of the duchy of Lancaster, under the powers of the act 57 Geo. 3, c. 97, or in the purchase of other lands to be conveyed to her majesty in right of the duchy(*l*).

By the stat. 1 & 2 Vict. c. 101, s. 2, it is provided that accounts of the receipts and disbursements of the duchy of Lancaster shall be annually submitted to the treasury *by the officers of the duchy, and shall then be laid before parliament(*m*).

X. And here, to prevent misapprehension and render more complete the view presented in this chapter of the royal income, may be noticed the possessions and revenues of the duchy of Cornwall, which have never been surrendered to the public. They now consist,—of the undisposed of portion of those granted by king Edward III. to the Black Prince, upon, or after, his creation as duke of Cornwall; of those annexed to the duchy by subsequent sovereigns, and not since alienated; of lands and revenues acquired by purchase and exchange, and of an annuity(*n*), charged upon the consolidated fund, under the stat 1 & 2 Vict. c. 120, in lieu of certain tin coinage duties, and other rights.

The ancient possessions of the duchy comprise minerals in the “conventionary tenements”(*o*) in various manors in Cornwall, called the “assessionable manors,” the right to which minerals is defined and regulated, under the provisions of the stats. 7 & 8 Vict. c. 105 and 11 & 12 Vict. c. 83, and also minerals

(*h*) 48 Geo. 3, c. 73.

(*i*) 57 Geo. 3, c. 97, s. 25.

(*k*) 1 & 2 Geo. 4, c. 52, s. 13.

(*l*) 18 & 19 Vict. c. 58.

(*m*) The gross income of the duchy of Lancaster in the year 1867 amounted to upwards of 40,000*l.*, including 30,101*l.* from rents and profits of courts, 7727*l.* from minerals, and 803*l.* from an annuity payable out of the consolidated fund under the stats. 43 Geo. 3, c.

156, and 2 & 3 Will. 4, c. 84, for the surrender of duties of prisage and butlerage within the county palatine of Lancaster. The payments made in 1867 out of the duchy revenues to the keeper of the privy purse for her majesty's use amounted to 29,000*l.*

(*n*) Amounting to 16,216*l.* 15*s.* per annum.

(*o*) See *Rowe v. Brenton*, 8 B. & C. 737; 3 M. & R. 133.

in various manors, formerly parcel of the duchy, which have been sold, subject to a reservation of minerals(*p*).

*By the Cornwall Submarine Mines Act, 1858 (21 & 22 Vict. c. 109), [*399] s. 1, all mines and minerals(*q*) lying under the sea shore, between high and low water mark, and under other places (below high water mark), even below low water mark, being in and part of the county of Cornwall, are, as between her majesty and his royal highness the prince of Wales and duke of Cornwall, declared to be vested in his royal highness, as part of the territorial possessions of the duchy; and by s. 2, all mines and minerals lying below low water mark, under the open sea, adjacent to, but not being part of, the county of Cornwall, are, as between her majesty and the prince, declared to be vested in her majesty, as part of the soil and territorial possessions of the crown(*r*).

The estates and revenues(*s*) of the duchy of Cornwall are managed by the prince of Wales and duke of Cornwall, with the advice of his council, the members of which are appointed by letters patent under the prince's seal.

By the Duchy of Cornwall Management Act, 1863 (26 & 27 Vict. c. 49), the duke of Cornwall, or the personage for the time being entitled to the revenues of the duchy, is now empowered (subject in certain cases to the approval of the board of treasury) to sell any part of the possessions of the duchy, to purchase other lands, to settle disputed claims, to refer disputes to arbitration, to grant leases, *and to exercise other powers in relation to the manage- [*400] ment of the estates of the duchy.

By the 23 & 24 Vict. c. 53, the provisions of the 9 Geo. 3, c. 16 (commonly known as the *Nullum Tempus* Act), were made applicable to the duchy of Cornwall, and by the 24 & 25 Vict. c. 62, those provisions were extended.

This finishes our inquiries into the fiscal prerogatives of the crown; or the royal revenue, both ordinary and extraordinary. We have now chalked out all

the principal outlines of this vast title of the law, the supreme executive magistrate, considered in his several capacities and points of view. But, before we entirely dismiss this subject, it may not be improper to take a short comparative review of the power, or prerogative of the crown, as it stood in former days, and as it stands at present. And we cannot but observe, that most of the laws for ascertaining, limiting, and restraining this prerogative have been made within the compass of little more than a century; from the petition of right in 3 Car. I. to the accession of George III. So that the powers of the crown are now to all appearance greatly curtailed and diminished since the reign of

The general tendency of the changes in the constitution since Car. I. has been against prerogative.

(*p*) Although a large extent of land, parcel of the possessions of the duchy, was sold at or about the commencement of the present century, to raise funds for the redemption of the land tax on the residue of the estates of the duchy, those estates, other than land below high water mark in Cornwall, and waste lands out of that county, now comprise about 50,000 acres of land.

(*q*) Which expression is by s. 8 of the above-cited act interpreted to comprehend all mines, minerals, stone, substrata, and the ground and soil in, upon, or under, which the same may lie.

(*r*) Generally as to the tenure of the duchy of Cornwall see *The Prince's Case*, 8 Rep. 1.

(*s*) The net income of the duchy in the year 1838 (the year after the accession of her majesty to the throne), was 11,586*l.*; in 1861, the net income of the duchy was 46,616*l.*; and in 1867, it was 55,468*l.* In the last-mentioned year, the payments out of the duchy revenues to the use of his royal highness the prince of Wales and duke of Cornwall, amounted to 54,927*l.* 9*s.* 11*d.*

The gross revenue of the duchy in 1867, included 50,178*l.* from rents and profits of courts; 6,383*l.* from minerals; and 16,316*l.* from the annuity charged on the consolidated fund under the act 1 & 2 Vict. c. 120.

king James I.: particularly by the abolition of the star-chamber and high commission courts in the reign of Charles I., and by the disclaiming of martial law and the power of levying taxes on the subject by the same prince: by the disuse of forest laws; and by the many excellent provisions enacted in the time of Charles II.; especially the abolition of military tenures, purveyance, and pre-emption; the *habeas corpus* act; and the act to prevent the discontinuance of parliaments for above three years; and, since the Revolution, by the strong and emphatic words in which our liberties are asserted in the bill of rights, and act of settlement; by the act for triennial, since turned into septennial, elections; by the exclusion of certain officials from the house of commons; by rendering [*401] the seats of the judges *permanent, and their salaries liberal and independent; and by restraining the royal pardon from obstructing parliamentary impeachments. Besides all this, if we consider how the crown is impoverished and stripped of its ancient revenues, so that it must greatly rely on the liberality of parliament for its necessary support and maintenance, we might perhaps at first be led to think, that the balance is sufficiently inclined to the popular scale, and that the executive magistrate has not power enough left to check the united will of the lords and commons.

But, on the other hand, it is to be considered, that every sovereign in the first parliament after his accession, has by long usage a truly royal revenue settled upon him for his life; and should never have occasion to apply to parliament for supplies, but upon some public necessity of the whole realm. This restores to the crown all the constitutional independence which it can legitimately need, and frees the sovereign from being liable to coercion by a threat of reducing or withdrawing his annual allowance.

In addition to constitutional checks on the royal prerogative, the latest of which were imposed upwards of a century ago, we must remember that the personal authority of the crown has been considerably diminished within the last fifty years, not by express enactments, but by the natural course of events. The sovereign, indeed, has now, as formerly, the power of appointing his own ministers, but as these cannot hold office in the face of a hostile majority of the legislature, the royal choice is practically limited to the man who for the time being can command the votes of the house of commons. This has led to the practice of the monarch not appointing all the ministers of state himself, but merely selecting one who possesses the above qualification. This one (popularly called the premier) is usually appointed first lord of the treasury, and allowed to select his own colleagues, the crown appointing the objects of his choice to the *offices for which they have been thus designated. [*402] The ministry, once appointed, hold office during the will of the lower house, and though the royal pleasure may turn the balance when the scales of party are nearly even, and may occasionally influence some appointment, yet practically England is governed by the premier and his colleagues, supported by a majority of the legislative body.

Let it not be inferred from anything above propounded that it can to any loyal subject be a matter of indifference what individual occupies the throne. The personal influence of the reigning monarch, which now principally depends on private character, is very great, it operates both socially and politically; and the respect with which the conduct of our present most gracious sovereign has inspired her attached people, is perhaps the strongest, as it is decidedly the most glorious bulwark of the British throne.

*CHAPTER IX.

[*403]

SUBORDINATE MAGISTRATES.

IN a former chapter of these Commentaries^(a) we distinguished magistrates into two kinds; supreme, or those in whom the sovereign power of the state resides; and subordinate, or those who act in an inferior secondary sphere. We have hitherto considered the former kind only; namely, the supreme legislative power, or parliament; and the supreme executive power, which is the sovereign; and are now to proceed to inquire into the rights and duties of the principal subordinate magistrates.

And herein we are not to investigate the powers and duties of the great officers of state, the principal secretaries, or the like; because they do not appear to be in that capacity in any considerable degree the object of our laws, nor have they any very important share of magisterial power conferred upon them; except that the secretaries of state have in some instances been allowed the power of commitment in order to bring offenders to trial^(b). Neither shall I here treat of the office and authority of the lord chancellor, or the other judges of the superior courts of justice; because they will find a more proper place in the third volume of these Commentaries. Nor shall I enter into any minute disquisitions, with *regard to the rights and dignities of mayors and aldermen, or other magistrates of particular corporations; [*404] because these are mere private and strictly municipal rights, depending entirely upon the domestic constitution of their respective franchises. But the magistrates and officers, whose rights and duties it will be proper in this chapter to consider, are such as have a jurisdiction and authority dispersedly throughout the kingdom; who are principally sheriffs, coroners, justices of the peace, constables, surveyors of highways, and overseers of the poor; in treating of whom I shall inquire into, first, their antiquity and origin; next, the manner in which they are appointed and may be removed; and lastly, their rights and duties.

I. The sheriff is an officer of great antiquity in this kingdom, his name being derived from two Saxon words, *respe 3epera*, the reeve, bailiff, or officer I. Sheriff. An- of the shire. He is called in Latin *vice-comes*, as being the antiquity and origin of the office. deputy of the earl or *comes*, to whom the custody of the shire is said to have been committed at the first division of this kingdom into counties. But the earls in process of time, by reason of their high employments, and attendance on the king's person, not being able to transact the business of the county, were delivered of that burden^(c), reserving to themselves the honour, whilst the labour was laid on the sheriff. So that now the sheriff does all the queen's business in the county; and though he be still called *vice-comes*, yet he is entirely independent of, and not subject to, any local authority; the crown, by letters patent, having long committed *custodiam comitatûs* to the sheriff, and him alone, and the appointment of the sheriff (which, since the 3 & 4

(a) Ch. 2, p. 178.

(b) *Search's Case*, 1 Leon. 70; *Hollyard's Case*, 2 Ib. 175; *R. v. Kendal*, Comb. 848; *Yaxley's Case*, Carth. 291. As to the illegality of general warrants issued by secretaries of state, see Broom's Const. L. pp. 525, *at seq.*

(c) Dalton of Sheriffs, 2.

Will. 4, c. 99, has been by warrant in the form set forth in the schedule to that act, made out and signed by the clerk of the privy council, instead of by letters [*405] *patent under the great seal), is also made to him only. This office was so honourable in ancient times that we hear of its being filled by barons, earls, dukes and even the sons of kings, among whom may be mentioned Edward, eldest son of Henry III. (afterwards Edward I.), who was sheriff of Rutland for five years(d).

Sheriffs were formerly chosen by the inhabitants of the several counties(e).(105) In confirmation of which it was ordained by statute 28 Edw. 1, c. 8, that the people should have the election of sheriffs in every shire, where the mode of appointment. the shrievalty is not of inheritance. For anciently in some counties the office of sheriff was hereditary, as it continued to be in the county of Westmoreland, till the 13 & 14 Vict. c. 30. The citizens of London have also

(d) Spel. Gloss. *Vicecom.*

(e) Lamb. *de prisciis Ang. leg.* 147.

(105) In the United States sheriffs are generally elected by the people in the same manner as other public officers. The officers under the United States government who discharge duties similar to those of a sheriff are called marshals, who are appointed by the president and senate.

The powers, rights and duties of sheriffs in this country are very similar to those of a sheriff in England. An alien, not qualified as an elector in his county, is ineligible to the office of sheriff. *State v. Smith*, 14 Wis. 497.

A sheriff who receives money paid to redeem mortgaged premises, is in no sense the agent of the party, but acts in his official capacity. *Horton v. Maffitt*, 14 Minn. 289. So in making an arrest under a warrant, or by authority of a statute, he acts officially. *Warner v. Grace*, id. 487. In acting under a bench warrant issued upon an indictment he cannot arrest the party in another state, as he would be considered a mere individual without legal process. *Mandeville v. Gurnsey*, 51 Barb. 99. A prisoner who has escaped from civil process cannot be pursued and re-arrested in another state. *Bromley v. Hutchins*, 8 Vt. 194. And the rule is the same where the escape is from criminal process. *Mandeville v. Gurnsey*, 51 Barb. 99. See *Butolph v. Blust*, 41 How. Pr. 481. See 1 Wait's Pract. 657, 658, 694, and cases cited. He cannot levy upon any real estate except such as is situated within his county. *Kent v. Roberts*, 2 Story, 591.

A sheriff, as such, cannot legally serve an execution on his deputy, even though it is directed to him. *Dane v. Gilmore*, 51 Me. 544. But see *contra Ford v. Dyer*, 26 Miss. (4 Cush.) 243. Nor can he serve the writ when he is the plaintiff of record, though he has no interest in the suit. *Knott v. Jarbee*, 1 Metc. (Ky.) 504. So of a service by his deputy, when the sheriff is plaintiff. *May v. Walters*, 2 McCord, 470; *Chambers v. Thomas*, 3 A. K. Marsh. 526. So a deputy sheriff cannot serve an execution issued in his own favor. *Chambers v. Thomas*, 1 Litt. 268; *Samuel v. Commonwealth*, 6 Monr. 173. When the sheriff is a real or a nominal party, the writ or process should be directed to and served by a coroner. *Barker v. Remick*, 43 N. H. 288. And cannot be executed by a deputy of the sheriff. *Stewart v. Magness*, 1 Cold. (Tenn.) 810.

Nor can a sheriff, while in the discharge of his official duty, divest himself of his official character, and do as an individual what he cannot do as a public officer; such as to warrant the title to property which he is selling as an officer. *Ball v. Pratt*, 36 Barb. 402. If he receives money as sheriff, without an operative execution in his hands, he acts without authority, and unofficially, and his acts will not bind the plaintiff, unless acting as the private agent of the latter. *Crane v. Bedwell*, 25 Miss. 507. A purchase by a sheriff at his own sale, either for himself or as the agent of another, is entirely void. *Harrison v. McHenry*, 9 Ga. 164; *Ormond v. Faircloth*, 1 Murph. 35, and C. & N. 550. But see *Arnold v. Brown*, 24 Pick. 89.

A sheriff is, *ex officio*, a conservator of the peace, and it is not merely his right, but it is his duty, to arrest all persons, with their abettors, who oppose the execution of legal process. *Coyles v. Hartin*, 9 Johns. 85.

the inheritance of the shrievalty of Middlesex vested in their body by charter of king John(*f*), the reason of these popular elections being assigned in the 28 Edw. 1, c. 13, that the commons might choose such as would not be a burden to them. And here appears plainly a trace of the democratical part of our constitution, in which form of government it is an indispensable requisite, that the people should choose their own magistrates(*g*). This election was in all probability not absolutely vested in the commons, but required the royal approbation. For in the Gothic constitution, the judges of the county courts (which office is still for some purposes executed by our sheriff(*h*)) were elected by the people, though confirmed by the king, and the form of their election was thus managed: the people, or *incolæ territorii*, chose twelve electors, and they nominated three persons, *ex quibus rex unum confirmabat*(*i*). But with us in England these popular elections, growing tumultuous, were put an end to by the statute 9 Edw. *2, st. 2, which enacted, that the sheriffs should from thenceforth be assigned by the chancellor, treasurer, and the judges; as being persons [*406] in whom the same trust might with confidence be reposed. By statutes 14 Edw. 3, st. 1, c. 7, 23 Hen. 6, c. 7, and 21 Hen. 8, c. 20, the chancellor, treasurer, president of the king's council, chief justices, and chief baron, are to make this election; and that on the morrow of All Souls in the exchequer. And the king's letters patent, appointing the new sheriffs, used commonly to bear date the sixth day of November(*j*). The statute of Cambridge, 12 Ric. 2, c. 2, ordained that the chancellor, treasurer, keeper of the privy seal, steward of the king's house, the king's chamberlain, clerk of the rolls, the justices of the one bench and the other, barons of the exchequer, and all others who might be called to ordain, name, or make justices of the peace, sheriffs, and other officers of the king, should be sworn to act indifferently, and to appoint no man that sueth either privily or openly to be put in office, but such only as they should judge to be the best and most sufficient. And the custom now is (and has been at least ever since the time of Fortescue(*k*), who was chief justice and chancellor to Henry VI.), that the judges, together with the other great officers and privy councillors, meet in the exchequer on the morrow of St. Martin(*l*), yearly and then and there the judges propose three persons, to be reported (if approved of) to the queen, who afterwards appoints one of them to be sheriff; and it has been decided that where the appointment is open to no legal objection, and the appointee can offer no legal excuse for not accepting the office, it is a misdemeanor to refuse to serve(*m*).

*This custom of the twelve(*n*) judges proposing three persons, seems [*407] similar to the Gothic constitution before mentioned; with this difference, that among the Goths the twelve nominators were first elected by the

(*f*) 3 Rep. 72.

(*g*) Montesq. Sp. L. b. 2, c. 2.

(*h*) *Post*, pp. 409, 410, 415.

(*i*) Stiern. de jure Goth. l. 1, c. 3.

(*j*) Stat. 13 Edw. 4, c. 1.

(*k*) De Leg. c. 24.

(*l*) 24 Geo. 2, c. 48, s. 12.

(*m*) *R. v. Woodrow*, 2 T. R. 731. See also *R. v. Bower*, 1 B. & C. 585.

By an act of the Common Council, any one elected sheriff of London is obliged to serve, under a penalty of 400*l.*, unless he can swear that he is not worth 20,000*l.* The payment of the penalty operates to exempt thenceforth

from liability to serve, unless the person paying it, afterwards becomes an alderman. *Impey on Sheriffs*, 23, 27. Pulling, Laws and Customs of London, 134. See also *City of London v. Vanaore*, Salk. 142.

The sheriff was formerly required on his appointment to take an oath prescribed by 8 Geo. 1, c. 15, s. 18; but now under the 31 & 32 Vict. c. 72, he must make a declaration merely in the form of such oath.

(*n*) Increased to fifteen under 11 Geo. 4 & 1 Will. 4, c. 70, s. 1, and to eighteen under 81 & 82 Vict. c. 125, s. 11.

people themselves. And this usage of ours, at its first introduction, was perhaps founded upon some statute, not now to be found among our printed laws; first, because it is materially different from the direction of all the statutes before mentioned, which it is hard to conceive that the judges would have countenanced by their concurrence, or that Fortescue would have inserted in his book, unless by the authority of some statute; and also because a statute is expressly referred to in the record, which sir Edward Coke tells us^(o) he transcribed from the council-book of 3 March, 34 Hen. VI., and which is in substance as follows. The king had of his own authority appointed a man sheriff of Lincolnshire, which office he refused to take upon him; whereupon the opinions of the judges were taken, what should be done in this behalf. And the two chief justices, sir John Fortescue and sir John Pricot, delivered the unanimous opinion of them all, "that the king did an error when he made a person sheriff, that was not chosen and presented to him according to the statute; that the person refusing was liable to no fine for disobedience, as if he had been one of the three persons chosen according to the tenor of the statute, that they would advise the king to have recourse to the three persons that were [*408] chosen according to the statute, or that some other *thrifty man be entreated to occupy the office for this year; and that, the next year, to eschew such inconveniences, the order of the statute in this behalf made be observed." But notwithstanding this unanimous resolution of the judges of England, thus entered in the council-book, and the statute 34 & 35 Hen. 8, c. 26, s. 61, which expressly recognises this to be the law of the land, some of our writers^(p) have affirmed that the crown, by its prerogative, may name whom it pleases to be sheriff, whether chosen by the judges or no. This is grounded on a very particular case in the fifth year of queen Elizabeth, when, by reason of the plague, Michaelmas term was not kept at Westminster, so that the judges could not meet there to nominate the sheriffs, whereupon the queen named them herself, without such previous assembly, appointing for the most part one of the two remaining on the last year's list^(q). And this case, thus circumstanced, is the only authority in our books for the making of these extraordinary sheriffs. It was indeed held, the reporter adds, that the queen by her prerogative might make a sheriff without the election of the judges, *non obstante aliquo statuto in contrarium*; but the doctrine of *non obstante*, which sets the prerogative above the laws, was effectually demolished by the bill of rights at the Revolution, and abdicated Westminster hall when king James abdicated the kingdom. However, it must be acknowledged, that the practice of occasionally naming what are called pocket-sheriffs, by the sole authority of the crown, continued to the reign of George III., since which time few, if any, such compulsory instances have occurred in England^(r).

[*409] *The sheriff, by virtue of several old statutes, is to continue in office no longer than one year; and yet it has been said^(s) that a sheriff

(o) 2 Inst. 559.

(p) Jenkins, 229.

(q) Dyer, 225.

(r) Before summoning the Long Parliament, Charles I. appointed seven of the leading patriots sheriffs by prerogative, in order to prevent their being returned to parliament. Sir E. Coke being returned, sat in parliament notwithstanding; and it appears now that (in England at any rate) a sheriff

may be returned as member anywhere except for his own county, or for any borough therein for which he happens to be returning officer. Rogers, El. 11th ed. 218; Fortesc. c. 24, note (k), ed. 1775. See further on this subject the speech of Lord Lyndhurst in the House of Lords on moving for an inquiry into the mode of appointing sheriffs in Ireland. (Parl. Deb. xliii. p. 990.)

(s) 4 Rep. 82.

may be appointed *durante bene placito*, and so is the form of the royal writ(*t*), and of the present warrant of appointment superseding that writ(*u*). Therefore, till a new sheriff be named, his office cannot be determined, unless by his own death, or the demise of the crown(*x*), in which last case it was usual for the successor to send a new writ to the old sheriff; but now by statute 1 Ann. st. 1, c. 8, all officers appointed by the preceding sovereign may hold their offices for six months after the demise of the crown, unless sooner displaced by the successor. We will further observe, that by statute 1 Rich. 2, c. 11, no man who has served the office of sheriff for one year, can be compelled to serve the same again within three years after(*y*).

We shall find it is of the utmost importance to have the sheriff appointed according to law, when we consider his power and duty. These are either as a judge, as the keeper of the queen's peace, as a ministerial officer of the superior courts of justice, or as the queen's bailiff.

In his judicial capacity the sheriff formerly presided in the tourn court, where such was his authority that archbishops, bishops, abbots, priors, earls, and barons were bound to attend before him till specially exempted from doing so by the statute of Marlbridge(*z*) (52 Hen. 3, c. 10), since which time the sheriff's tourn gradually fell into disrepute, and its business, which was criminal, became, under the authority of 1 Edw. 4, c. 2, transferred to the quarter sessions. The sheriff's county court had *till recently jurisdiction in certain civil cases where the amount claimed was not in excess of forty shillings, and though the statute 9 & 10 Vict. c. 95, took away the sheriff's small debt jurisdiction in the old county court, yet sect. 4 of that statute expressly preserved it for other purposes, and the sheriff has still to hold his court for the election of knights of the shire, whose return *de facto* he decides, as well as for that of coroner. In this court also proceedings are taken with a view to outlawry. Writs of inquiry, under 8 & 9 Will. 3, c. 11, to assess damages in cases where judgment has gone by default, are directed to the sheriff(*a*), and when this is done he has, under 3 & 4 Will. 4, c. 42, s. 16, to empanel a jury, and then sit as judge, to decide the cause, though practically these duties are always performed by the under-sheriff.

As keeper of the queen's peace, both by common law and special commission, the sheriff is the first man in the county, and superior to any nobleman therein, during his term of office(*b*). He may apprehend, and commit to prison, all persons who break the peace, or attempt to break it; and may bind any one in a recognisance to keep the peace. He may, and is bound *ex officio* to pursue, and take all traitors, murderers, felons, and other misdoers, and commit them to gaol for safe custody. He is also to defend his county against any of the queen's enemies when they come into the land: and for this purpose, as well as for keeping the peace and pursuing felons, he may command all the people of his county to attend him; which is called the *posse comitatûs*, or power of the county(*c*): and this summons every person above

(*t*) Dalt. 8.

(*u*) 8 & 4 Will. 4, c. 99. Sched.

(*z*) Dalt. 7.

(*y*) In the city of London a person who has once served the office of sheriff is not only exempt from serving again, but is also for ever ineligible by an act of the Common Council in 1748. See Impey on Sheriffs, 27.

(*z*) Spel. Gloss. tit. *Viccom.*

(*a*) So were writs of trial under the statute 3 & 4 Will. 4, c. 42, s. 17, where the sum claimed did not exceed 20*l.*, but these writs were abolished by s. 6 of 30 & 31 Vict. c. 143, an act giving increased jurisdiction to the County Courts.

(*b*) 1 Roll. Rep. 287.

(*c*) Dalt. Sheriff, 354—356.

fifteen years old, (the clergy and aged and decrepit persons only excepted,) is [*411] bound to attend upon warning(d), under *pain of fine and imprisonment(e). But though the sheriff is thus the principal conservator of the peace in his county, yet by the express directions of the great charter(f), he is forbidden to hold pleas of the crown, or, in other words, to try any criminal offence. For it would be highly unbecoming, that the executioner of justice should be also the judge; should impose, as well as levy, fines and amercements; should one day condemn a man to death, and personally execute him the next. Neither may he act as an ordinary justice of the peace during the time of his office(g); for this would be equally inconsistent; he being in some respects the servant of the justices.

In his ministerial capacity the sheriff is bound to execute process issuing from the courts of justice.(106) In the commencement of civil causes, where a bail-

(d) Lamb. Eiren. 812; Bac. Abr. tit. Sheriff

(f) John, c. 27; Hen. 8, c. 17.

(N. 2).

(g) Stat. 1 Mar. st. 2, c. 8.

(e) Stat. 2 Hen. 5, st. 1, c. 8.

(106) If the process is regular on its face, and is issued by a court having jurisdiction to issue it, it is the duty of the sheriff to execute it according to its command. And he ought to do this at the earliest practicable moment, though he may take such reasonable time as the needs and circumstances of the case require. *Whitney v. Battersfield*, 13 Cal. 835; *Chapman v. Thornburgh*, 17 id. 87.

If the process is regular on its face, and there is nothing in it to show a want of jurisdiction in the court issuing it, he will be protected in its execution. *Savacool v. Boughton*, 5 Wend. 170; *Chegaray v. Jenkins*, 5 N. Y. (1 Seld.) 376; *Howard v. Clark*, 44 Mo. 344; *Brown v. Mason*, 40 Vt. 157; *Chase v. Ingalls*, 97 Mass. 524; *Higdon v. Conway*, 12 Mis. 295.

But, although the process is regular on its face, yet if the court issuing it had no jurisdiction, he may refuse to execute it, and show the want of jurisdiction as a defense. *Earl v. Camp*, 16 Wend. 562; *Cornell v. Barnes*, 7 Hill, 85; *Tucker v. Malloy*, 49 Barb. 85.

A sheriff cannot excuse himself from the service of process because it is erroneous or irregular, but only when it is absolutely void. *Stoddard v. Tarbell*, 20 Vt. 321; *French v. Willet*, 4 Bosw. 649; S. C., 10 Abb. Pr. 99; *Hutchinson v. Brand*, 9 N. Y. (5 Seld.) 208; 6 How. Pr. 78; *Bacon v. Cropsey*, 7 N. Y. (3 Seld.) 195.

The party in whose favor an execution issues may give such directions as will excuse the sheriff from his general duty or liability. *Root v. Wagner*, 30 N. Y. (3 Tiff.) 9; *Fletchers v. Bradley*, 12 Vt. 22. And an implied promise of indemnity to a sheriff arises if he follows the direction. *Ranlett v. Blodgett*, 17 N. H. 298. But where process is merely handed to him for service, without any direction as to the mode, there is no implied promise of indemnity. *Nelson v. Cook*, 17 Ill. 443.

A sheriff acts upon his own responsibility in executing process, and the court will not direct or advise him as to the mode of doing it. *Bowie v. Brahe*, 4 Duer, 676; *Matter of Steamship Circassian*, 50 Barb. 490.

Ignorance of duty is no excuse for a sheriff. *York v. Clopton*, 32 Ga. 363.

Grain in the straw which has been attached ought to be threshed, if that is necessary for its preservation. *Briggs v. Taylor*, 85 Vt. 57.

Coal seized on a vessel, in a replevin suit, must receive such care as a prudent man of good judgment, well acquainted with the location of the vessel, and having the power of the sheriff, might be expected to take of his own coal. *Moore v. Westervelt*, 27 N. Y. (13 Smith) 234. But a sheriff who has attached personal property is not liable for a loss or injury which was not caused by his negligence or want of ordinary care. *Kendall v. Morse*, 43 N. H. 553. If attached property, of which due care is taken by the sheriff, is stolen, the sheriff is not liable. *Dorman v. Kane*, 5 Allen (Mass.), 38. But a sheriff was held liable where he kept money in a trunk under his bed, after its collection on an execution, from whence it was stolen. *Gilmore v. Moore*, 30 Ga. 628.

A sheriff must execute process before its return day, or his acts will be void. *Lofland v.*

able *capias* has been issued, he is to arrest, and to take bail; when the cause comes to trial, he must summon and return the jury; when it is determined, he must carry the judgment of the court into execution. In criminal matters, he also arrests and imprisons, he returns the jury, he has the custody of the delinquent, and he executes the sentence of the court, though it extend to death itself.

As the queen's bailiff, it is his business to preserve the rights of the crown within his bailiwick; for so his county is frequently called in the writs; a word introduced by the princes of the Norman line, in imitation of the French, whose territory was divided into bailiwicks, as that of England into counties(*h*). He must seize to the queen's use all lands devolved to the crown by attainder or escheat; must levy all fines and forfeitures; must seize and keep all waifs, wrecks, estrays, and the like, unless they be granted to some subject; and he had to collect the rents of the crown within his bailiwick, till this duty was taken from him by the statute 3 & 4 Will. 4, c. 99(*i*).

*To execute these various duties, the sheriff has under him many inferior officers; an under-sheriff, a deputy-sheriff, bailiffs, and gaolers; who must neither buy, sell, nor farm their offices, on forfeiture of 500*l*.(*k*). [* 412]

The under-sheriff, who must now be nominated by the sheriff within one month after his own appointment(*l*), usually performs the routine duties of the shrievalty; some few duties only, for discharging which the personal presence of the high sheriff is necessary, being excepted. Formerly the under-sheriff was precluded from remaining in office above a year(*m*), and from practising as an attorney during such period(*n*), but these regulations, which had long been successfully evaded, are abolished(*o*), and the under-sheriff is now almost invariably an attorney, and frequently remains in office for many consecutive years. As the sheriff is responsible for the acts of his under-sheriff, it is usual and proper to take security from him for the due performance of his duties(*p*).(*107*) At one time the office of under-sheriff was

(*h*) Fortesc. de Leg. c. 24.

(*i*) Dalt. Sheriff, 47.

(*k*) 3 Geo. 1, c. 15, s. 10.

(*l*) 3 & 4 Will. 4, c. 99, s. 5.

(*m*) 42 Edw. 3, c. 9; 23 Hen. 6, c. 7; Dalt. Sheriff, 454.

(*n*) 1 Hen. 5, c. 4.

(*o*) 7 Will. 4 & 1 Vict. c. 55, s. 1.

(*p*) Hob. 14; Dalt. Sheriff, 445.

Jefferson, 4 Harr. 303; *Vail v. Lewis*, 4 Johns. 450; *Van Benschelae v. Kidd*, 6 N. Y. (3 Seld.) 331, 333; *Prescott v. Wright*, 6 Mass. 20.

He has no right to use the property levied on; and if it be manuscript, he cannot make and sell copies of it, before the sale. *Banker v. Caldwell*, 3 Minn. 94.

In the execution of process, the sheriff may, if necessary, call to his aid the power of the county. *Sutton v. Allison*, 2 Jones' Law (N. C.), 339; *Coyles v. Hurtin*, 10 Johns. 85; *Bell v. North*, 4 Litt. 183. A sheriff cannot delegate to another the power to appoint a deputy for him. *Perkins v. Reed*, 14 Ala. 536.

(107) It is a rule of very general application that a sheriff is civilly responsible for the acts or neglects of his deputy while acting in an official capacity. *Mason v. Ide*, 30 Vt. 697; *Sheldon v. Paine*, 10 N. Y. (6 Seld.) 398; 7 N. Y. (3 Seld.) 453; *Pond v. Leman*, 45 Barb. 152. A neglect by a deputy to pay over money collected by him as an officer renders the sheriff liable. *Norton v. Nye*, 56 Me. 211; *Seaver v. Pierce*, 42 Vt. 325; *Hammond v. Root*, 15 Gray (Mass.), 516; *Hill v. Fitzpatrick*, 6 Ala. 314.

The sheriff is liable when the deputy levies upon goods not the property of the defendant in the execution. *Pond v. Leman*, 45 Barb. 152; *Commonwealth v. Stockton*, 5 Monr. 193;

determined by the death of the sheriff, but the stat. 3 Geo. 1, c. 15, provides that in the event of the death or lawful supercession of the latter during his year of office, the under-sheriff (or deputy-sheriff) shall continue in office, and execute the duties thereof in the name of the deceased sheriff until another be appointed.

The deputy-sheriff, as at present constituted, is an officer formerly unknown to the law; for though by various old statutes the sheriff was ordered to make a deputy in the courts of common law and chancery, yet the practice was for him to appoint his under-sheriff deputy, and the under-sheriff appointed his agent in town to act for him. But now, by 3 & 4

Will. 4, c. 42, *s. 20, the sheriff himself is required to appoint a deputy (q), [*413] for the receipt of writs, granting warrants thereon, making returns thereto, and accepting of all rules and orders to be made on, or touching the execution of, any process or writ directed to the sheriff(r).

Bailiffs, or sheriff's officers, are either bailiffs of hundreds, or special bailiffs. Bailiffs of hundreds, or common bailiffs, are officers appointed over those respective districts by the sheriff, to collect fines therein, to summon juries, to attend the judges and justices at the assizes and

quarter-sessions, and also to execute writs and process in the several hundreds. And it was once held that these bailiffs should be persons who knew every man's person and land within the hundred, so that they might the more easily execute process, and it was provided by several ancient statutes that they should have sufficient lands within the county to answer the king and his people in case any should complain against them. The sheriff being generally answerable for the misdoing of these bailiffs(s), they are usually bound in an obligation with sureties for the due execution of their office.

Special bailiffs are officers chosen by the plaintiff in a suit, or his attorney, and appointed by the sheriff at their request for the purpose of executing a particular writ; and the sheriff is not usually responsible for their misconduct, to those at whose instance he appointed them(t), though he may be so to third persons.

The gaoler was formerly the servant of the sheriff, who was responsible for his conduct, and might appoint and *dismiss him at pleasure(u). [*414] It was the gaoler's business to keep safely all persons committed by

(q) Who must either reside or have an office within one mile of the Inner Temple Hall. *Brackenbury v. Laurie*, 8 Dowl. 180.

(r) *Harrie v. Carter*, 5 M. & W. 432; *Woodland v. Fuller*, 11 A. & E. 859. (s) *Gregory v. Cottrell*, 5 E. & B. 571.

(t) *Doe v. Trye*, 5 Bing. N. C. 573; *Ford v. Leche*, 6 A. & E. 699.

Since this statute the delivery of any order or rule to the deputy has been held equivalent to a delivery to the sheriff. See also (u) *Bac. Abr. tit. Sheriff*, H. 5.

Carmack v. Commonwealth, 5 Binn. 184; *Wilbur v. Strickland*, 1 Rawle, 458; *Satterwhite v. Carson*, 8 Ired. 549.

So he is liable to his deputy where another of his deputies has taken goods which the other had previously levied upon. *Robinson v. Ensign*, 6 Gray (Mass.), 800.

But he is not liable for the services of a person employed by his deputy to keep property attached by the latter. *Dooley v. Root*, 18 Gray (Mass.), 303; *Krum v. King*, 12 Cal. 412. Nor is he liable for the act of his deputy, which was performed while he was the deputy of a former sheriff. *Wilton Manufacturing Co. v. Butler*, 34 Me. 481. Nor will an action lie against a sheriff upon a judgment recovered against his deputy. *Percear v. Kimball*, 8 Allen (Mass.), 199.

A deputy sheriff may be removed and deprived of authority by a written notice to him from the sheriff revoking his appointment. *Edmunds v. Barton*, 31 N. Y. (4 Tiff.) 495.

lawful warrant to his custody; and if he suffered any to escape, the sheriff had to answer to the crown, in a criminal, or to the party injured in a civil case(x). (108) Gaoler

And to this end he was required to have lands sufficient within the county to answer the claims of the sovereign and his people. The absolute authority of the sheriff over the gaoler was, however, curtailed by various statutes, and now by the 28 & 29 Vict. c. 126, this latter officer is appointed by the justices at sessions, instead of by the sheriff, and holds office during their pleasure. The legal custody of all prisoners confined in prison under the above act is vested in the gaoler, not in the sheriff, except as regards prisoners under sentence of death, over whom, for the purpose of carrying the sentence into effect, the sheriff has the same jurisdiction as he possessed before the statute. The only prisoners for whose escape the sheriff is now liable, are debtors, and for their safe custody the gaoler is bound to give him security.

The vast expense, which custom had introduced in serving the office of high sheriff, had become so burthensome to the subject, that it was enacted, by statute 13 & 14 Car. 2, c. 21, that no sheriff (except of London, Westmoreland, and towns which are counties of themselves) should keep any table at the assizes, except for his own family, or give any presents to the judges or their servants, or have more than forty men in livery: yet, for the sake of safety and decency, he might not have less than twenty men in England and twelve in Wales; upon forfeiture, in any of these cases, of 200*l*. The expenses attendant on the shrievalty have been still further diminished by 22 & 23 Vict. c. 32, s. 18, enacting that the justices of any county may direct a certain number of *police to be employed in keeping order in the assize court and its precincts, and that when this has been done, it shall be unnecessary for [415] the sheriff to provide javelin men, or men in livery, notwithstanding the statute of Charles II.

II. The office of coroner is very ancient. He is called coroner, *coronator*, because he has principally to do with pleas of the crown, or such wherein the sovereign is more immediately concerned(y). And in this light the lord chief justice of the queen's bench is the principal coroner in the kingdom, and may (if he pleases) exercise the jurisdiction

II. Coroner.
Antiquity and
origin of the
office.

(z) Dalt. Sheriff, 465; *Milton's Case*, 4 Rep. 34. (y) 2 Inst. 31; 4 Inst. 271.

(108) The liability of a sheriff in civil actions for the escape of a party in his custody on civil process is the settled law of the several states. A sheriff who releases a debtor imprisoned upon an execution, in pursuance of an order of the court which is invalid upon its face, is liable for an escape. *Bulymore v. Cooper*, 2 Lans. 71; 46 N. Y. (1 Sick.) 236; *Bush v. Pettibone*, 4 N. Y. (4 Comst.) 300; 5 Barb. 278. The insufficiency of the jail is no legal excuse for an escape. *Kepler v. Barker*, 18 Ohio St. 177; see *Haygood v. Justices*, 20 Ga. 845; *State v. Halford*, 6 Rich. Law (S. C.) 58; *Smith v. Hart*, 2 Bay, 395; *Parsons v. Lee*, Jeff. 50. But a sheriff is not liable for the escape of a debtor whom he has arrested on a process which was not sufficient to authorize the arrest, or was void. *Hitchcock v. Baker*, 2 Allen (Mass.), 431; *Carpentier v. Willett*, 31 N. Y. (4 Tiff.) 90; 28 How. Pr. 225; 1 Keyes, 510; *Tuttle v. Wilson*, 24 Ill. 553; *Howard v. Crawford*, 15 Ga. 423; *Kidder v. Barker*, 18 Vt. 454. Errors, irregularities or defects in the judgment or execution will not be allowed as a defense to an action for an escape. *Bensel v. Lynch*, 44 N. Y. (5 Hand) 162; 2 Rob. 448.

A rescue, by a mob, of a defendant taken in execution, is no defense. *Abbott v. Holland*, 20 Ga. 598. Nothing but the act of God, or of the enemies of the country, will excuse a sheriff for an escape. *Fairchild v. Case*, 24 Wend. 881; *Rainey v. Dunning*, 2 Murph. 868.

of a coroner in any part of the realm(*z*), the puisne judges of that court being also "sovereign coroners of the land"(*a*).

But there are also particular coroners for every county of England; usually four, but sometimes six, and sometimes fewer(*b*). This officer(*c*) is of equal antiquity with the sheriff; and was ordained together with him to keep the peace, when the earl gave up the wardship of the county.

Except in some few instances, such as the coroner of a royal verge, of the admiralty, or one who is appointed by the council or corporation of a borough, the election of the coroner is now regulated by the 7 & 8 Vict. c. 92(*d*), and he is still chosen by the freeholders of the county(*e*) (or district, if the county has been divided into districts, in pursuance of the act), in the county court of such county or district, which the sheriff is ordered to hold for the purpose of such election(*f*). (109)

[*416] This is the mode in which, by the policy of our ancient *laws, the sheriffs, conservators of the peace, and all other officers concerned in matters that affected the liberty of the people were appointed(*g*); and as verderors of the forest were appointed, whilst that office existed, their business being to stand between the prerogative and the subject in the execution of the forest laws. For this purpose there is a writ at common law *de coronatore eligendo*(*h*): in which it is expressly commanded the sheriff, "*quod talem eligi faciat, qui melius et sciat, et velit, et possit, officio illi intendere.*" And in order to effect this the more surely, it was enacted by the statute of Westm. I.(*i*) that none but lawful and discreet knights should be chosen; and there was an instance in the 15 Edw. III., of a man being removed from this office because he was only a merchant(*k*). But it was afterwards held sufficient if a man had lands enough to be made a knight, whether he were really knighted or not(*l*): for the coroner ought to have an estate sufficient to maintain the dignity of his office, and answer any fines that may be set upon him for misbehaviour(*m*); and if he has not enough to answer, his fine shall be levied on the county, as the punishment for electing an insufficient officer(*n*).

This does not apply to the coroner of a borough, who requires no qualification, provided he be a "fit person," and neither alderman nor councillor of the borough(*o*).

Although in very early times, no coroner would condescend to be paid for serving his country, and though he was by the aforesaid statute of Westm. I. expressly forbidden to take reward, under pain of a great forfeiture to the crown; yet coroners were allowed fees for their attendance on inquests by the

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| (<i>z</i>) 4 Rep. 57, b.; Spell. Gloss. <i>Coronator</i> . | (<i>g</i>) 2 Inst. 558, 559. |
| (<i>a</i>) 4 Inst. 73; Year Bk. 17 Edw. 3, 13, a; | (<i>h</i>) F. N. B. 163. This writ is preserved |
| Broom's Const. L. 782, n. (<i>w</i>). | by 7 & 8 Vict. c. 92, s. 29. |
| (<i>b</i>) F. N. B. 163. | (<i>i</i>) 8 Edw. 1, c. 10. |
| (<i>c</i>) Mirror, c. 1, s. 3. | (<i>k</i>) 2 Inst. 32. |
| (<i>d</i>) As to the mode of appointing the coroners of boroughs, see s. 62 of the Municipal Corporations Act, 5 & 6 Will. 4, c. 76. | (<i>l</i>) F. N. B. 163, 164. |
| (<i>e</i>) Com. Dig. tit. Officer, G. 3. | (<i>m</i>) <i>Ib</i> . |
| (<i>f</i>) 7 & 8 Vict. c. 92, s. 10. | (<i>n</i>) Mirr. c. 1, s. 3; 2 Inst. 175. |
| | (<i>o</i>) 5 & 6 Will. 4, c. 76, s. 62; Jervis on Coroners, 3rd ed. 12. |

(109) In the several states coroners are elected at the same time and in the same manner as sheriffs; and their powers and duties are generally similar to those of coroners in England. For the statutory provisions relating to them the statutes of the particular state must be examined.

statute 3 Hen. 7, c. 1, which sir *Edward Coke complained of(*p*); [*417] though since his time those fees have been much enlarged(*q*).

The system of payment by fees, however, being found very inconvenient in counties, was abolished by the 23 & 24 Vict. c. 116, and county coroners are now paid by salary, calculated proportionately to the fees received(*r*).

The coroner is chosen for life: but may be removed, either by being made sheriff, which is an office incompatible with the other; or by the writ *de coronatore exonerando*, for a cause to be therein assigned, as that he is engaged in other business, is incapacitated by years or sickness, has not a sufficient estate in the county, or lives in an inconvenient part of it(*s*). And by the statute 23 & 24 Vict. c. 116, s. 6, inability or misbehaviour in office are also made causes of removal, such removal to be effected by the lord chancellor, who exercises a general jurisdiction over coroners(*t*).

The functions of a coroner are like those of the sheriff, either judicial or ministerial; but principally judicial. His duty is in a great measure ascertained by statute 4 Edw. I., *De officio coronatoris*: and consists, first, in inquiring, when any person is slain, or dies suddenly, or in prison, concerning the manner of his death. And this must be "*super visum corporis*"(*u*): for, if the body be not found, the coroner cannot sit(*x*). He was formerly obliged to sit at the very place where the death happened: but it is now provided by the 6 & 7 Vict. c. 12, s. 1, that, as it is often unknown where persons lying dead have come *by their deaths, the inquest may be held by the coroner within whose jurisdiction the body shall be found; and his [*418] inquiry is made by a jury from the county, over whom he is to preside. This jury must consist of at least twelve, and it is desirable to have a larger number, as, in the event of their not being unanimous, the verdict of a majority (not less than twelve) is sufficient(*y*). If any be found guilty by this inquest of murder or other homicide, the coroner is to commit them to prison for further trial, and is also to inquire concerning their lands, goods, and chattels, which are forfeited thereby: and he should certify the whole of this inquisition (under his own seal and the seals of his jurors(*z*)), together with the evidence thereon, to the court of queen's bench, or the next assizes. By 6 & 7 Vict. c. 83, any coroner may by writing under his hand and seal appoint any fit and proper person to act for him as a deputy in the holding of inquests, subject, however, to the lord chancellor's approval of such appointment; which the coroner also may at any time revoke.

Another duty appertaining to the coroner is to inquire concerning treasure-trove(*a*); he is also to inquire who were the finders, and where it is, and whether any one be suspected of having found and concealed a treasure; "and that may be well perceived (saith the old statute of Edw. I.(*b*)) where one liveth

(*p*) 2 Inst. 210.

(*q*) Stat. 25 Geo. 2, c. 29; 1 Vict. c. 68, s. 3.

(*r*) Jervis on Coroners, 8rd ed. 75—78.

(*s*) F. N. B. 168, 164.

(*t*) Broom, Const. L. p. 791. *Ex parte Ward*, 30 L. J. Ch. 775.

(*u*) 4 Inst. 271.

(*x*) Thus, in the Gothic constitution, before any fine was payable by the neighbourhood, for the slaughter of a man therein, *de corpore delicti constare oportebat*; i. e. non tam fuisse aliquem in territorio isto mortuum in-

ventum, quam vulneratum et casum. *Potest enim homo etiam ex aliâ causâ subito mori.* Stiern. de jure Goth. l. 8, c. 4.

(*y*) *Cobbat's case*, 2 Hale, P. C. 161(â).

(*z*) Stat. 88 Hen. 8, c. 12, s. 3; 1 & 2 P. & M. c. 18, s. 5; 2 West. c. 18; Crompt. Off. Just. Peace, 264; Tremain. P. C. 621.

An inquisition cannot now be quashed for not being under seal, except in cases of murder and manslaughter, 6 & 7 Vict. c. 83, s. 2.

(*a*) *Ante*, chap. viii.

(*b*) 4 Edw. I., *De Officio Coronatoris*.

riotously, haunting taverns, and hath done so of long time;" whereupon he might be attached, and held to bail, upon this suspicion only.

The ministerial office of the coroner is as the sheriff's substitute. When just exception can be taken to the sheriff, for suspicion of partiality (as that he is interested in the suit, or of kindred to either plaintiff or defendant),

[*419] *process being then awarded to the coroner, instead of the sheriff, for execution(c).

III. The subordinate magistrates next to be considered, are justices of the peace; the principal of whom is the *custos rotulorum*(d), or keeper of the records of the county. The common law has ever had a special care and regard for the conservation of the peace; for peace is the very end and foundation of civil society. And, therefore, before the present constitution of justices was invented, peculiar officers were appointed by the common law for the maintenance of the public peace. Of these some had, and still have, the power of maintaining it annexed to offices which they hold; others had it merely by itself, and were thence named *custodes* or *conservatores pacis*.

The sovereign(e) is, by her office and dignity royal, the principal conservator of the peace within her dominions; and may give authority to any other to see the peace kept, and to punish such as break it: hence it is usually called the queen's peace. The lord chancellor or keeper, the lord treasurer, the lord high steward of England, the justices of the court of queen's bench (by virtue of their offices), and the master of the rolls (by prescription), are general conservators of the peace throughout the kingdom, and may commit all breakers of it, or bind them in recognizances to keep it(f): the other judges are only so in their own courts. The coroner is also a conservator of the peace within his own county(g); as is the sheriff(h); and either of them may take a recognizance or security for the peace. Constables are also conservators of the peace within their own jurisdictions; and may apprehend all breakers of the peace and commit them, till they find sureties for their keeping it(i).

[*420] *Those who were, without any office, simply and merely conservators of the peace, either claimed that power by prescription(k); or were bound to exercise it by the tenure of their lands(l); or, lastly, were chosen by the freeholders in full county court before the sheriff; the writ for their election directing them to be chosen "*de probioribus et potentioribus comitatus sui in custodes pacis*"(m). But when queen Isabel, the wife of Edward II., had contrived to depose her husband by a forced resignation of the crown, and had set up his son, Edward III. in his place; this, being a thing then without example in England, it was feared would much alarm the people: especially as the old king was living, though hurried about from castle to castle; till at last he met with an untimely death. To prevent, therefore, any risings, or other disturbance of the peace, the new king sent writs to all the sheriffs in England, the form of which is preserved by Thomas Walsingham(n), giving a plausible

(c) 4 Inst. 271.

(d) *Post*, vol. iv. p. 356.

(e) Lambard, *Eirenarch*. 11.

(f) Lamb. 12.

(g) Britton, 8.

(h) F. N. B. 81.

(i) Lamb. 18.

(k) Lamb. 14, 15.

(l) *Ib.* 16.

(m) *Ib.* 15.

(n) Hist. A. D. 1327

account of the manner of his obtaining the crown; saying that it was done *ipsius patris bene placito*: and commanding each sheriff that the peace be kept throughout his bailiwick, on pain and peril of disinheritance and loss of life and limb. And in a few weeks after the date of these writs, it was ordained in parliament(o), that, for the better maintaining and keeping of the peace in every county, good men and lawful, which were no maintainers of evil, or barretors(p) in the country, should be assigned to keep the peace. And in this manner, and upon this occasion, was the election of the conservators of the peace taken from the people and given to the crown(q); this assignment being construed to be by the queen's commission(r). But still *they were called only conservators, wardens, or keepers of the peace, till the [*421] statute 34 Edward 3, c. 1, gave them the power of trying felonies; and then they acquired the more honourable appellation of justices(s).

These justices are appointed by the queen's special commission under the great seal, the form of which was settled by the judges, A. D. 1590(t), and has been very slightly altered since. This appoints all the justices named in it(u), jointly and separately, to keep the peace, and any two or more of them to inquire of and determine felonies and other misdemeanors: in which number some particular justices, or one of them, were directed to be always included, and no business to be done without their presence: the words of the commission running thus, "*quorum aliquem vestrum A. B. C. D. &c., unum esse volumus*," whence the persons so named were usually called justices of the *quorum*. And formerly it was customary to appoint only a select number of justices, eminent for their skill and discretion, to be of the *quorum*; but now the practice is to advance all of them to that dignity, naming them over again in the *quorum* clause, and no exception is now allowable for not expressing in the form of warrants, &c., that the justice who issued them is of the *quorum*(x). When any justice intends to act under this commission, he sues out a writ of *dedimus potestatem*, from the clerk of the crown in chancery, empowering certain persons therein named to administer the usual oaths to him(y). This being done, he is at liberty to act.

*Touching the number and qualifications of justices; it was ordained [*422] by 18 Edw. 3, st. 2, c. 2, that two or three of the best reputation in each county, should be assigned to be keepers of the peace. But these being found rather too few for that purpose, it was provided by statute 34 Edw. 3, c. 1, that one lord, and three, or four of the most worthy men in the county, with some learned in the law, should be made justices in every county. Afterwards the number of justices, through the ambition of private persons, became so large, that it was thought necessary by stats. 12 Ric. 2, c. 10, and 14 Ric. 2, c.

(o) Stat. 1 Edw. 3, st. 2, c. 16.

(p) A barretor is said to be a common mover of suits and quarrels either in courts or elsewhere in the country. Jacob's Law Dict. *ad verb.* See also *The Case of Barrettry*, 8 Rep. 36 b.; *post*, vol. iv.

(q) Lamb. 19.

(r) Stat. 4 Edw. 3, c. 2; 18 Edw. 3, st. 2, c. 2.

(s) Lamb. 22.

(t) *Ib.* 41.

(u) Lamb. 33; Burn. tit. Justices, s. 2.

(x) Stat. 26 Geo. 2, c. 27. See also st. 7 Geo. 3, c. 21, amended by 4 Geo. 4, c. 27.

(y) Till July, 1868, these oaths were the

oath of office (8 Burn's Just. 908, 29th ed.), an oath that the justice possessed the property qualification (*post*, p. 423), and the oath provided by 80 & 81 Vict. c. 75, in lieu of the oaths of allegiance, supremacy, and abjuration. By 81 & 82 Vict. c. 72, every justice must now take the oath of allegiance and the judicial oath therein contained, and must make a declaration to the effect of the oath set forth in 18 Geo. 2, c. 20, but *quare*, whether the judicial oath is in substitution of the former official oath, or whether a declaration to the effect of that oath must be taken?

11, to restrain them, at first to six, and afterwards to eight only. This rule, however, is now disregarded, and the cause seems to be (as Lambard observed long ago^(z)), that the astonishing increase of statutory provisions, the execution of which is entrusted to justices of the peace, has necessitated their increase to a larger number. As to their qualifications, the statutes just cited direct them to be of the best reputation, and most worthy men in the county: and the 13 Ric. 2, st. 1, c. 7, orders them to be of the most sufficient knights, esquires, and gentlemen of the law. Also by statute 2 Hen. 5, st. 1, c. 4, and st. 2, c. 1, they must be resident in their several counties; though now by 11 & 12 Vict. c. 42, ss. 5, 6, 7, and 11 & 12 Vict. c. 43, s. 6, amended by 26 & 27 Vict. c. 77, it is provided that justices of two adjoining counties, or ridings, or divisions of counties, resident in one of them, may act in the other, and also that such justices may act in detached parts of counties, or in cities, towns, and precincts having a separate jurisdiction.

Further, because, contrary to the earlier statutes, men of small substance had crept into the commission, whose poverty made them both covetous and contemptible, it was enacted by statute 18 Hen. 6, c. 11, that no justice [*423] *should be put in commission if he had not lands to the value of 20*l.* per annum. And the rate of money having greatly altered since that time, it has since been enacted by statutes 5 Geo. 2, c. 18, and 18 Geo. 2, c. 20, that every justice, except as is therein excepted, shall have 100*l.* per annum clear of all deductions, derived from landed property in possession; or else shall be entitled to the immediate reversion of the same class of property of the yearly value of 300*l.*, and if a person assumes to act as justice without this qualification, he becomes liable to a penalty of 100*l.*(a). Also it is provided by the 5 Geo. 2, c. 18, s. 2, that no practising proctor, and by 6 & 7 Vict. c. 73, s. 33, that no practising attorney or solicitor, shall be capable of acting as a justice of the peace; but each of these acts contains a proviso that the prohibition shall not extend to any city or town being a county of itself, or to any city, town, cinque port, or liberty, having justices of the peace within their respective limits and precincts, by charter, commission, or otherwise.

The office of justice of the peace subsists only during the pleasure of the crown, and is determinable: 1. By the demise of the crown; or rather, in six months after^(b). Though if the same justice is put in commission by the successor, he shall not be obliged to sue out a new *dedimus*, or make the declaration as to his qualification afresh^(c): nor, by reason of any new commission, to take the oaths still required more than once in the same reign^(d).

[*424] 2. By express writ under the great seal^(e), discharging any *particular person from being any longer justice. 3. By superseding the commission by writ of *supersedeas*, which suspends the power of all the justices, but does not totally destroy it: seeing it may be revived again by another writ, called a *procedendo*. 4. By a new commission, which virtually, though silently,

(z) Lamb. 82.

(a) It is provided that these acts shall not extend to peers, judges, the eldest sons or heirs apparent of peers, and many others. Nor do borough justices, appointed under the Municipal Corporation Act (5 & 6 Wm. 4, c. 76), need any qualification by estate (see sect. 101).

It may be observed, that if a person act as

a justice without being duly qualified, his acts are not absolutely void, but only render himself liable to the penalty. *Margate Pier Co. v. Hannam*, 8 B. & A. 266.

(b) Stat. 1 Ann. c. 8, s. 2.

(c) Stat. 1 Geo. 3, c. 18.

(d) Stat. 7 Geo. 3, c. 9.

(e) Lamb. 63.

discharges all the former justices that are not included therein; for two commissions cannot subsist at once. 5. By accession to the office of sheriff(*f*), which disqualifies during the period of the shrievalty, but no longer. Formerly it was thought, that if a man named in any commission of the peace, had afterwards a new dignity conferred upon him, his office was determined; he no longer answering his description in the commission: but it was provided, that notwithstanding a new title of dignity, the justice on whom it was conferred should still continue a justice(*g*).

The power, office, and duty of a justice of the peace depend on his commission, and on the statutes which have created his jurisdiction. His commission empowers him singly to conserve the peace; and thereby gives him the power of the ancient conservators at the common law, in suppressing riots and affrays, in taking securities for the peace, and in apprehending and committing criminals. It also empowers any two or more justices to hear and determine felonies and other offences; which is the ground of their jurisdiction, much curtailed by statute(*h*), at the general sessions.

Many other duties have been cast on justices of the peace by parliament; so complicated, indeed, have these duties become, that to prevent the possibility of a justice being harassed by action for having unwittingly exceeded the letter of the law, statutory provisions have from time to time been made to protect him in the upright discharge *of his office(*i*); which, among [*425] other privileges, prohibit a justice from being sued for any oversight, without notice beforehand; and stop any suit begun, on tender made of sufficient amends.(110) The principal statute now in force for this purpose is the

(*f*) Stat. 1 Mar. sess. 2, c. 8.

It seems to have been thought at one time that the accession to the office of coroner was also a disqualification. Dalt. Country Just. 12; Lamb. 66, 67.

(*g*) Stat. 1 Edw. 6, c. 7, s. 4.

(*h*) *Post*, vol. 4. As to stipendiary magistrates, *Ib*.

(*i*) See 7 Jac. 1, c. 5; 21 Jac. 1, c. 12; 24 Geo. 2, c. 44.

(110) In the United States the office of a justice of the peace is a most important one. In the several states the jurisdictions of justices' courts will differ in regard to amount involved, or the subjects which may be litigated. But the court is everywhere a convenient one for the people. It brings justice home to each man's door; the remedy is prompt; the expense is trifling; and, in the main, justice is fairly administered. In addition to this, a ready and cheap mode of review is given, and, as a consequence, a large proportion of the litigation of the country relating to small claims or demands, is conducted in these courts. Justices of the peace also act as conservators of the peace, in securing the arrest and confinement of criminals, and they generally have a limited jurisdiction for the trial of minor offenses.

It is always important to a justice that he should have jurisdiction over the matter in which he assumes to act. If he acts without jurisdiction, and an injury results to another person in consequence of his acts, he will be liable for the damages caused. See 2 Watt's Law & Pr. 4 to 39.

Jurisdiction may relate to territory, to person, to property, to amount, or to subject-matter. As to all these the justice must have jurisdiction to justify him in acting. The cases are exceedingly numerous upon this point. Such inferior courts do not take any authority by implication, so far as it relates to their jurisdiction. *Jones v. Reed*, 1 Johns. Cas. 20; *Kundolf v. Thalheimer*, 12 N. Y. (2 Kern.) 593; *Ford v. Babcock*, 1 Denio, 158; *Granite Bank v. Treat*, Maine (6 Shep.) 840; *Barrett v. Crane*, 16 Vt. 246; *State v. Kinebrough*, 2 Dev. 481; *Low v. Commissioners*, R. M. Charl. 803; *State v. Shreves*, 8 Green, 57; *Bowers v. Green*, 1 Seam. 42; *Coil v. Pitman*, 46 Mo. 15; *Ohio, etc., R. R. Co. v. Shultz*, 31 Ind. 150. Superior courts will be presumed to have jurisdiction, while inferior courts must clearly and expressly show it. *Ib*. Consent may confer jurisdiction over the person, but cannot do so

11 & 12 Vict. c. 44, which *inter alia*, provides that no action shall be brought against a magistrate for anything done within his jurisdiction, unless it be alleged and proved to have been done maliciously and without reasonable and probable cause(*k*), nor for anything done under a conviction or order, unless it shall have been quashed(*l*); that an action shall be brought against the justice who makes a conviction or order, and not against the justice who grants a warrant upon it, if these acts be done by different justices(*m*); that no justice shall be liable for granting a warrant of distress to enforce a poor rate which turns out to be invalid, or for the manner in which he exercises any discretionary power entrusted to him(*n*). If a justice refuse to do any act for fear of having an action brought against him, whoever wishes it done may apply to the queen's bench for a rule ordering the justice to do it, and he, acting under such rule, will be free from liability(*o*). Lastly, no action shall be brought against a justice for anything done by him in the execution of his office, more than six months after the act complained of, or without a month's notice(*p*). On the other hand, any malicious or tyrannical abuse of his office by a justice of the peace is usually severely punished: and any person recovering a verdict against a justice, for a wilful or malicious injury, is entitled to full costs to be taxed as between attorney and client.

[*426] IV. I shall next consider some officers of lower rank *and of more confined jurisdiction than those which have before been noticed, but still performing useful duties throughout the kingdom.

(IV.) Constables,
antiquity and
origin of the
office.

The word constable is by some derived from the Saxon *konung stapel* and said to signify "the stay (or hold) of the king"(*q*). But as we borrowed the name as well as the office of constable from

(*k*) Sect. 1.
(*l*) Sect. 2.
(*m*) Sect. 3.
(*n*) Sect. 4.

(*o*) Sect. 5.
(*p*) Sects. 8, 9. See, also, Broom's Const.
L. 786.
(*q*) Lamb. of Constables, 5; 4 Inst. 128.

as to subject-matter. *Dodson v. Scroggs*, 47 Mo. 285; *Bureau County v. Thompson*, 89 Ill. 566; *Brady v. Richardson*, 18 Ind. 1; *Little v. Fitts*, 38 Ala. 848; *Walker v. Rogan*, 1 Wis. 597; *Dudley v. Mayhew*, 8 N. Y. (8 Comst.) 9.

Nor can consent confer jurisdiction upon an appellate court. *McMahon v. Rauhr*, 47 N. Y. (2 Sick.) 67; *Ames v. Boland*, 1 Minn. 365.

Where a justice of the peace acts judicially and within his jurisdiction he will have the same protection that is given to a judge of a superior court, and will not be liable to an action for his acts. *Robbins v. Gorham*, 25 N. Y. (11 Smith) 588; *Clark v. Holdridge*, 58 Barb. 61; 40 How. Pr. 330; *Yates v. Lansing*, 5 Johns. 282; *Cunningham v. Bucklin*, 8 Cow. 178; *Randall v. Brigham*, 7 Wall. (U. S.) 523; *Howe v. Mason*, 14 Iowa, 510; *Downing v. Herrick*, 47 Me. 462; *Evans v. Foster*, 1 N. H. 374; *Ambler v. Church*, 1 Root, 211; *Raymond v. Bolles*, 11 Cush. (Mass.) 315.

But when he acts ministerially, he will be responsible for any error which injures a third party, without reference to his motives in doing the act. *Pratt v. Hill*, 16 Barb. 303. If he makes a false return he will be liable to an action. *Houghton v. Swarthout*, 1 Denio, 589. So if he issues an attachment without the bond required by statute (*Davis v. Marshall*, 14 Barb. 96), or without the proof required by statute. *Adkins v. Brewer*, 8 Cow. 206. So, if a justice renders a judgment in favor of a plaintiff, but by mistake enters it up in favor of the defendant, for the amount adjudged due the plaintiff, and a transcript is filed in the county clerk's office, upon which execution is issued, and the plaintiff is compelled to pay the judgment, he may recover the resulting damages from the justice. *Christopher v. Van Liew*, 57 Barb. 17.

the French, it seems safer to deduce it, with sir Henry Spelman(*r*) and Dr. Cowell(*s*), from their language: wherein it is plainly derived from the Latin *comes stabuli*(*t*), an officer well known in the empire; so called because, like the great constable of France, as well as the lord high constable of England, he was to regulate all matters of chivalry, tilts, tournaments, and feats of arms, which were performed on horseback. This office of lord high constable has been disused in England, except only upon great and solemn occasions, as a coronation and the like, ever since the attainder of Stafford duke of Buckingham under king Henry VIII.; as in France it was suppressed about a century after by an edict of Louis XIII.(*u*): but from his office, says Lambard(*x*), this lower constablenesship was at first drawn and fetched, and is as it were a very finger of that hand. For the statute of Winchester(*y*) directed that, for the better keeping of the peace, two constables in every hundred and franchise should inspect all matters relating to arms and armour.

Constables were formerly of two sorts, high constables, and petty constables. The former are thought by some to have been first appointed by the statute of Winchester(*z*), (13 Edw. 1, st. 2, c. 6,) and the latter in the reign of Edward III.(*a*), while others, on better grounds, consider constables to be officers known to our common law, *though additional duties were cast on them by [*427] the above-mentioned statutes(*b*) and it is certain that they are referred to by name, as officers already existing, in the statute of Westminster 1st(*c*).

High constables are appointed at the court leets of the franchise or hundred over which they preside, or, in default of that, by the justices at their special sessions(*d*); and are removable by the same authority that appoints them(*e*). Petty constables are inferior officers in every town and parish subordinate to the high constable of the hundred. These petty constables had two offices united in them: the one ancient, the other modern. Their ancient office was that of head-borough, tithing-man, or borsholder; of whom we formerly spoke(*f*), and who are as ancient as the time of the Saxons; their more modern office was that of constable merely, in order to assist the high constable(*g*). And in general, the ancient head-boroughs, tithing-men, and borsholders, were made use of to serve as petty constables; though not so generally, but that in many places they still continued distinct officers from the constable. They were formerly chosen by the jury at the court leet; or if no court leet were held, were appointed by two justices of the peace(*h*);(111) but petty constables

(*r*) Gloss. *ad verb.*

(*s*) Dict. *ad verb.*

(*t*) Du Cange, *ad verb.*

(*u*) Philip's Life of Pole, ii. 161, ed. 1767.

(*x*) Of Constables, 5.

(*y*) 13 Edw. 1, st. 2, c. 6.

(*z*) 4 Inst. 267.

(*a*) See Spel. Gloss. 148.

(*b*) Salk. 175; *Reg. v. Wyat*, *Id.* 880; Spel. Gloss. *Constabularius Villa*, 4 Inst. 267.

(*c*) 3 Edw. 1, c. 15.

(*d*) 7 & 8 Vict. c. 38, s. 8.

(*e*) Salk. 150.*

(*f*) *Ante*, pp. 185, 186.

(*g*) Lamb. of Constables, 9.

(*h*) Stat. 13 & 14 Car. 2, c. 12, s. 15.

(111) In the various states of the Union, constables are generally elected as town officers; and usually they execute the process issued by justices of the peace, whether civil or criminal.

They are ministerial officers, and their rights, duties and privileges as officers are of a character similar to those of sheriffs. See note 105, *ante*.

A constable is justified in making an arrest without a warrant, though no felony has been actually committed, if he has reasonable ground to suspect that one has been, and he acts

* As to the office of high constable, see 32 & 33 Vict. c. 47.

are now appointed by the justices in special petty sessions, and the act⁽ⁱ⁾ directing such appointment expressly provides that no head-borough, &c., shall be appointed at any court leet, except for the performance of duties unconnected with the preservation of the peace.

Petty constables, though still existing in many parts of the kingdom, have been to a great extent superseded by the county constabulary, which by several [*428] acts^(j) are now *appointed in every county; the justices being empowered in quarter sessions to appoint a chief constable, with superintendents, inspectors, and sergeants under him, for the county or a district therein, and the chief constable, with the concurrence of two or more justices, may appoint any number of petty constables to act under him. Again, all boroughs falling within the provisions of the municipal corporation acts are expressly empowered to appoint their own constables^(k), such power of appointment being vested in a watch committee consisting of the mayor and a certain chosen number of the members of the council of the borough. The borough police may, in any case, be consolidated with the county constabulary in the adjoining county, if the county justices and the council of the borough agree to do so^(l); but though this agreement is voluntary in the first instance, yet when once entered into, it cannot be put an end to without the sanction of a secretary of state^(m). None of these arrangements apply to the city of London, or to the metropolitan police district, each of which has a police jurisdiction of its own.

One material difference exists between the original petty, often called parish, constables, and those appointed under various statutes for counties, boroughs, or the metropolis, viz., that the latter receive pay, and may resign on giving due notice when they choose, whereas the former are entitled to no remuneration, and are liable to a penalty if they refuse to serve or find a substitute⁽ⁿ⁾, unless they come within the class of exempted persons^(o).

In order to preserve the peace, when there is reason to believe that its ordinary guardians are or may be insufficient for the purpose, it is provided by statute that whenever it shall be made to appear to two or more justices^(p),

(i) 5 & 6 Vict. c. 109, s. 21.

(n) 5 & 6 Vict. c. 109, s. 18.

(j) 2 & 3 Vict. c. 98; 3 & 4 Vict. c. 88; 19 & 20 Vict. c. 69.

(o) As to exempted persons, see 5 & 6 Vict. c. 109, s. 5; and Archbold's Parish Lawyer, 4th ed. 120.

(k) 5 & 6 Will. 4, c. 76, ss. 76, *et seq.*

(l) 3 & 4 Vict. c. 88, s. 14.

(p) 1 & 2 Will. 4, c. 41; 5 & 6 Will. 4, c. 43. See also 5 & 6 Will. 4, c. 76, s. 83.

(m) 19 & 20 Vict. c. 69, s. 20.

in good faith and without evil design. *Burns v. Erben*, 40 N. Y. (1 Hand) 463; *Carpenter v. Mills*, 29 How. Pr. 473; *Holley v. Mix*, 3 Wend. 350; *Russel v. Shuster*, 8 W. & S. 308; *Rohan v. Sawin*, 5 Cush. 281.

He cannot make an arrest outside of the limits of his jurisdiction. *Butolph v. Blust*, 41 How. Pr. 481; S. C., 5 Lans. 84. And at common law he cannot make an arrest without warrant where there is no breach of the peace. *Ib.*; *People v. Adler*, 3 Park. C. C. 249.

A regular officer is not bound to show his authority or process when he arrests a defendant; but a special deputy is. *Arnold v. Steeves*, 10 Wend. 514; *Frost v. Thomas*, 24 id. 418.

He ought, however, before or at the moment of making the arrest, to make known that he comes in his official character, and not as a mere wrong-doer. *Bellows v. Shannon*, 2 Hill, 86. When a constable who has a justice's attachment for execution becomes satisfied that the justice had no jurisdiction to issue it, he may refuse to execute it, and if sued for a neglect of duty, he may show the invalidity of the process as a defense. *Tucker v. Malloy*, 48 Barb. 85; *Earl v. Camp*, 16 Wend. 562. See note 106, *ante*. But he cannot refuse or neglect to execute process for any defect except that of jurisdiction. *State v. Fowler*, 4 Harr. 358; *Poster v. Gault*, 2 McMullan, 385; *Hickman v. Griffin*, 6 Miss. 87. See, *ante*, 364, note 106.

*on the oath of a credible witness, that there is reason to apprehend some felony, tumult, or riot, and that the ordinary officers are insufficient to repress it, then they may appoint any number of persons, not legally exempt, to be sworn in and serve as special constables. Persons so appointed are bound to act, and till their services are dispensed with by the justices of the county or place within which they have been called out, they have the authority and privileges of other constables(*q*). [*429]

The general duty of constables, high and petty, as well as of the other officers, is to keep the peace in their several districts; and for that purpose they are armed with large powers, of arresting and imprisoning, of breaking open houses, and the like;(112) nor can an action be brought against a constable for anything done in the execution of his duty, unless brought within six calendar months from the time of the act complained of(*r*): he is also protected from legal proceedings for anything done in pursuance of a justice's warrant, whether the justice be liable to an action for excess of jurisdiction or not(*s*). One of the constable's principal duties, arising from the statute of Winchester, was to keep watch and ward in his jurisdiction. Ward guard, or *custodia*, was chiefly applied to the day-time, in order to apprehend rioters, and robbers on the highways; the manner of doing which was left to the discretion of the justices of the peace and the constable(*t*): the hundred being however answerable in respect of robberies committed therein, by day-light, for having kept negligent guard. Watch was properly *applicable to the night only (being called among our Teutonic ancestors *wacht* or *wacta(u)*), [*430] it began at the time when ward ended, and ended when that began, for, by the statute of Winchester, in walled towns the gates were to be closed from sun-setting to sun-rising, and watch was to be kept in every borough and town, especially in the summer season, to apprehend all rogues, vagabonds, and night-walkers, and make them give an account of themselves. The constable was formerly allowed to appoint watchmen, at his discretion, regulated by the custom of the place; and these, being his deputies, had for the time being the authority of their principal; but now the duties of watchmen are generally performed by constables, though it is provided by stat. 3 & 4 Will. 4, c. 90, that any parish or other place may under certain circumstances adopt the provisions of that act for watching and lighting, and, if so, elect inspectors, who may appoint such number of watchmen as they think fit for the protection of the inhabitants, houses, and property within the limits of the parish: these watchmen are however only to be appointed where there are no other means of preserving the peace, for it is enacted(*v*) that if the chief constable of any county in which such parish or other place is situate, give notice that he is ready to take the charge thereof upon himself, then from the time specified in his

(*q*) By stat. 3 & 4 Vict. c. 88, s. 19, the chief constable of a county is authorised on the application of any person and at his expense to appoint constables to act at a particular place, on being convinced of the necessity thereof, and with the approval of the justices in quarter session. A like power to appoint constables is vested in the Commissioners of

Metropolitan Police at their discretion by stat. 2 & 3 Vict. c. 47, s. 8.

(*r*) 24 Geo. 2, c. 44, s. 8.

(*s*) *Ib.* s. 6.

(*t*) Dalt. Just. c. 104.

(*u*) Du Cange, Gloss. *ad verb.*

(*v*) 3 & 4 Vict. c. 88, s. 20.

(112) See notes 111, *ante*, and 106, *ante*, as to the rights, duties and liabilities of constables and sheriffs.

notice, the watchmen shall cease as an independent force, and there shall no longer remain any power to levy a rate for their support(x).

V. We are next to consider the surveyors of highways.(113) Every parish is bound of common right to keep the high roads, that go through it, in good and sufficient repair; unless, by reason of the tenure of (V.) Surveyors of highways. [*431] lands or otherwise, this *care is consigned to some particular private person. From such burthen no man was exempt by our ancient laws, whatever other immunities he might enjoy: this being part of the *trinoda necessitas* to which every man's estate was subject; viz. *expeditio contra hostem, arcium constructio, et pontium reparatio*(y). For, though the reparation of bridges only is expressed, yet that of roads also must be understood. And indeed now, for the most part, the care of the roads only seems to be left to parishes; that of bridges being in great measure devolved upon the county at large, by statute 22 Hen. 8, c. 5. If the parish neglected these repairs, they might formerly, as they may still, be indicted for such their neglect: but it was not then incumbent on any particular officer to call the parish together, and set them upon this work; for which reason, by the statute 2 & 3 Ph. & Mary, c. 8, surveyors of the highways were ordered to be chosen in every parish.

These surveyors were, according to the above statute of Philip and Mary, to be appointed by the constable and churchwardens of the parish; they were afterwards constituted by two neighbouring justices, out of such Origin of the office. inhabitants or others as were described in the statutes 3 W. & M. c. 12, s. 2, and 13 Geo. 3, c. 78, s. 1. They are now elected annually by the parishioners under the provisions of the General Highway Act(z), though the justices may appoint in default of such election(a). This act, which has been amended by various statutes(b), provides that the surveyor may be a paid officer(c), also that several parishes may unite in a district and appoint a district surveyor, who shall have like power as the surveyors of highways, except that of levying a rate(d), for which purpose each parish must appoint a surveyor of its own(e). [*432] There are statutory provisions for forming *highway districts, each under the control of a highway board, and for appointing officers called waywardens(f).

Where surveyors of highways still exist, their office and duty consist in putting in execution various regulations for the repair and management of the public roads; that is, of ways leading from one town to another: Their duty. 1, they are to prevent and abate nuisances or encroachments on any highway, and remove from it obstructions(g); 2, they are to repair and

(z) With regard to other minute duties, laid upon constables by many statutes, see Lambard's Eirenarch., Burn's Just., and Archbold's Parish Officer.

(y) *Ante*, p. 818.

(x) 5 & 6 Will. 4, c. 50, s. 6.

(a) Sect. 11

(b) 4 & 5 Vict. cc. 51, 59; 8 & 9 Vict. c. 71; 25 & 26 Vict. c. 61.

(c) Sect. 9.

(d) Sects. 13, 14, 15, 16.

(e) Sect. 17.

(f) 25 & 26 Vict. c. 61.

(g) 5 & 6 Will. 4, c. 50, ss. 26, 64, 65, 73, 74.

(113) In all the different states there are ample statutory regulations as to the construction and repair of highways, and also as to the election of officers, for that purpose, whose powers and duties are properly declared and defined. As there is a diversity as to the details of the laws of each state, the only source of information is the statutes and decisions of the state whose laws upon this subject it is desirable to examine and understand.

keep in repair every highway(*h*) within the parish, and see that it is of sufficient width, which width in a cartway leading to a market town must be at least twenty feet(*i*); 3, they must widen any highway which shall appear to two justices to be of insufficient width, but are not bound to make it more than thirty feet wide(*k*); 4, for the purpose of repairs, &c., they may take materials from waste parts of the parish, or (with certain exceptions) from enclosed lands, paying to the owners thereof a reasonable compensation(*l*); 5, when by order of justices a highway is to be shut up or diverted, the surveyors are to execute such order(*m*); 6, they are to erect proper direction posts and boundary stones(*n*); 7, they are to levy with the authority of two justices the necessary rates(*o*).

Turnpike tolls, which were introduced in aid of highway rates, depend on local acts, and on the general provisions of 3 Geo. 4, c. 126, as explained and amended by subsequent statutes. Turnpike roads were formerly quite independent of ordinary highways and their surveyors, but, owing to the introduction of railways, the tolls taken on turnpike roads became so much reduced in amount, that the legislature interfered in their favour, and empowered the justices of the peace at special sessions, on *proof of the deficiency of the funds of any turnpike trust, to order a portion of the highway rate to be applied to the repair of the roads of such trust, and the surveyors of the highway are bound to pay over such amount to the commissioners of the trust(*p*).

VI. I proceed, lastly, to consider the overseers of the poor; their origin, and duties.(114)

(VI.) Overseers
of the poor.

Antiquity and
origin of the
office.

The poor of England, till the time of Henry VIII., subsisted entirely upon private benevolence, and the charity of well-disposed Christians. For though it appears(*q*), that by the common law the poor were to be "sustained by parsons, rectors of the church, and the parishioners, so that none of them die for default of sustenance;" and though by the statutes 12 Ric. 2, c. 7, and 19 Hen. 7, c. 12, the poor were directed to abide in the cities or towns wherein they were born, or such wherein they had dwelt for three years (which seems to be the first rudiment of parochial settlement), yet till the statute 27 Hen. 8, c. 25, no compulsory method was chalked out for effecting these purposes: but the poor seem to have been left to such relief as the humanity of their neighbours would afford them. The monasteries were, in particular, their principal resource; and among other bad effects which attended the monastic institutions, it was not perhaps one of the

(*h*) Sect. 6.

(*i*) Sect. 80.

(*k*) Sects. 82, 83.

(*l*) Sects. 51, 52, 53, 54.

(*m*) Sects. 84—93.

(*n*) Sect. 24.

(*o*) Sects. 27, 28, 29.

(*p*) The 4 & 5 Vict. c. 59, providing as above, was a temporary act, but was renewed from time to time, and by 28 & 29 Vict. c. 119, was continued to Dec. 1, 1870, and the end of the next session of parliament. It being

doubtful whether highway boards were liable to contribute to the repair of the turnpike roads, it was enacted by stat. 26 & 27 Vict. c. 94, that they were so.

The acts relating to turnpike roads down to 1858 will be found in the tabular list at the commencement of Oke's Law of Turnpike Roads. See also Glen's Highway Laws, 2nd ed. The last acts concerning turnpike roads are 81 & 83 Vict. cc. 66 & 99.

(*q*) Mirror, c. 1, s. 8.

(114) In this country the several states have made ample provision for the relief of poor persons, but this is not the place to explain them. Resort must be had to the statutes, and the decisions of the state whose laws are to be studied or applied.

least (though frequently esteemed quite otherwise) that they supported and fed a very numerous and very idle poor, whose sustenance depended upon what was *daily distributed in alms at the gates of the religious houses. [*434] But, upon the total dissolution of these, the inconvenience of thus encouraging the poor in habits of indolence and beggary was quickly felt throughout the kingdom: and abundance of statutes were made in the reign of king Henry VIII. and his children, for providing for the poor and impotent: who, the preambles to some of them recite, had then of late years greatly increased. These poor were principally of two sorts; sick and impotent, and therefore unable to work; idle and sturdy, and therefore able, but not willing, to exercise any honest employment. To provide in some measure for both of these, in and about the metropolis, Edward VI. founded three royal hospitals; Christ's and St. Thomas's, for the relief of the impotent through infancy or sickness: and Bridewell for the punishment and employment of the vigorous and idle. But these were far from being sufficient for the care of the poor throughout the kingdom at large: and therefore, after many other fruitless experiments, by the statute 43 Eliz. c. 2, overseers of the poor were appointed in every parish.

By virtue of the statute last mentioned, these overseers were to be nominated yearly in Easter week, or within one month after (though a subsequent nomination was valid(*r*)), by two justices dwelling near the parish. They were to be, and still must be, substantial householders, and so expressed to be in the appointment of the justices(*s*).

Their office and duty, according to the same statute, were principally these: first, to raise competent sums for the necessary relief of the poor, impotent, old, blind, and such others being poor, and not able to work; and secondly, to provide work for such as were able, and could not otherwise get employment; but this latter part of their duty, which, according to the regulations of that statute, *should have been performed with the other, was long neglected. [*435] However, for these joint purposes, they were empowered to make and levy rates upon the several inhabitants of the parish, by the same act of parliament; which was further explained and enforced by subsequent statutes.

The two great objects of this statute seem to have been, 1. To relieve the impotent poor, and them only. 2. To find employment for such as were able to work: and this principally by providing stocks of raw materials to be worked up at their separate homes, instead of accumulating all the poor in one common workhouse; for, political economy being little understood in those days, it was looked upon as the duty of government to find work for all who wanted it: and the danger of interfering with trade, altering the price of labour, or underselling the industrious poor who maintained themselves without assistance, does not seem to have been thought of.

Such appears to have been the plan of the statute of queen Elizabeth; in which one great defect was confining the management of the poor to small parochial districts, frequently incapable of furnishing proper work, or providing able directors for them. However, the laborious poor were then at liberty to seek employment wherever it was to be had: none being obliged to reside in the places of their settlement but such as were unable or unwilling to work.

(*r*) *R. v. Sparrow*, Stra. 1123.

(*s*) *R. v. Sheringbrooke*, 2 Lord Raym. 1394.

and those places of settlement being only such where they were born, or had made their abode, originally for three years(*t*), and afterwards (in the case of vagabonds) for one year only(*u*).

After the Restoration a very different plan was adopted, which rendered the employment of the poor more difficult, by authorising the subdivision of parishes; which greatly increased their number, by confining them all to their respective districts: which gave birth to the intricacy of *our poor laws, by multiplying and rendering more easy the methods of gaining settlement; and, in consequence, created an infinity of expensive law-suits between contending neighbourhoods, concerning those settlements and removals. By the statute 13 & 14 Car. 2, c. 12, a legal settlement was declared to be gained by birth: or by inhabitancy, apprenticeship or service, for forty days: within which period all intruders were made removable from any parish by two justices of the peace, unless they settle in a tenement of the annual value of 10*l*. The frauds naturally consequent upon this provision, which gave a settlement by so short a residence, produced the statute 1 Jac. 2, c. 17, which directed notice in writing to be delivered to the parish officers, before a settlement could be gained by such residence. Subsequent provisions allowed other circumstances of notoriety to be equivalent to such notice given; and those circumstances were from time to time altered, enlarged, or restrained, whenever the experience of new inconveniences, arising daily from new regulations, suggested the necessity of a remedy.

The power given by the above-mentioned statute of Charles II., of removing persons likely to become chargeable as paupers, was found to operate prejudicially in this way, it prevented poor persons from going to a place where they might obtain work, and to obviate this mischief certificates were invented. A certificate might, by stat. 8 & 9 Will. 3, c. 30, s. 1, be granted to a man by the churchwardens and overseers of the parish in which he was settled, acknowledging the fact of such settlement, and directed to the churchwardens and overseers of some other parish. Armed with this protection, the certificated person could not be removed from the parish to which he went unless he became actually chargeable, but as he was (with some exceptions) precluded from acquiring a new settlement by any length of residence, parishes were very cautious about giving such certificates, and they were *consequently very sparingly bestowed. Certificates remained, however, in use till the 35 Geo. 3, c. 101, s. 1, which, by enacting that no one should be removed from any parish till actually chargeable, rendered them practically useless.

The law of settlements, after many changes, may be now reduced to the following general heads; or, a settlement in a parish may be acquired: 1. By birth; for, wherever a child is first known to be, that is always *prima facie* the place of settlement, until some other can be shown(*x*). But though the place of birth be *prima facie* the settlement, yet it is not conclusively so; for there is, 2. Settlement by parentage, being the settlement of one's father or mother: a legitimate child being really settled in the

(*t*) Stat. 19 Hen. 7, c. 12; 1 Edw. 6, c. 3; 3 Edw. 6, c. 16; 14 Eliz. c. 5.

(*u*) Stat. 39 Eliz. c. 4, s. 3.

(*x*) *Whitechapel Parish v. Stepney Parish*, Carth. 433; *Duke of Banbury v. Parish of Broughton*, Comb. 364; *Inhabitants of St.*

Nicholas v. Inhabitants of Hillingdon, Salk. 485; *Hamlet of Spittlefields v. Parish of St. Andrew, Holborn*, 1 Ld. Raym. 567; *Reg. v. Newchurch*, 3 B. & S. 107; S. C., 32 L. J. M. C. 19.

parish where his father is settled(y); and if he have no settlement, or it be unknown, then in the parish in which his mother was settled at the time of her marriage(z), until the child get a new settlement for himself. It was formerly held that an illegitimate child being *nullius filius* could only have a birth settlement, being entitled to none by parentage(a); but it is now enacted by 4 & 5 Will. 4, c. 76, s. 71, that every illegitimate child born after Aug. 14, 1834, shall have its mother's settlement till it attains the age of sixteen years, or acquires a settlement in its own right. If, therefore, it attains that age without having acquired a settlement, it is remitted to the birth settlement it would have had before the statute(b).

[*438] *A new settlement may be acquired in several ways; as, 3. By marriage. For a woman, marrying a man who is settled in another parish, changes her own settlement, and immediately acquires that of her husband(c). During her marriage she is unable to acquire any settlement of her own(d) but follows that of her husband, however often it may be changed. Should he have no settlement, or should it be unknown, she retains her maiden settlement(e), but it is suspended during his life(f), as she cannot be separated from him without his consent(g). In such a case the wife's settlement is, however, only suspended, not lost, and she can be removed to it after her husband's death, or if he has abandoned her, or is absent when she becomes chargeable(h). From the fact that a wife always has her husband's settlement, it follows that on the marriage of a woman having an illegitimate child, such child is entitled to the stepfather's settlement until it has attained the age of sixteen years(i).

4. The next method of gaining a settlement is by apprenticeship; for this purpose, there must *inter alia* be a binding by deed, and a residence of at least forty days(k).

5. A settlement may also be gained by renting a tenement of the minimum value of 10*l.*, and residing therein for forty days(l), though since the passing of stat. 4 & 5 Will. 4, c. 76, no settlement can be gained in this way, unless the tenant has been assessed to the poor rate, and shall have paid the same in respect of the tenement for one year. Closely connected with this mode of acquiring a settlement, may be mentioned,

[* 439] *6. A settlement by paying taxes. It was originally enacted that any person coming to inhabit any town or parish, who should be charged with and pay his share towards the public taxes in such place, should be deemed to have a settlement therein(m). This qualification has been much restricted by subsequent enactments. The scavenger's rate, house tax, and highway rate(n) have been excepted from the taxes conferring a settlement, the property must be of the value of 10*l.* per annum(o), there must be an occupation for a year, and if the

(y) *Hard's Case*, Salk. 427; *Cornwell v. Shillingford*, Fort. 813.

(z) *R. v. Inhabitants of St. Botolph*, Burr. Set. Ca. 387, 372; *R. v. St. Mary, Leicester*, 3 A. & E. 644.

(a) *Hard's Case*, Salk. 427; *Inhabitants of St. Nicholas v. Hillingdon*, Ib. 485.

(b) *Overseers of Bodenham v. Overseers of St. Andrews, Worcester*, 1 E. & B. 465.

(c) *St. Giles, Reading v. Boersley, Blackwater*, 1 Str. 580; *R. v. Hinworth*, Cald. 42.

(d) *Berkhampstead v. St. Mary's Northchurch*, 2 Bott. 25; *R. v. Aythorp*, Burr. Set. Ca. 412.

(e) *R. v. Ryton*, Cald. 39; *R. v. Hensingham*, Ib. 206; *R. v. Hudson*, Ib. 371.

(f) *R. v. Carleton*, Burr. Set. Ca. 818.

(g) *R. v. Eltham*, 5 East, 113.

(h) *R. v. Cottingham*, 7 B. & C. 615; *St. Giles's v. St. Margaret's Westminster*, Fol. 287.

(i) *R. v. St. Mary, Newington*, 4 Q. B. 581.

(k) 3 W. & M. c. 11, s. 8.

(l) 18 & 14 Car. 2, c. 12, s. 1.

(m) 3 W. & M. c. 11, s. 6.

(n) 9 Geo. 1, c. 7, s. 7.

(o) 35 Geo. 3, c. 101, s. 4.

property does not belong to the occupier, it must be a separate building or land *bond fide* rented for 10*l.* a year at least for the term of a whole year, and the rent for the same to the amount of 10*l.* must have been actually paid(*p*).

7. The last mode in which a settlement can now be obtained is by estate. As no man can be removed from his own property(*q*), a man may gain a settlement by residence for forty days on an estate of his own, of any value if it come to him by descent or devise(*r*), but, if by purchase, the purchase money must amount to 30*l.* at least(*s*). This settlement, however, only lasts as long as the owner of the estate resides in the parish in which it was situate, or within ten miles thereof(*t*).

Formerly there were other methods of obtaining a settlement, among which may be mentioned forty days' residence with notice, hiring and service, and serving an office. The first of these settlements was abolished by 33 Geo. 3, c. 101, and the two latter by 4 & 5 Will. 4, c. 76, s. 64.

Any person not legally settled, may be removed from the parish in which he is residing, should he become chargeable to it, and may be taken to the place of his settlement. *There are, however, certain exceptions to this rule, of which we may mention that no one can be removed from a [*440] parish or union in which he has resided continually for three(*u*) years; nor can a widow, residing with her husband at the time of death, be removed within twelve months afterwards(*x*); nor can a child under the age of sixteen years, living with its father or mother, be removed(*y*).

The duty of relieving or removing our poor formerly devolved on the overseers, viz., the churchwardens, who are overseers *ex officio*, and the persons appointed overseers annually by the justices(*z*), but by the 4 & 5 Will. 4, c. 76, the poor law commissioners, and by the 12 & 13 Vict. c. 103, the poor law board(*a*) were empowered to consolidate any number of parishes into one union for the relief of the poor. This being done, each parish has to elect one or more guardians, who act for the relief of the poor in the union subject to the rules of the poor law board. In this case the overseers have nothing to do with giving relief, except in cases of sudden emergency(*b*); they have, however, certain duties to perform in relation to the election of guardians. They are bound to make and levy the poor rates, and have other duties imposed upon them, most of which, however, may be discharged by an assistant overseer, a paid officer whom the inhabitants of each parish may appoint if they think fit(*c*).

(*p*) 6 Geo. 4, c. 57, s. 2.

(*q*) *Murley v. Grandborough*, 1 Str. 97; *Burcham v. Eastwoodhay*, *Id.* 163; *Bishop v. Harrow*, 2 Salk. 524.

(*r*) *R. v. Marwood*, Burr. Set. Ca. 886; *R. v. Ingleton*, *Id.* 560.

(*s*) 9 Geo. 1, c. 7, s. 5.

(*t*) 4 & 5 Will. 4, c. 96, s. 68.

(*u*) 24 & 25 Vict. c. 55, s. 1.

(*x*) 9 & 10 Vict. c. 66, s. 2.

(*y*) *Id.* s. 3.

(*z*) 54 Geo. 3, c. 91.

(*a*) 12 & 13 Vict. c. 103. The power of the poor law board, at first temporary, was continued from time to time by different statutes (see 29 & 30 Vict. c. 103), and was made permanent by 30 & 31 Vict. c. 106. This act has been amended, and further provisions for the relief of the poor have been made by 31 & 32 Vict. c. 122.

(*b*) 4 & 5 Will. 4, c. 76, s. 54.

(*c*) See Archbold's Parish Officer, 4th ed. tit. Overseer.

[*441]

*CHAPTER X.

THE PEOPLE, WHETHER NATURAL-BORN SUBJECTS,
ALIENS, OR DENIZENS.

HAVING in the eight preceding chapters treated of persons clothed with magisterial functions, I now proceed to consider such as fall under the denomination of the people. And herein all the inferior and subordinate magistrates, treated of in the last chapter, are included.

The first and most obvious division of the people is into natural-born subjects and aliens.(115) Generally speaking, natural-born subjects are such as

(115) In a previous note, *ante*, 218, note 90, the subject of aliens and their naturalization has been briefly noticed ; and in this place some of the general principles of daily application will be considered. The power to enact laws relating to the naturalization of foreigners is vested in congress. U. S. Const., art. 1, § 8. And congress has exercised this power by enacting a complete system of laws upon the subject. Act of April 14, 1802 ; 2 Stat. at Large, 153 ; act of March 8, 1813, 2 id. 811 ; act of March 23, 1816, 3 id. 259 ; act of May 26, 1824, 4 id. 69 ; act of May 24, 1828, 4 id. 310 ; act of June 26, 1848, 9 id. 240 ; act of July 6, 1812, 2 id. 781 ; act of July 17, 1862, 12 id. 597.

The subject of citizenship will not be considered here any further than it relates to the United States government. Citizens are either native born or naturalized ; and in the United States any one is regarded as a citizen if he has a right to vote for representatives in congress, and other public officers, and is qualified to hold offices which are in the gift of the people. Citizenship carries with it the right to the protection of the government, and imposes a duty which is usually termed allegiance. The right of expatriation and of terminating the allegiance of foreigners to their governments or sovereigns has been a subject of much discussion. Foreign governments have usually denied the right or the power of the subject to sever the relation of sovereign and subject without the permission of the sovereign. In this country the subject has been several times discussed by the courts. But a recent act of congress has finally settled the rule so far as the government of the United States is concerned : " Whereas, the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness ; and whereas, in the recognition of this principle this government has freely received emigrants from all nations, and invested them with the rights of citizenship ; and whereas, it is claimed that such American citizens, with their descendants, are subjects of foreign states, owing allegiance to the governments thereof ; and whereas, it is necessary to the maintenance of public peace that this claim of foreign allegiance should be promptly and finally disavowed ; therefore, *be it enacted by the senate and house of representatives of the United States of America in congress assembled*, That any declaration, instruction, opinion, order or decision of any officers of this government which denies, restricts, impairs, or questions the right of expatriation, is hereby declared inconsistent with the fundamental principles of this government." Act of July 27, 1868, 15 Stat. at Large, 223, 224.

" § 2. *And be it further enacted*, That all naturalized citizens of the United States, while in foreign states, shall be entitled to, and shall receive from this government, the same protection of persons and property that is accorded to native born citizens in like situations and circumstances." *Ib.*, § 2.

" § 8. *And be it further enacted*, That whenever it shall be made known to the president that any citizen of the United States has been unjustly deprived of his liberty by or under the authority of any foreign government, it shall be the duty of the president forthwith to demand of that government the reasons for such imprisonment, and if it appears to be wrongful and in violation of the rights of American citizenship, the president shall forthwith demand the release of such citizen, and if the release so demanded is unreasonably

are born within the dominions of the crown of England; that is, within the ligeance, or allegiance of the sovereign: and aliens, such as are born out of it.

Natural-born subjects. Allegiance is the tie, or *ligamen*, which binds the subject to the sovereign, in return for that protection which the sovereign

delayed or refused, it shall be the duty of the president to use such means, not amounting to acts of war, as he may think necessary and proper to obtain or effectuate such release, and all the facts and proceedings relative thereto shall, as soon as practicable, be communicated by the president to congress." *Ib.*, § 8.

The right of expatriation is now recognized by several foreign governments; and by treaties with this government they have expressly agreed to respect that right. Some of the principal features of these treaties in regard to this subject provide that when citizens of those countries shall have become naturalized in the United States, and shall have resided here uninterruptedly for five years, they shall be held to be citizens of the United States, and shall be treated as such; and when citizens of the United States shall have become naturalized citizens of a foreign government, with a like residence of five years, they are to be regarded as citizens of such foreign country. If any such person shall have committed any crime before leaving his country, the right to punish him on his return is reserved. Treaty with Prussia, Feb. 23, 1868, 15 Stat. at Large, 615; treaty with Bavaria, May 26, 1868, 15 id. 661; treaty with Mexico, July 10, 1868, 15 id. 687; treaty with Russia, as to cession of Russian possessions, etc., March 30, 1867, 15 id. 539, 542; treaty with Grand Duchy of Baden, July 19, 1868, 16 id. 731; treaty with kingdom of Württemberg, July 28, 1868, 16 id. 735; treaty with China, July 28, 1868, 16 id. 739, 740; convention with Grand Duchy of Hesse, Aug. 1, 1868, 16 id. 742; convention with Belgium, Nov. 16, 1868, 16 id. 747; treaty with Great Britain, May 13, 1870, 16 id. 775. From the readiness with which the right of expatriation has been recognized by foreign governments, it is probable that it will be very generally regarded as a natural right.

The question who is an alien is generally one of no difficulty, and yet cases have occurred in which doubts arose which were only settled by a resort to the courts. A person born in a foreign country of parents who were foreigners is an alien. Evidence that a person was living in Germany with German parents, when six years of age; that he came to the United States when he was seventeen or eighteen years old; that he then spoke the German language, and did not speak English, and that his father died in Germany when he was six or eight years old, is sufficient to justify a finding that he was an alien born. *Walther v. Rabolt*, 80 Cal. 185. The general rule, that persons born in a foreign country, of foreign parents, are aliens, has been frequently laid down by our courts. *Ainslie v. Martin*, 9 Mass. 454; *Jackson v. Burns*, 3 Binn. 75; *Dawson's Lessee v. Godfrey*, 4 Cranch, 321; *Blight's Lessee v. Rochester*, 7 Wheat. 535; *Jackson v. Wright*, 4 Johns. 75; *Barrias v. Hopkins*, 3 Rand. 276; *Trevelant v. Osborne*, 1 Const. Rep. 61; *Inglis v. Trustees of Snug Harbor*, 3 Pet. 99, 126.

Persons born in this country, of parents who are citizens, are citizens. Formerly the black race was generally excluded from citizenship. But, by recent amendments of the constitution of the United States, this distinction is abrogated, and race, color, or previous condition is not recognized as a test of citizenship. See amendments XIII, XIV, XV. By act of congress May 31, 1870, the right to vote irrespective of race, color, or previous condition of servitude is provided for, and a penalty imposed for any restraint of the right. 16 Stat. at Large, 140. In New York a statute has been enacted for securing the equality of the blacks with those of the whites, so far as it relates to innkeepers, common carriers, owners or managers of places of amusement, schools or institutions of learning, and cemetery associations. Laws 1878, ch. 186. By the English common law, children of English subjects, if born in foreign countries, were aliens. See text, 450. Under the laws of the United States children of citizens are also citizens, although born in a foreign country. Act of April 14, 1802; 2 Stat. at Large, 153, § 4; act Feb. 10, 1855; 10 Stat. at Large, 604, § 1; *Campbell v. Gordon*, 6 Cranch, 176; *Sasportas v. De la Motta*, 10 Rich. Eq. (S. C.) 38. By the act of congress of Feb. 10, 1855, a person, although born out of the United States, is a citizen thereof, if, at the time of his birth, his father was a citizen of the United States. *Oldtown v. Bangor*, 58 Me. 353.

Free persons of color, born within the allegiance of the United States, are citizens, and have always been entitled to be so regarded. *United States v. Rhodes*, 1 Abb. (U. S.) 28.

affords the subject. The thing itself, or substantial part of it, is founded in reason and the nature of government; the name and the form of it are derived to us from our Gothic ancestors. Under the feudal system, every owner of lands held them in subjection to some superior or lord, Their allegiance.

The terms "married" or "who shall be married," in the act of congress of Feb. 10, 1855, mean that whenever a woman, who under previous acts might be naturalized, is in a state of marriage to a citizen, she becomes by that fact a citizen also. His citizenship, whenever it exists, confers, under the act, citizenship on her. *Kelly v. Owen*, 7 Wall. (U. S.) 496. A white woman, a native of Ireland and not an alien enemy, who marries a citizen of the United States, is a citizen of the United States although she has always resided in Ireland. *Kans v. McCarthy*, 68 N. C. 299. When a citizen of the United States, while under age, goes to a foreign country, with the intention of remaining there in trade indefinitely, but not naturalized there, his children, if he marries a native of such country, will be entitled to inherit property as citizens of the United States. *Ludlam v. Ludlam*, 26 N. Y. (12 Smith) 356. The widow of a naturalized citizen of the United States is entitled to dower, although she never resided in the United States. *Burton v. Burton*, 1 Keyes, 359.

Both national and state courts act in the naturalization of aliens. See, *ante*, 213, note 90. The order of a court of competent jurisdiction, admitting an alien to citizenship, is, in the absence of fraud, conclusive as to the question of the requisite length of residence of the naturalized citizen in the United States. *The Acorn*, 2 Abb. (U. S.) 484. The judgment of a competent court, admitting a person to citizenship, if duly entered upon record, closes all inquiry as to the testimony on which it was pronounced, and, like every other judgment, is complete evidence of its own validity. *Spratt v. Spratt*, 4 Pet. 393; *Starks v. Chesapeake Ins. Co.*, 7 Cranch, 420; *Ritchie v. Putnam*, 18 Wend. 524; *Priest v. Oummings*, 16 id. 617, 625. See *People v. Snyder*, 41 N. Y. (3 Hand) 397, 409.

It has been the practice of both national and state governments to extend to alien friends, as extensive rights as are consistent with the interests and safety of the country. One of the most exclusive rules that has been enforced, is that relating to the ownership of lands by aliens. And this matter is one which is regulated by each state for itself. Alien friends may purchase real estate, and no one can question their title, except the state; and, until office found, the title of the alien is valid. *Goodrich v. Russell*, 42 N. Y. (8 Hand) 177; *Cross v. De Valle*, 1 Wall. (U. S.) 5; *Morris v. Hoyt*, 18 Cal. 217; *Fairfax v. Hunter*, 7 Cranch, 608; *McCreery v. Allender*, 4 Har. & McHen. 409; *Groves v. Gordon*, 1 Const. Rep. 111; *Marshall v. Conrod*, 5 Call. 864; *Unicornity v. Miller*, 3 Dev. 191; *Buchanan v. Deahon*, 1 Har. & Gill. 280; *Sheaffe v. O'Neil*, 1 Mass. 256; *Jenkins v. Noel*, 3 Stew. 60; *Jackson v. Adams*, 7 Wend. 367; *Goodrich v. Russell*, 42 N. Y. (8 Hand) 177.

So an alien may take by devise as well as by grant. *Fairfax v. Hunter*, 7 Cranch. 608; *Fox v. Southack*, 12 Mass. 143; *Vaux v. Nesbit*, 1 McCord's Ch. 352.

Where real estate is devised to an alien, and the land is construed to be converted into personal property, he may take and hold it. *Craig v. Leslie*, 3 Wheat. 563. In the United States courts, alien friends are entitled to claim the same protection of their rights that is accorded to citizens. *Taylor v. Carpenter*, 3 Story, 458; 2 Woodb. & M. 1. So one alien may sue another in a state court upon a contract made abroad, when the parties are transiently within the state. *Roberts v. Knights*, 7 Allen (Mass.), 449. But it is otherwise when a subject of one belligerent nation sues the subjects of the other party, for acts growing out of the war. *Juando v. Taylor*, 2 Paine, 652.

Alien enemies cannot maintain actions in our courts against any person. *Crawford v. The William Penn*, Pet. C. C. 106; *Wilcox v. Henry*, 1 Dall. 69; *Mumford v. Mumford*, 1 Gall. 866; *Bell v. Chapman*, 10 Johns. 183. During the late civil war, a citizen of South Carolina was not permitted to enforce any of his claims against any of our citizens (New York), in the courts of this state. *Bonneau v. Dinmore*, 23 How. Pr. 397. So a citizen of Florida, who engaged in the civil war against the United States, although not technically an alien enemy, was still an enemy, and during the war, was not permitted to maintain an action in the courts of New York, against a citizen of that state. *Sanderson v. Morgan*, 25 How. Pr. 144; S. C., 39 N. Y. (12 Tiff.) 231. See also *Leftwich v. Clinton*, 4 Lans. 176. So in the United States courts, all the people of any district that was in insurrection against the United States were regarded as enemies. *Alexander's Cotton*, 3 Wall. (U. S.) 404.

from whom or whose ancestors the tenant or vassal had received them; and there was a mutual trust or confidence subsisting between the lord and vassal, that the lord should protect the vassal in the enjoyment of the territory granted

The acts of congress relating to naturalization, provide: That any alien, being a free white person, may be admitted to become a citizen of the United States, or any of them, on the following conditions, and not otherwise:

First. That he shall have declared, on oath or affirmation, before the supreme, superior, district or circuit court of some one of the states, or of the territorial districts of the United States, or a circuit or district court of the United States, or before a clerk of either of said courts, two years at least before his admission, that it was his *bona fide* intention to become a citizen of the United States, and to renounce forever all allegiance and fidelity to any foreign prince, potentate, state or sovereignty whatever, and particularly, by name, the prince, potentate, state or sovereignty whereof such alien may, at the time, be a citizen or subject.

Secondly. That he shall, at the time of his application to be admitted, declare on oath or affirmation, before some one of the courts aforesaid, that he will support the constitution of the United States, and that he doth absolutely and entirely renounce and abjure all allegiance and fidelity to every foreign prince, potentate, state or sovereignty whatever, and particularly, by name, the prince, potentate, state or sovereignty whereof he was before a citizen or subject; which proceedings shall be recorded by the clerk of the court.

Thirdly. That the court admitting such alien shall be satisfied that he has resided within the United States five years at least, and within the state or territory where such court is at the time held, one year at least; and it shall further appear to their satisfaction that during that time he has behaved as a man of good moral character, attached to the principles of the constitution of the United States, and well disposed to the good order and happiness of the same; *Provided*, That the oath of the applicant shall, in no case, be allowed to prove his residence.

Fourthly. That in case the alien, applying to be admitted to citizenship, shall have borne any hereditary title, or been of any of the orders of nobility in the kingdom or state from which he came, he shall, in addition to the above requisites, make an express renunciation of his title or order of nobility in the court to which his application shall be made, which renunciation shall be recorded in the said court: *Provided*, That no alien who shall be a native citizen, denizen or subject of any country, state or sovereign with whom the United States shall be at war at the time of his application, shall be then admitted to be a citizen of the United States.

Any alien, of the age of twenty-one years and upward, who has enlisted or shall enlist in the armies of the United States, either the regular or the volunteer forces, and has been or shall be hereafter honorably discharged, may be admitted to become a citizen of the United States, upon his petition, without any previous declaration of his intention to become a citizen of the United States, and he shall not be required to prove more than one year's residence within the United States previous to his application to become such citizen; and the court admitting such alien shall, in addition to such proof of residence and good moral character, as is now provided by law, be satisfied by competent proof of such person having been honorably discharged from the service of the United States as aforesaid. Any alien, being a free white person and a minor, under the age of twenty-one years, who shall have resided in the United States three years next preceding his arriving at the age of twenty-one years, and who shall have continued to reside therein to the time he may make application to be admitted a citizen thereof, may, after he arrives at the age of twenty-one years, and after he shall have resided five years within the United States, including the three years of his minority, be admitted a citizen of the United States, without having made the declaration required in the first condition of the first section of the act to which this is in addition, three years previous to his admission; *Provided*, Such alien shall make the declaration required therein at the time of his or her admission; and shall further declare on oath, and prove to the satisfaction of the court, that, for three years next preceding, it has been the *bona fide* intention of such alien to become a citizen of the United States; and shall, in all other respects, comply with the laws in regard to naturalization.

The children of persons duly naturalized under any of the laws of the United States, or

him, and, on the other hand, that the vassal should be faithful to the lord, and defend him against all his enemies. This obligation on the part of the vassal was called his *fidelitas* or fealty; and an oath of fealty was required, by the [*442] feudal law, to be taken by every tenant to his landlord, *couched in almost the same terms as our ancient oath of allegiance(a); except that in the oath of fealty there was frequently a saving or exception of the faith due to a superior lord by name, under whom the landlord himself was perhaps only a tenant or vassal. But when the acknowledgment was made to the absolute superior himself, who was vassal to no man, it was no longer called the oath of fealty, but the oath of allegiance; and therein the tenant swore to bear faith to his sovereign lord, in opposition to all men, without any saving or exception; "*contra omnes homines fidelitatem fecit*"(b). Land held by this exalted species of fealty was called *feudum ligium*, a liege fee; the vassals *homines ligii*, or liege men; and the sovereign their *dominus ligius*, or liege lord. And when sovereign princes did homage to each other for lands held under their respective sovereignties, a distinction was always made between simple homage, which was only an acknowledgment of tenure(c); and liege homage, which included the fealty before mentioned, and the services consequent upon it. Thus when our Edward III., in 1329, did homage to Philip VI. of France, for his ducal dominions on the continent, it was warmly disputed of what species the homage was to be, whether liege or simple homage(d). But with us, in England, it becoming a settled principle of tenure, that all lands in the kingdom are holden of the sovereign as lord paramount, no oath but that of fealty could ever be taken to inferior lords, and the oath of allegiance was necessarily confined to the person of the sovereign. By an easy analogy the term "allegiance" was soon brought to signify all other engagements which are due from subjects to their prince, as well as those duties which were simply and merely territorial. And the oath of allegiance, as administered The oath of al-
legiance. for upwards of six hundred years(e), contained a promise "to be [*443] true and *faithful to the king and his heirs, and truth and faith to bear of life and limb and terrene honour, and not to know or hear of any ill or damage intended him, without defending him therefrom." Upon which sir Matthew Hale(f) makes this remark; that it was short and plain,

(a) 2 Feud. 5, 6, 7.

(b) 2 Feud. 99.

(c) *Calvin's Case*, 7 Rep. 7.

(d) 2 Carte, 401.

(e) Mirror, c. 8, s. 35; Fleta, 8, 16; Britton, c. 29; *Calvin's Case*, 7 Rep. 6.

(f) 1 Hale, P. C. 68.

who, previous to the passing of any law on that subject by the government of the United States, may have become a citizen of any of the said states, under the laws thereof, being under the age of twenty-one years, at the time of their parents being so naturalized or admitted to the rights of citizenship, shall, if dwelling in the United States, be considered as citizens of the United States, and the children of persons who now are or have been citizens shall, though born out of the limits and jurisdiction of the United States, be considered as citizens of the United States: *Provided*, That the right of citizenship shall not descend to persons whose fathers have never resided within the United States.

When any alien who shall have complied with the first condition specified in the first section of the said original act, and who shall die before he is actually naturalized, the widow and children of such alien shall be considered as citizens of the United States, and shall be entitled to all rights and privileges as such, upon taking the oaths prescribed by law. The various statutes which have been quoted will be found in 2 Stat at Large, 158; id. 202; id. 811; 3 Stat at Large, 259; 4 id. 69; id. 810; 9 Stat. at Large, 240; 12 id. 597.

not entangled with long or intricate clauses or declarations, and yet was comprehensive of the whole duty from the subject to his sovereign. But, at the Revolution, the terms of this oath being thought perhaps to favour too much the notion of non-resistance, another form, more general and indeterminate, was introduced by the convention parliament, the subject only promising "that he would be faithful and bear true allegiance to the king," without mentioning "his heirs," or specifying in the least wherein that allegiance might consist. The oath of supremacy was principally calculated as a renunciation of the pope's pretended authority: and the oath of abjuration, introduced in the reign of king William (*g*), very amply supplied the loose and general texture of the oath of allegiance; it recognising the right of his majesty, derived under the act of settlement: engaging to support him to the utmost of the juror's power; promising to disclose all traitorous conspiracies against him; and expressly renouncing any claim of the descendants of the pretender, in as clear and explicit terms as the English language could furnish. This oath was required to be taken by all persons in any office, trust, or employment; and might be tendered by two justices of the peace to any person whom they suspected of disaffection (*h*). And the oath of allegiance might formerly have been tendered (*i*) to any person above the age of twelve years, whether native, denizen, or alien, either in the court-leet of the manor, or in the sheriff's tourn, which was the court-leet of the *county; a refusal to take it when duly tendered being indictable (*k*). [* 444]

In regard to the taking of the oaths above-mentioned and the form of words which should be used to express allegiance, many important changes have by statutes passed during the last century been effected; these changes having been made in a truly liberal spirit, with a view to satisfy religious scruples, and so preventing the exclusion from various offices of men dissenting from the religious tenets of our Established Church, yet well qualified to serve the state and well-affected towards the crown. The statutory changes referred to need not here otherwise than thus generally be noticed (*l*), inasmuch as the subject before us has by statute 31 & 32 Vict. c. 72, been much simplified, and put upon a basis likely to endure. No person can now "be required or authorised to take the oaths of allegiance, supremacy, and abjuration, or any of such oaths, or any oath substituted for such oaths or any of them, or to make any declaration to the like effect of such oaths or any of them" (*m*), except the persons indicated in the above act, in the "Clerical Subscription Act, 1865" (*n*), and the "Parliamentary Oaths Act, 1866" (*o*).

The statute 31 & 32 Vict. c. 72, moreover, prescribes three forms of oath, respectively constituting the oath of allegiance, the official, and the judicial oath. By the first of these, A. B. swears that he "will be faithful and bear true allegiance to her majesty queen Victoria, her heirs and successors, according to law;" by the second, that he "will well and truly serve" her majesty "in the office of —;" and by the third, that he "will well and truly serve" her majesty "in the office of —" and "will do *right to all manner of [*445] people after the laws and usages of this realm without fear or favour,

(*g*) Stat. 13 Will. 3, c. 6.

(*h*) Stat. 1 Geo. 1, c. 13; 6 Geo. 3, c. 53.

(*i*) 2 Inst. 121; 1 Hale, P. C. 64.

(*k*) Broom's Const. Law, p. 12 (*k*).

(*l*) For details respecting them, see Raw-

linson's Municip. Corp. Acts, (ed. by Geary,) pp. 88 (1); 897 (3); 553 (2).

(*m*) 31 & 32 Vict. c. 72, s. 9.

(*n*) *Post*, c. 11.

(*o*) 29 & 30 Vict. c. 19.

affection or ill-will." With the first of the foregoing oaths only have we here any direct concern; but the consideration of it cannot be altogether dis severed from that of the other two. The effect of the statute is as under: 1st, the form of the oath of allegiance is to be always as above. 2ndly. The official or the judicial oath must, in conjunction with the oath of allegiance, be tendered to and taken by each of the officers(*p*) named in the schedule(*q*) to the act; and if any such officer declines or neglects to take any such oath when duly tendered, he shall, if he has already entered on his office, vacate the same; and if he has not entered upon it, be disqualified from doing so. 3rdly. Where an affirmation or a declaration is under any statute permitted in lieu of the oath(*r*), such affirmation or declaration is to be *mutatis mutandis* in like form as the oath for which it is substituted, and the penalty for not making it will be the same(*s*).

But, besides express engagements, such as above considered, the law holds that there is an implied, original, and virtual allegiance, owing from every subject to his sovereign, antecedently to any express promise; and although the subject never swore any faith or allegiance in form. For as the sovereign, by the descent of the crown, is fully invested with all the rights, and bound to all the duties of sovereignty, before his coronation; so the subject is bound to his prince by an intrinsic allegiance, before the superinduction of outward solemnities, and irrespective of them, such formalities having been only instituted to remind the subject of his previous duty, and for the better securing its performance(*t*). The profession, therefore, of subjection, is nothing more than a declaration in words of what was before implied in law. *Which [*446] occasions sir Edward Coke justly to observe(*u*), that "all subjects are equally bounden to their allegiance, as if they had taken the oath; because it is written by the finger of the law in their hearts, and the taking of the corporal oath is but an outward declaration of the same." The sanction of an oath, it is true, in case of violation of duty, makes the guilt still more accumulated, by superadding perjury to treason: but it does not increase the civil obligation to loyalty; it only strengthens the social tie by uniting it with that of religion; and the policy of our legislature has of late been unmistakeably evinced to do away with unnecessary oaths.

Allegiance, expressed or implied, is distinguished by the common law into two sorts or species, the one natural, the other local; the former being perpetual, the latter temporary. Natural allegiance is such as is due from all men born within the dominions of the crown immediately upon their birth(*x*). For, immediately upon their birth, they are under the sovereign's protection: at a time too, when (during infancy) they are incapable of protecting themselves. Natural allegiance is therefore a debt of gratitude: which cannot (according to our customary law) be forfeited, cancelled, or altered by any change of time, place, or circumstance, nor by anything but the united concurrence of the legislature(*y*). According to our customary law, an Englishman who removes to France, or to China, owes the same allegiance to the sovereign of England there as at home, and will owe it twenty

(*p*) Sects. 5, 6.

(*q*) Parts 1 & 2.

(*r*) See sects. 12, 13.

(*s*) Sect. 11.

(*t*) 1 Hale, P. C. 61.

(*u*) 2 Inst. 121.

(*x*) *Calvin's Case*, 7 Rep. 7.

(*y*) 2 P. Wms. 124.

years hence as well as now. For it is a principle of universal law(*z*), that the natural-born subject of one prince cannot by any act of his own, no, not by swearing allegiance to another, put off or discharge his natural allegiance to the former: for this natural allegiance was intrinsic and primitive, and antecedent to the other; and cannot be divested without the concurrent act of that prince to whom it was first *due(*a*). The natural-born subject of one prince to whom that subject owes allegiance, may indeed be [*447] entangled by subjecting himself absolutely to another: but it is his own act that brings him into these straits and difficulties, of owing service to two masters; and it is unreasonable that, by such voluntary act of his own, he should be able at pleasure to unloose those bands by which he is connected with and tied to his natural prince.(116)

Local allegiance is such as is due from an alien, or stranger born, for so long time as he continues within the dominion and protection of the crown(*b*), and by our customary law it ceases the instant such stranger transfers himself from this kingdom to another. Natural allegiance is therefore perpetual, and local allegiance temporary only: for this reason, evidently founded upon the nature of government, that allegiance is a debt due from the subject, upon an implied contract with the prince, that so *long as the one affords protection, [*448] so long the other will demean himself faithfully. As therefore the prince is under a constant tie to protect his natural-born subjects at all times and in all countries, their allegiance due to him is equally universal and permanent. But, on the other hand, as the prince affords his protection to an alien only during his residence in this realm, the allegiance of an alien is confined (in point of time) to the duration of such his residence, and (in point of locality) to the dominions of the British empire. From which considerations sir Matthew Hale(*c*) deduces this consequence, that, though there be an usurper of the crown, yet it is treason for any subject, while the usurper is in full possession of the sovereignty, to practise anything against his crown and dignity: wherefore, although the true prince regain the sovereignty, yet such attempts against the usurper (unless in defence or aid of the rightful king) have been afterwards punished with death; because of the breach of that temporary allegiance which was due to him as king *de facto*. And upon this footing, after

(*z*) 1 Hale, P. C. 68.

(*a*) This principle may be exemplified by the case of Eneas McDonald (Fost. 184). There a native of Great Britain, who had received his education from infancy in France, had spent his riper years in a profitable employment in that kingdom, and had accepted a commission in the service of the French king; having, whilst acting under that commission, been taken in arms against the king of England, was indicted and convicted of high treason; though afterwards pardoned, on condition of his leaving the kingdom for ever. In *Doe v. Acklam*, 2 B. & C. 779, it was held that upon the recognition of the independence of the United States of America in 1783, the natural-born subjects of the crown of England, adhering to the United States, became aliens to all intents and purposes. In *Doe v. Mulcaster*, 5 B. & C. 771, the con-

verse was held, viz., that children, born in the United States after the recognition of American independence, of parents who had resided there before, but who were natural-born British subjects, and at the time of the separation of the two countries adhered to the British government, did not become aliens, but remained capable of inheriting lands in this country. Again, in *Marryat v. Wilson*, 8 T. R. 81; s. c. in error, 1 B. & P. 490, a natural-born subject of this country, who had been admitted a citizen of the United States, either before or after the declaration of American independence, was held to be a subject of the United States, so as to be entitled to the benefit of all treaties of commerce between the two countries.

(*b*) *Calvin's Case*, 7 Rep. 6.

(*c*) 1 Hale, P. C. 60.

Edward IV. recovered the crown, which had been long detained from his house by the line of Lancaster, treasons committed against Henry VI. were capitally punished; though Henry had been declared an usurper by parliament.

The oath or declaration of allegiance, or rather the allegiance itself, is applicable not only to the political capacity or regal office, but to the natural person and blood-royal of the sovereign: and for the misapplication of their allegiance, viz. to the regal capacity or crown, exclusive of the person of the king, were the Spencers banished in the reign of Edward II.(d). And hence arose that principle of personal attachment and affectionate loyalty which induced our forefathers (and, if occasion required, would doubtless induce their sons) to hazard everything dear to them, life, fortune, and family, in defence and support of their sovereign.

[*449] *Allegiance then, under the distinctions here laid down, of local and temporary, or universal and perpetual, is the duty of all subjects of the crown. Their rights are also distinguishable by the same criterions of time and locality; natural-born subjects having a great variety of rights, which they acquire by being born within the ligeance, and can never forfeit by any distance of place or time, but only by their own misbehaviour: the explanation of which rights is the principal subject of the two first Books of these Commentaries.

The rights of aliens are more circumscribed than those of natural-born subjects. According to our customary law, if an alien born purchase land for his own use, the crown is thereupon entitled to it(e).(117) If an alien could acquire a permanent property in land, he must owe an allegiance, equally permanent with that property, to the crown of England; which would probably be inconsistent with that which he owes to his own natural liege lord: besides that thereby the nation might in time become subject to foreign influence, and feel many other inconveniences(f). Wherefore by the civil law also such contracts were made void(g): though the prince had no advantage of forfeiture thereby as with us in England. At common law, however, an alien might acquire a property in goods, money, and other personal estate, which is of a transitory and moveable nature, and under the statute 7 & 8 Vict. c. 66(h), s. 4, an alien *ami* may hold every species of personal property(i), except chattels real, and by s. 5, he "may by grant, lease, demise, *assignment, bequest, representation, or otherwise, take and hold any lands, houses, and other tenements for the purpose of residence, or of occupation," "or for the purpose of any business, trade, or manufacture," for any term not exceeding twenty-one years. An alien may also contract or maintain an action concerning personalty(k), may make a will, and dispose of his chattel property(l).

(d) 1 Hale, P. C. 67.

(e) Co. Litt. 2.

(f) Broom's Const. Law, 4 (g).

(g) Cod. l. 11, tit. 55.

(h) This statute does not extend to the colonies, 11 & 13 Vict. c. 83, s. 8.

(i) As to the ownership of British ships. see 17 & 18 Vict. c. 104, s. 18.

An alien friend, who during his temporary residence in a British colony, first publishes

in the United Kingdom a book of which he is the author, is under the stat. 5 & 6 Vict. c. 45, entitled to the benefit of English copyright. *Routledge v. Low*, L. R. 8 H. L. 100.

(k) The general rule is that an alien friend may acquire personal rights, and maintain personal actions in respect of injuries to them. Judgm. 5 C. B. 884.

(l) Lutw. 84.

These rights however can be exercised by alien friends only, or such whose countries are at peace with ours; for alien enemies have no rights, no privileges(*m*), unless by the special favour of the sovereign during the time of war.(118)

The proposition that an alien is one born out of the queen's dominions, or allegiance, must be understood with some restrictions. The common law indeed stood absolutely so, with only very few exceptions; so that a particular act of parliament became necessary after the Restoration(*n*), "for the naturalization of children of his majesty's English subjects, born in foreign countries during the late troubles." And this maxim of the law proceeded upon a general principle, that every man owes natural allegiance where he is born, and cannot owe two such allegiances, or serve two masters at once. Yet the children of the king's ambassadors born abroad were always held to be natural subjects(*o*); for as the father, though in a foreign country, owes not even a local allegiance to the prince to whom he is sent; so, with regard to the son also, he was held (by a kind of *postliminium*) to be born under the king of England's allegiance, represented by his father, the ambassador. To encourage also foreign commerce, it was enacted by statute 25 Edw. 3, st. 2, that all children born abroad, provided both their *parents were at the time of birth in allegiance to the king, and the mother had passed the seas by [*451] her husband's consent, might inherit as if born in England; and these restrictions were afterwards still further taken off(*p*); so that all children, born out of the ligeance of the crown, whose fathers (or grandfathers by the father's side) were natural-born subjects, were to be deemed natural-born subjects themselves, to all intents and purposes; unless their said ancestors were attainted, or banished beyond sea, for high treason; or were at the birth of such children in the service of a prince at enmity with Great Britain. Also by stat. 11 & 12 Will. 3, c. 6, explained by 25 Geo. 2, c. 39, any natural-born subject might inherit and be inheritable to land, although the ancestor through whom the title might be traced or derived, was born out of the allegiance. And further by the 7 & 8 Vict. c. 66, s. 3, every person born out of her majesty's dominions of a mother being a natural-born subject of the United Kingdom, "shall be capable of taking to him, his heirs, executors, or administrators, any estate, real or personal, by devise or purchase, or inheritance of succession."

The distinction between an alien and a natural-born subject being still, notwithstanding the statutory changes mentioned, exceedingly material, the legislature has deemed it expedient that a person should be enabled by formal procedure to establish his right to be deemed a natural-born subject of the crown, and has accordingly enacted that any natural-born subject of the queen, or any person whose right to be deemed a natural-born subject depends wholly or in part on his legitimacy, or on the validity of a marriage, being domiciled in England or Scotland, or claiming any real or personal estate situate in England, may apply by petition to the Court for Divorce and Matrimonial Causes, "for a decree declaratory of his right to be deemed a natural-born subject of her

(*m*) Co. Litt. 129 b.

(*n*) Stat. 29 Car. 2, c. 6.

(*o*) *Calvin's Case*, 7 Rep. 18.

(*p*) 7 Ann. c. 5; 10 Ann. c. 5; 4 Geo. 2, c. 21, and 18 Geo. 3, c. 21.

[*452] majesty," *and such decree will be thereupon made as to such court may seem just(*g*). It will not, however, "prejudice any person unless he has been cited or made a party to the proceedings, or is the heir-at-law or next of kin, or other real or personal representative of, or derives title under or through a person so cited or made a party, nor shall such sentence or decree of the court prejudice any person if subsequently proved to have been obtained by fraud or collusion"(*r*).

A denizen is an alien born, who has obtained *ex donatione regis* letters patent to make him an English subject: a high and incommunicable branch of the royal prerogative(*s*). A denizen is in a kind of middle state, between an alien and a natural-born subject, and partakes of the privileges of each of them. He may take lands by purchase or devise, which an alien may not; but cannot take by inheritance(*t*); for his parent, through whom he must claim, being an alien, had no inheritable blood, and therefore could convey none to the son. And, upon a like defect of hereditary blood, the issue of a denizen, born before denization, cannot inherit to him; though his issue born after may(*u*). No denizen can be of the privy council, or either house of parliament, or have any office of trust, civil or military, or be capable of any grant of lands, &c., from the crown(*x*).

Naturalization could formerly have been effected by act of parliament only; for by this an alien is put in the same state as if he had been born in the queen's
 Naturalized persons. ligeance; except only that he is incapable, as well as a denizen, of being a member of the privy council or parliament, holding offices, grants, &c.(*y*). And no bill for naturalization *could by stat. [*453] 1 Geo. 1, st. 2, c. 4, have been received in either house of parliament (unless in very special cases), without a disabling clause in it to such effect. An alien is now, however, enabled, on complying with the provisions of the recent statute 7 & 8 Vict. c. 66(*a*), to obtain from a principal secretary of state a certificate of naturalization conferring upon him all the rights and capacities of a natural-born British subject, except the capacity of being a member of the privy council, or of either house of parliament, and such rights and capacities, if any, as may be specially excepted in the certificate(*b*).

By the same statute(*c*), it is moreover enacted that "any woman married, or who shall be married to a natural-born subject or person naturalized, shall be deemed and taken to be herself naturalized," and shall have "all the rights and privileges of a natural-born subject"(*d*). (119)

Such are the principal distinctions between natural-born subjects of the crown, aliens, and denizens, recognized by our law; distinctions upon which it would be useless further to enlarge, inasmuch as legislative intervention has been announced concerning them.

(*g*) 21 & 22 Vict. c. 93, ss. 1, 2. Under sect. 9 proceedings may be taken with a like object by a person domiciled in Scotland.

(*r*) 21 & 22 Vict. c. 93, s. 8.

The stat. 31 & 32 Vict. c. 20, applies similarly to Ireland.

(*s*) *Calvin's Case*, 7 Rep. 25.

(*t*) Co. Litt. 8 a.

(*u*) Co. Litt. 8; Vaugh. 285.

(*x*) Stat. 12 & 13 Wm. 3, c. 2.

(*y*) *Ib.*

(*a*) By sect. 10, within sixty days of the date of the certificate, the applicant is required to make an oath which will now be in the form prescribed by 31 & 32 Vict. c. 72, s. 14.

(*b*) Sect. 8.

(*c*) Sect. 16.

(*d*) See also s. 18.

*CHAPTER XI.

[*454]

THE CLERGY.

THE people, whether natural-born subjects, aliens, or denizens, are divisible into two kinds; the clergy and the laity: the clergy comprehending all persons in holy orders, and in ecclesiastical offices, will be the subject of the following chapter.(120)

(120) "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof;" * * * U. S. Const. amendment, art. 1.

"* * * But no religious test shall ever be required as a qualification to any office or public trust under the United States." U. S. Const., art. 6. The principles contained in the constitution above quoted have been adopted and are acted upon in every state of the Union. Free toleration in all matters of religion is the principle that governs the national and the state governments. Liberty to all, but preference to none, is our principle and our practice. *Guardians of the Poor v. Greene*, 5 Binn. (Pa.) 554, 555. No one is compelled by law to make any but voluntary contributions for the support of religion. As we shall see hereafter, parties may bind themselves by contract to pay money for such purposes, in the same manner that they may bind themselves by any other contracts.

While there is the largest liberty of conscience in matters of religion, there are acts which are so repugnant to the large mass of the people that they are prohibited. Thus, while the law allows each person to worship God according to the dictates of his own conscience, it does not permit him to interfere with the exercise of the like right by every other person. And, therefore, the unlawful disturbance of a religious meeting is punishable criminally. *Cockreham v. State*, 7 Humph. 11; *State v. Swink*, 4 Dev. & Batt. 358; *State v. Ringer*, 6 Blackf. 109; *State v. Jasper*, 4 Dev. 323. But, to constitute the offense, the acts must have taken place when the congregation were assembled for worship. *State v. Edwards*, 33 Mo. 548.

A state may constitutionally enact laws which prohibit certain acts from being done on Sunday. *People v. Hoym*, 20 How. Pr. 76; *Lindenmüller v. People*, 33 Barb. 548; 21 How. Pr. 156; *Omit v. Commonwealth*, 21 Penn. St. 426; *Updegraph v. Commonwealth*, 11 Serg. & R. 394; *Shouer v. State of Arkansas*, 5 Eng. (Ark.) 259; *Bloom v. Richards*, 2 Ohio St. 387; *Warner v. Smith*, 8 Conn. 14; *State v. Ambs*, 20 Miss. 214; *Commonwealth v. Sampson*, 97 Mass. 407; *Lynch v. People*, 16 Mich. 472; *People v. Ball*, 42 Barb. 824; *Vogelsay v. State*, 9 Ind. 112.

Blasphemy is an offense which is punishable at common law. *People v. Ruggles*, 8 Johns. 290; *Updegraph v. Commonwealth*, 11 Serg. & R. 394; *Commonwealth v. Kneeland*, 20 Pick. 206; *State v. Chandler*, 2 Harr. 553.

The organization of religious societies is generally provided for by the statutes of the several states. And there must be some diversity in the details of the various acts. It would be difficult, therefore, to lay down general rules which would be applicable to every state. But there are some general principles which will be generally recognized, and a statement of some of them may be useful. Again, to state the rules settled by some of the states will be convenient as showing the course of adjudication upon questions submitted to the courts. A religious corporation created under the general statutes of New York consists not of the trustees alone, but of the members of the society. *Robertson v. Bullions*, 11 N. Y. (1 Kern.) 243; *Graw v. Prussia, etc., German Society*, 36 N. Y. (9 Tiff.) 761; 3 Trans. App. 989.

The relation of the trustees to the society is not that of a private trustee to the *cestui que trust*; they are trustees only in the same sense in which the directors of a civil corporation are such. *Robertson v. Bullions*, 11 N. Y. (1 Kern.) 243.

The legal title and possession of a church are in the corporation or the trustees thereof, and not in the pew-holders as joint tenants or tenants in common. *Cooper v. Trustees of First Presb. Church of Sandy Hill*, 32 Barb. 222.

All the church property of a religious corporation, whether real or personal, is vested in

The clergy have large privileges allowed them by our municipal laws: and had formerly much greater, which were abridged at the time of the Reformation on account of the ill use which the popish priests had endeavoured to make of

the trustees, and they have the entire control over it. *German Reformed Church v. Busche*, 5 Sandf. 666; *People v. Runkle*, 9 Johns. 147; *Green v. Cady*, 9 Wend. 414; *Petty v. Tooker*, 21 N. Y. (7 Smith) 267; *Beckett v. Lawrence*, 7 Abb. N. S. 403.

The court will not, upon a mere motion, decide who are the rightful trustees of the society, or determine the question who is entitled to the office. *North Baptist Church on Staten Island v. Parker*, 36 Barb. 171.

Where a religious association is organized upon the basis of community of property, and a member has been excluded from membership, and from the enjoyment of the property in common with the others, a court of equity may entertain a bill for an accounting and a payment to the injured party of his share of the assets. *Nachtrieb v. Harmony Settlement*, 3 Wall. Jr. 66.

Persons otherwise qualified do not lose their right to vote at elections for officers, in consequence of their having individually or collectively renounced the doctrine and ecclesiastical government professed and recognized by the religious body in whose worship and services the corporate property had always been employed. *Petty v. Tooker*, 21 N. Y. (7 Smith) 267. To qualify one as a voter he must have been a regular attendant at the church for one year previous to the election, and must have contributed to the support of the church. *People v. Tuthill*, 81 N. Y. (4 Tiff.) 550.

Trustees regularly elected, under the statute, for one year, cannot be removed by the election of others until the year has elapsed. *Den v. Pilling*, 4 Zab. 653.

An election of trustees is valid, although the requirements of the statute as to notice of election have not been complied with, provided the election was fairly conducted, and there is no complaint of want of notice. *People v. Peck*, 11 Wend. 604.

A majority of a church congregation may direct and control in church matters consistently with the particular and general laws of the organization or denomination to which it belongs, but not in violation of them. *Sutter v. First Reformed Dutch Church*, 43 Penn. St. 508; *Presbyterian Congregation v. Johnston*, 1 W. & S. 37; *Den v. Bolton*, 7 Halst. 206; *Miller v. Gable*, 3 Denio, 492; *Petty v. Tooker*, 21 N. Y. (7 Smith) 267; 29 Barb. 256; *Den v. Hay*, 1 Zab. 174; *Graw v. Prussia, etc., German Society*, 86 N. Y. (9 Tiff.) 161; 8 Trans. App. 339.

In case of a disruption or division of a religious corporation, the title to the church property will remain with those who retain their connection with and continue to conform to the usages and discipline of the organization, even though a minority of the society; and the seceders will not be entitled to any part of it. *Ferraria v. Vasconcelles*, 23 Ill. 456; *McGinnis v. Watson*, 41 Penn. St. 9; *M. E. Church of Cincinnati v. Wood*, 5 Ohio, 283; *The Dublin Case*, 88 N. H. 459; *Harper v. Straus*, 14 B. Monr. (Ky.) 89; *Page v. Crosby*, 24 Pick. 211.

A tax assessed upon a pew by a religious corporation in part for purposes not specifically named in a deed of the pew, which alone gives the power to make such assessment, and which strictly defines and limits such power, is invalid, *in toto*. *First Methodist, etc., Society v. Brayton*, 9 Allen (Mass.), 248. Taxes and assessments cannot be enforced by a forfeiture of the shares of members, unless the constitution or by-laws so provide. *Perrin, Adm'r, v. Granger*, 30 Vt. 595. Taxes and assessments cannot be legally assessed or levied, if they exceed the amount specified in the act of incorporation. *Second Universalist Society v. Cooke*, 7 R. I. 69. A religious society may purchase and hold land in trust for any use within the general objects of its incorporation. *Tucker v. St. Clement's Church*, 3 Sandf. Sup. Ct. (N. Y.) 242; 8 N. Y. (4 Seld.) 558, note.

But a deed of land to trustees *de facto* of an unincorporated religious society conveys no title to the society. *Bundy v. Birdsall*, 29 Barb. 81.

A religious corporation which has purchased land may execute a mortgage for the purchase-money without an order from a court. *South Baptist Society of Albany v. Clapp*, 18 Barb. 85.

Religious corporations have inherent power to alien their property, though where a statute requires leave of a court before sale, such leave must be obtained before the sale

them. For, the laws having exempted the Catholic priesthood from almost every personal duty, they attempted a total exemption from secular ties. But it is observed by sir Edward Coke (a), that, as the overflowing of waters doth many times make the river to lose its proper channel, so in times past ecclesiastical persons, seeking to extend their liberties beyond their true bounds, either

(a) 2 Inst. 4.

can be completed. *Madison Avenue Baptist Church v. Baptist Church in Oliver street*, 1 Abb. N. S. 214; 80 How. Pr. 455; 8 Rob. 570.

Resolutions adopted by a church corporation, directing a sale of church property and an appropriation of the proceeds, must be taken as a whole, and no sale will be allowed unless the appropriation of the proceeds is legal. *Wiswell v. First Cong. Church*, 14 Ohio, N. S. 31.

A religious society has a right to prescribe such rules as they may think proper for preserving order, when met for public worship, and may use necessary force to remove a person willfully violating such rules. *McLain v. Matlock*, 7 Ind. 525.

The officers of a religious corporation may preserve order, and may remove from the church persons who are disturbing the meeting of the church. *Beckett v. Lawrence*, 7 Abb. N. S. 403; *Wall v. Lee*, 34 N. Y. (7 Tiff.) 141.

In the absence of other provisions, the corporation may provide by by-laws as to the mode of conducting elections. *Juker v. Commonwealth*, 20 Penn. St. 484. And so in relation to what shall constitute membership. *Taylor v. Edson*, 4 Cush. (Mass.) 522.

In the administration of church rules or discipline, the courts do not interfere unless civil rights are involved, and then only for the protection of such rights. *Robertson v. Bullions*, 9 Barb. 64; 11 N. Y. (1 Kern.) 243; *First Baptist Church in Hartford v. Withersoll*, 8 Paige, 296; *Hendrickson v. DeCow*, Sandf. Ch. (N. J.) 577. See *Counitt v. Reformed Prot. Dutch Church*, 4 Lans. 389. The treasurer of a congregational church holds the funds as a trustee, and is subject to the jurisdiction of a court of equity. *Weld v. May*, 9 Cush. (Mass.) 181.

In church organizations, those who adhere and submit to the regular order of the church, local and general, though a minority, are the true congregation, and corporation, if incorporated. *Winebrenner v. Colder*, 43 Penn. St. 244; *Ferraria v. Vasconcelles*, 23 Ill. 456; *M. E. Church of Cincinnati v. Wood*, 5 Ohio St. 283; *The Dublin Case*, 38 N. H. 459; *Harper v. Straus*, 14 B. Monr. (Ky.) 43; *Page v. Crosby*, 24 Pick. 211.

The question of membership of religious societies or congregations is left to be determined by the rules of the religious denomination to which they belong. *Den v. Pilling*, 4 Zab. 653.

A purchaser of a pew in a church has but a qualified right, subject to the right of the trustees in a proper case, to repair, remove, or rebuild the church, without compensation to pew-holders. *Van Houten v. First Reformed Dutch Church*, 2 Green (N. J.), 126; *Perrin v. Granger*, 33 Vt. 101; *Cooper v. First Presb. Church of Sandy Hill*, 32 Barb. 222; *Voorhees v. Presb. Church of Amsterdam*, 17 id. 103; *Howard v. First Parish of North Bridgewater*, 7 Pick. 188.

The settlement of a minister over a congregational church and society, without any limitation as to its continuance, or any express stipulations as to the mode of its dissolution, is a contract for life, determinable only in the manner, and for the causes, established by law. *Sheldon v. Easton*, 24 Pick. 281, 282.

A "call" from a presbyterian congregation to a minister, drawn in the words prescribed by the forms and discipline of that church, and signed by three elders and a trustee, does not bind them to pay the minister's salary, but is to be regarded as the act of the congregation. *Paddock v. Brown*, 6 Hill, 530.

An action in favor of a religious corporation, in the name of its president, cannot be maintained in the absence of a statute authority. *Lowenthal v. Wiseman*, 56 Barb. 490. Such actions ought to be brought in the corporate name or title of the society. *Bundy v. Birdsall*, 29 Barb. 81; *People v. Fulton*, 11 N. Y. (1 Kern.) 94.

Trover or replevin will lie to recover the records of a parish. *Sudbury v. Stearns*, 21 Pick. 143.

lost or enjoyed not those which of right belonged to them. Some such personal exemptions do, however, continue. A clergyman cannot be compelled to serve on a jury(*b*). Neither can he be compelled to serve as bailiff, constable, or the like, in regard of his own continual attendance on the sacred function(*c*). During his attendance on divine service he is privileged from arrest in a civil suit(*d*), *i. e.*, *eundo morando et redeundo*; but on criminal process this immunity is allowed only during *the actual continuance of such service(*e*). [**455*] A clergyman also, whilst engaged in performing any parochial duty within his parish is exempt from toll(*f*).

But as the clergy have their privileges, so also they have their disabilities, on account of their spiritual avocations. A clergyman is incapable of sitting in the house of commons(*g*), or of being a councillor or alderman of any borough(*h*); and by statute 1 & 2 Vict. c. 106, s. 28, spiritual persons are forbidden to take to farm for occupation more than eighty acres, except with the consent of the bishop, (and then not for more than seven years,) under a penalty of 40s. per annum for each acre above eighty. By sect. 29 of the same act, spiritual persons, beneficed or performing ecclesiastical duty, are also forbidden to engage in trade or buy to sell again for profit or gain(*i*). But by sect. 30, this prohibition does not extend to spiritual persons engaged in keeping schools, or in education, in respect of anything done or any buying or selling in such employment, or to selling anything *bona fide* bought for the use of the family, or to being a manager, director, or shareholder in any benefit or life or fire assurance society; or to buying and selling cattle (if not in person), where incidental to the occupation of glebe or other land, which any such spiritual person may lawfully hold(*j*).

Of the clergy there are divers ranks and degrees; which will here be considered in their respective order, merely as they are taken notice of by the secular laws of England; without intermeddling with the canons(*k*) and *constitutions ecclesiastical. In connection with each division of the clergy will be specified, 1st. The method of their appointment; 2ndly. Their rights and duties; and 3rdly. The manner wherein their character or office may cease.

I. An archbishop or a bishop is elected by the chapter of his cathedral church, by virtue of a licence from the crown. Election was, in very early times, the usual mode of elevation to the episcopal chair throughout Christendom; and this was promiscuously performed by the laity as well as the clergy(*l*): till at length, it becoming tumultuous, the emperors and other sovereigns of the respective kingdoms of Europe took the appointment in some degree into their own hands; by reserving to themselves the right of confirming these elections, and of granting investiture of the temporalities, which now began almost universally to be annexed to this spiritual dignity; without

(b) 6 Geo. 4, c. 50, s. 2.

(c) Finch. L. 88; 1 Inst. 96.

(d) Stat. 1 Ric. 2, c. 15, *post*, vol. iv.

(e) *Post*, vol. iv.

(f) 3 Geo. 4, c. 126, s. 33; *Temple v. Dickenson*, 1 E. & E. 34; *Layard v. Ovey*, L. R. 3 Q. B. 415; *Brunskill v. Watson*, *Id.* 418.

(g) *Ante*, p. 207.

(h) 5 & 6 Will. 4, c. 76, s. 28.

(i) See *Hale v. Hale*, 4 Beav. 369.

(j) Under s. 31 of the above act, the contract if made by a clergyman, contrary to its provisions, will not be void. See *Lewis v. Bright*, 4 E. & B. 917. As to banks, see 1 & 2 Vict. c. 10; 4 & 5 Vict. c. 14.

(k) As to the authority of the canons of 1603, see *Bishop of Exeter v. Marshall*, L. R. 8 H. L. 17.

(l) *Per clorum et populum*. Palm. 25; 2 Roll. Rep. 102; Mat. Paris, A. D. 1095.

which confirmation and investiture, the elected bishop could neither be consecrated nor receive any secular profits. This right was acknowledged in the emperor Charlemagne, A. D. 773, by pope Hadrian I., and the council of Lateran(m), and universally exercised by other christian princes: but the policy of the court of Rome at the same time began by degrees to exclude the laity from any share in these elections, and to confine them wholly to the clergy, which at length was completely effected; the mere form of election appearing to the people to be a thing of little consequence, while the crown was in possession of an absolute negative, which was almost equivalent to a direct right of nomination. Hence the right of appointing to bishoprics is said to have been in the crown of England(n), even in the Saxon times: because the rights of confirmation and investiture were in effect equivalent to a right of complete donation(o). But when, by length *of time, the custom of making [*457] elections by the clergy only was fully established, the popes began to except to the usual method of granting these investitures, which was *per annulum et baculum*, by the prince's delivering to the prelate a ring, and pastoral staff or crosier: pretending that this was an encroachment on the church's authority, and an attempt by these symbols to confer a spiritual jurisdiction: and pope Gregory VII., towards the close of the eleventh century, published a bull of excommunication against all princes who should dare to confer investitures, and all prelates who should venture to receive them(p). This was a bold step towards effecting the plan then adopted by the Roman see, of rendering the clergy entirely independent of the civil authority: and long and eager were the contests occasioned by this papal claim. But at length, when the emperor Henry V. agreed to remove all suspicion of encroachment on the spiritual character, by conferring investitures for the future *per sceptrum* and not *per annulum et baculum*; and when the kings of England and France consented also to alter the form in their kingdoms, and receive only homage from the bishops for their temporalities, instead of investing them by the ring and crosier; the court of Rome found it prudent to suspend for a while its other pretensions.

This concession was obtained from king Henry I. in England, by means of that obstinate and arrogant prelate, archbishop Anselm(q); but king John (about a century afterwards), in order to obtain the protection of the pope against his discontented barons, was also prevailed upon to give up by a charter, to all the monasteries and cathedrals in the kingdom, the free right of electing their *prelates, whether abbots or bishops: reserving only to the crown the custody of the temporalities during the vacancy; the [*458] form of granting a licence to elect (which is the original of our *congé d'élire*), on refusal whereof the electors might proceed without it; and the right of approbation afterwards, which was not to be denied without a reasonable and lawful cause(r). This grant was expressly recognized and confirmed in king John's *magna carta*(s), and was again established by statute 25 Edw. 3, st. 6, s. 3.

(m) Decret. 1, dist. 63, c. 22.

(n) Palm. 28.

(o) " *Nulla electio et prælatorum (sunt verba Inguilph) erat mere libera et canonica; sed omnes dignitates, tam episcoporum quam abbatum, per annulum et baculum regis curia pro sua complacentiâ conferebat.*" *Penes clericos*

et monachos fuit electio, sed electum a rege postulabant. Selden, Jan. Ang. l. 1, s. 39.

(p) Decret. 2, caus. 16, qu. 7, c. 12, 18.

(q) M. Paris, A. D. 1107.

(r) M. Paris, A. D. 1214; 1 Rym. Fœd. 196.

(s) Cap. 1, edit. Oxon. 1759.

The bishoprics of Gloucester and Bristol (now united), Peterborough, Oxford, and Chester, founded by Henry VIII., out of the ruins of the dissolved monasteries, have been however, and still are, donatives in form as well as substance(*t*). As also are the bishoprics of Ripon and Manchester, founded upon the recommendation of the ecclesiastical commissioners, under 6 & 7 Will. 4, c. 77. Moreover, by statute 25 Hen. 8, c. 20(*u*), the ancient right of nomination was, in effect, restored to the crown: it being enacted that, at every future avoidance of a bishopric, the king may send the dean and chapter his usual licence to proceed to election; which is always to be accompanied with a letter missive from the king, containing the name of the person whom he would have them elect: and if the dean and chapter delay their election above twelve days, the nomination shall devolve to the king, who may by letters patent appoint such person as he pleases. This election or nomination, if it be of a bishop, must be signified by the king's letters patent to the archbishop of the province: if it be of an archbishop, to the other archbishop and two bishops, or to four bishops; requiring them to confirm, invest, and consecrate [**459*] the person so elected: which they are bound to perform immediately. After which the bishop elect shall sue to the king for his temporalities, shall make oath to the king and none other, and shall take restitution of his secular possessions out of the king's hands only. And if such dean and chapter do not elect in the manner by this act appointed, or if such archbishop or bishop do refuse to confirm, invest, and consecrate such bishop elect, they or he shall incur the penalties of a *præmunire*(*x*).

An archbishop is the chief of the clergy in a whole province; and has the inspection of the bishops of that province, as well as of the inferior clergy, and may deprive(*y*) them on notorious cause(*z*). The archbishop has also his own diocese, wherein he exercises episcopal jurisdiction; as in his province he exercises archiepiscopal. As archbishop he, upon receipt of the queen's writ, calls the bishops and clergy of his province to meet in convocation; but without the queen's writ he cannot assemble them(*a*). To him an appeal in general lies from an inferior ecclesiastical jurisdiction within his province; and as an appeal lies from the bishop in person to him in person, so it also lies from the consistory court of each diocese to his archiepiscopal court. During the vacancy of any see in his province, he is guardian of the spiritualities thereof, as the crown is of the temporalities; and he executes all ecclesiastical jurisdiction therein. If an archiepiscopal see be vacant, the dean and chapter have been its spiritual guardians, ever since the office of prior of Canterbury was abolished at the Reformation(*b*). The archbishop is entitled to present by lapse to all the ecclesiastical livings in the disposal of his diocesan bishops, if not filled within six months. And the archbishop had formerly a

(*t*) Co. Litt. 184, a., *in notis*; 344, a.

(*u*) This statute was repealed by 1 Edw. 6, c. 2, but revived by 1 & 2 P. & M. c. 8, and 1 Eliz. c. 1; see 12 Rep. 7; Co. Litt. 184 a. n. 5; 26 & 27 Vict. c. 125.

(*x*) In *Reg. v. Archbishop of Canterbury*, 11 Q. B. 483, the question whether, under the above statute, it is imperative on the metropolitan to confirm the bishop designate without taking notice of objections put forward thereto, was discussed on an application for a mandamus, but the court being equally di-

vided in opinion, no order was made. The question has not been re-agitated.

(*y*) Deprivation is distinguishable from deposition. The effect of the former is to take from the bishop the exercise of his office in his diocese, the effect of the latter is to degrade from the episcopal office.

(*z*) *Lucy v. Bishop of St. David's*; Lord Raym. 541.

(*a*) 4 Inst. 822, 823.

(*b*) 2 Roll. Abr. 223.

customary prerogative, when a bishop was consecrated by him, to name a clerk or chaplain of his own to be provided for by such suffragan bishop; in lieu of which it was usual for the bishop to make over by deed to the archbishop, his executors and assigns, the next presentation of such dignity or benefice in the bishop's disposal within that see, as the archbishop himself should choose; which was therefore called his option(c); options seem, however, to have been abolished, perhaps undesignedly, by stat. 3 & 4 Vict. c. 113, s. 42, which enacts that "it shall not be lawful for any spiritual person to sell or assign any patronage or presentation belonging to him by virtue of any dignity or spiritual office held by him, and that every such sale or assignment shall be null and void to all intents and purposes"(d).

It is likewise the privilege, by custom, of the archbishop of Canterbury, to crown the kings and queens of this kingdom. And he has also by the statute 25 Hen. 8, c. 21, the power of granting dispensations in any case, not contrary to the holy scriptures and the law of God, where the pope used formerly to grant them; which is the foundation of his granting special licences to marry at any place or time, dispensation to hold two livings (now regulated by stat. 1 & 2 Vict. c. 106, ss. 5—7) and the like: and on this also is founded the right he exercises of conferring degrees, in prejudice of the two universities(e).

*The power and authority of a bishop, besides the administration of [*461] holy ordinances, are exercised principally in inspecting the manners of the clergy, and punishing them in order to reformation, by ecclesiastical censures. By 3 & 4 Vict. c. 86, a bishop is empowered to issue a commission of inquiry against, and to pronounce ecclesiastical sentence upon any clergyman charged with an offence against the laws ecclesiastical, or concerning whom there may exist scandal or evil report as having offended against those laws: and in the mean time such clergyman may be inhibited by the bishop from performing services in the church. Proceedings under this act, however, must be commenced within two years after the commission of the offence(f).

A bishop has several courts under him, and may visit at pleasure every part of his diocese. His chancellor is appointed to hold his courts for him, and to assist him in matters of ecclesiastical law; and must be a master of arts or bachelor of civil law, so created in some university(g). It is also the business of a bishop to institute, and to direct induction to all ecclesiastical livings in his diocese. But upon the promotion of the incumbent of a benefice in England to a bishopric the right to present to the avoided benefice is in the crown.

Archbishoprics and bishoprics may become void by death, deposition for any very gross and notorious crime, and also by resignation. All resignations must be made to some superior(h). Therefore a bishop must resign to his metropolitan; whereas an archbishop can resign to none but the sovereign.

(c) Cowel's Interpr. tit. *Option*. Stephen, *Laws Clerg.* i. 7, 41.

(d) Some of the provisions of this statute, it may be remarked, specifically apply to bishops (see s. 41), although it has generally reference to inferior dignitaries.

(e) See the *Bishop of Chester's Case*. Oxon.

(f) See further as to the procedure under the above act, *post*, vol. iii.

When an incumbent has a parish consisting

of two benefices with a church in each of them, it is his duty to perform a service every Sunday in each of such churches, and the incumbent may be compelled to do so under the provisions of the statute, *supra*, *Bishop of Winchester v. Rugg*, L. R. 2 Adm. & E. 247, affirmed on appeal, L. R. 2 P. C. 223.

(g) Stat. 37 Hen. 8, c. 17.

(h) Gibs. Cod. 832.*

*Refer to the Bishops' Resignation Act, 32 & 33 Vict. c. 111.

[*462] *It was an ancient custom that, when a bishop was absent from his diocese on an embassy, or by age or other infirmity became unable to fulfil his episcopal office(*i*), his spiritual duties of ordaining and so forth, were committed to a suffragan bishop, who was also called a "chorepiscopus," while his jurisdiction in collating, instituting, &c. was entrusted to a "coadjutor." But now by 6 & 7 Vict. c. 62, it is provided, that when any archbishop or bishop shall have been reported by commissioners appointed under the act, to be incapable by reason of mental infirmity(*k*), or shall have been found lunatic under a commission *de lunatico inquirendo*(*l*), and therefore incapable of duly performing his archiepiscopal or episcopal functions, one of the other bishops shall be appointed to perform such functions, and another spiritual person to assist in the administration of the temporalities of the see, until the death or recovery of such archbishop or bishop.

II. A dean and chapter are the council of the bishop, to assist him with their advice in affairs of religion, and also in the temporal concerns of his see(*m*).

(II.) *Dean and chapter.* When the rest of the clergy were settled in the several parishes of each diocese (as before mentioned), these were reserved for the celebration of divine service in the bishop's own cathedral; and the chief of them, who presided over the rest, obtained the name of *decanus* or dean, either because he was at first appointed to superintend ten canons or prebendaries, or more probably because a deanery, decennary, or tithing, was originally a district including ten parishes or churches(*n*).

All ancient deans were formerly elected by the chapter, by *congé d'élire* from [*463] the crown and letters missive of *recommendation; in the same manner as bishops(*p*); the ancient deaneries are now, however, by statute 3 & 4 Vict. c. 113, s. 24, in the direct patronage of the queen, who appoints thereto by letters patent; and in those chapters that were founded by Henry VIII. out of the spoils of the dissolved monasteries, the deanery has always been donative, and the installation merely by the sovereign's letters patent(*q*). The chapter, consisting of canons(*r*), are sometimes appointed by the crown and sometimes by the bishop.

The dean and chapter are, with the exceptions before noticed, the nominal electors of a bishop. The bishop is their ordinary and immediate superior; and has, generally speaking, the power of visiting them.

Deaneries and canonries may become void, like a bishopric, by death, by deprivation, or by resignation to either the crown or the bishop(*s*). Also, if a dean, canon, or other spiritual person, be made a bishop, all the preferments of

(*i*) See, also, the Proceedings against Archbp. Abbot, 2 St. Tr. 1160.

(*k*) Sect. 11.

(*l*) Sect. 14.

(*m*) 3 Rep. 75; Co. Litt. 103, 800.

(*n*) Cripps, Law of Clergy, 4th ed. 108.

(*p*) As to the mode of election, presentation, or donation to deaneries, ancient or modern, see Co. Litt. 95, n. 1—5. The ecclesiastical commissioners having recommended that several new archdeaconries should be created and that districts should be assigned to them, and that the limits of the then existing deaneries and archdeaconries should

be newly arranged, orders in council for that purpose were issued under 6 & 7 Will. 4, c. 77; see also 3 & 4 Vict. c. 113; 29 & 30 Vict. c. 111.

(*q*) Gibs. Cod. 173.

No person can be appointed dean of a chapter, archdeacon, or canon, until he has been six years complete in priest's orders, "except in the case of a canonry annexed to any professorship, headship, or other office in any university," 3 & 4 Vict. c. 113, s. 27.

(*r*) See 3 & 4 Vict. c. 113, s. 1.

(*s*) Plowd. 498.

which he was before possessed are void; and the crown may present to them in right of the prerogative royal.

III. An archdeacon has an ecclesiastical jurisdiction, immediately subordinate to the bishop, in some particular part of his diocese. An archdeacon is (III.) Arch- usually appointed by the bishop himself; and has a kind of deacons. episcopal *authority, originally derived from the bishop, but now, mostly, independent of and distinct from his(t). He visits [*464] the clergy: and has his separate court, over which in his absence a judge presides, who is designated the official(u).

IV. The rural deans are very ancient officers of the church(x), who seem to have been deputies of the bishop, planted round his diocese, the better to (IV.) Rural inspect the conduct of the parochial clergy, to inquire into and deans. report dilapidations, to examine the candidates for confirmation, and armed, in minuter matters, with an inferior degree of judicial and coercive authority(y). Rural deaneries still subsist as an ecclesiastical division of a diocese or archdeaconry, although custom seems to have transferred to the archdeacon the necessary and more active duties of such office(z).

V. The next, and most numerous, order of men, in the system of ecclesiastical polity, are the parsons: in treating of whom I shall first mark out the distinctions amongst them; shall next observe the method by (V.) Parsons. which one may become a parson or incumbent; shall then briefly touch upon his rights and duties; and shall, lastly, show how one may cease to be such.

A parson, *persona ecclesiæ*, is one who has full possession of all the rights of a parochial church. He is called parson, *persona*, because by his person the church, which is an invisible body, is represented: and he is in himself a body corporate, in order to protect and defend the rights of the church (which he personates) by a perpetual succession(a). He is sometimes called the rector or governor of the church: but the appellation of parson (however it may be depreciated by familiar and indiscriminate use), *is the most legal, most beneficial, and most honourable title that a parish priest can enjoy; [*465] because such a one (sir Edward Coke observes), and he only, is said *vicem seu personam ecclesiæ gerere*. A parson has, during his life, the freehold in himself of the parsonage house, the glebe, the tithes, and other dues. But a living is sometimes appropriated; that is to say, the benefice was, in Catholic times, perpetually annexed to some spiritual corporation, either sole or aggregate, being the patron of the living; which the law esteemed equally capable of providing for the service of the church, as any single private clergyman. This contrivance seems to have sprung from the policy of the monastic orders, who were never deficient in subtle inventions for the increase of their own power and emoluments. At the first establishment of parochial clergy, the tithes of the parish were distributed in a fourfold division; one for the use of the bishop,

(f) Cripps, L. Church and Clergy, 4th ed. 187.

(y) Gibs. Cod. 972, 1550.

(u) Po t, vol. iii. See stat. 6 & 7 Will. 4, c. 77, s. 19.

(z) Cripps, L. Church and Clergy, 4th ed

(a) Co. Litt. 800.

(æ) Kennett, Par. Antiq. 633.

another for maintaining the fabric of the church, a third for the poor, and the fourth to provide for the incumbent. When the sees of the bishops became otherwise amply endowed, they were prohibited from demanding their usual share of these tithes, and the division was into three parts only. And hence it was inferred by the monasteries, that a small part was sufficient for the officiating priest; and that the remainder might well be applied to the use of their own fraternities (the endowment of which was construed to be a work of the most exalted piety), subject to the burthen of repairing the church, and providing for its constant supply. And therefore they begged and bought, for masses and obits, and sometimes even for money, all the advowsons within their reach, and then appropriated the benefices to the use of their own corporations. But, in order to complete any such appropriation effectually, the licence of the crown, and consent of the bishop, must first have been obtained: because both the crown and the bishop might some time or other have had an interest, by lapse, in the presentation to the benefice; and a lapse could not [*466] *happen if the benefice were appropriated to the use of a corporation, which never dies; and also because the law reposes a confidence in the crown and bishop, that they will not consent to anything that shall be to the prejudice of the church. The consent of the patron also was necessarily implied: because (as above observed) the appropriation could be originally made to none, but to such spiritual corporation, as was also the patron of the church; the whole being indeed nothing else, than an allowance for the patrons to retain the tithes and glebe in their own hands, without presenting any clerk, they themselves undertaking to provide for the service of the church(*b*). When the appropriation had thus been made, the appropriators and their successors were perpetual parsons of the church; and any such corporation must still sue and be sued in matters concerning the rights of the church, in the name of the parson(*c*).

In the manner above mentioned were most, if not all, of the appropriations at present existing originally made: being annexed to bishoprics, prebends, religious houses, nay, even to nunneries and certain military orders, all of which were spiritual corporations. At the dissolution of monasteries by statutes 27 Hen. 8, c. 28, and 31 Hen. 8, c. 13, the appropriations of the several parsonages, which belonged to those respective religious houses (amounting to more than one-third of all the parishes in England(*d*)), would have been by the rules of the common law disappropriated, had not a clause in those statutes intervened, to give them to the king in as ample a manner as the abbots, &c., formerly held the same, at the time of their dissolution. This was not without example; for the same had been done in former reigns, when the alien priories (that is, such as were filled by foreigners only) were dissolved and given to the [*467] crown(*e*). And from *these two roots sprung the lay appropriations or secular parsonages now existing in the kingdom; they having been afterwards granted out from time to time by the crown(*f*).

The appropriating corporation, or religious house, was wont to depute one of its own body to perform divine service, and administer the sacraments, in those

(*b*) Plowd. 496—500.

(*c*) Hob. 307.

(*d*) Seld. Tith. c. 9; Spelm. Apology, 35.

(*e*) 2 Inst. 584.

(*f*) Sir H. Spelman (Of Tithes, c. 29), says,

these are now called impropriations, as being improperly in the hands of laymen. *Duke of Portland v. Bingham*, 1 Hagg. 162. But the correctness of this derivation has been doubted.

parishes of which the society was thus the parson. This officiating minister was in reality no more than a curate, deputy, or vicegerent of the appropriator, and therefore called *vicarius* or *vicar*. His stipend was at the discretion of the appropriator, who was however bound of common right to find somebody, *qui illi de temporalibus, episcopo de spiritualibus, debeat respondere*(g). But this was done in so scandalous a manner, and the parishes suffered so much by the neglect of the appropriators, that the legislature was forced to interpose: and accordingly it was enacted by statute 15 Ric. 2, c. 6, that in all appropriations of churches, the diocesan bishop should ordain (in proportion to the value of the church) a competent sum to be distributed among the poor parishioners annually; and that the vicarage should be sufficiently endowed. The parishes it seems were frequently sufferers, not only by the want of divine service, but also by the withholding of those alms for providing which, among other purposes, the payment of tithes was originally imposed: and therefore in this act a pension was directed to be distributed among the poor parochians, as well as a sufficient stipend to the vicar. But he, being liable to be removed at the pleasure of the appropriator, was not likely to insist too rigidly on the legal sufficiency of the stipend: and therefore by statute 4 Hen. 4, c. 12, it was ordained, that the vicar should be a secular person, not a member of any religious *house; that he should be vicar perpetual, not removable at the caprice [* 468] of the monastery; and that he should be canonically instituted and inducted, and be sufficiently endowed, at the discretion of the ordinary, for these three express purposes, to do divine service, to inform the people, and to keep hospitality. The endowments in consequence of these statutes were usually by a portion of the glebe or land belonging to the parsonage, and a particular share of the tithes which the appropriators found it most troublesome to collect, and which are therefore generally called small tithes; the greater, or predial, tithes being still reserved to their own use. But one and the same rule was not observed in the endowment of all vicarages; some were more liberally, and some more scantily, endowed: the tithes, for instance, of certain things, as wood, being in some parishes rectorial, and in some vicarial. The nature of tithes, however, will be discussed at large in the ensuing volume of these Commentaries.

An appropriation may be severed, and the church become disappropriate, two ways: as first, if the patron or appropriator presents a clerk, who is instituted and inducted to the parsonage: for the incumbent so instituted and inducted is to all intents and purposes complete parson: and the appropriation, being once severed, can never be reunited again, unless by a repetition of the same solemnities(h). And, when the clerk so presented is distinct from the vicar, the rectory thus vested in him becomes what is called a sinecure; because he has no cure of souls, having a vicar under him to whom that cure is committed. Also, if the corporation which has the appropriation is dissolved, the parsonage becomes disappropriate at common law; because the perpetuity of person is gone, which is necessary to support the appropriation. As to sinecure rectories(i), nothing further *need here be offered, inasmuch as they will before long have passed away by the operation of sect. 48(k) of the statute 3 [* 469]

(g) Seld. Tith. c. 11, l.
(h) Co. Litt. 46.

(i) 3 Burn. Eccl. Law, 9th ed. 649; Cripps
Law of Church and Clergy, 4th ed. 158.
(k) See also sects. 54, 55.

& 4 Vict. c. 113, which provides for the suppression of all such as are in the sole patronage of the crown, or of any ecclesiastical corporation aggregate or sole, where there is a vicar endowed or a perpetual curate, as vacancies may occur, also for the purchase by the ecclesiastical commissioners of any other such rectory, without cure of souls, the advowson whereof, or any right of patronage wherein, may belong to any person or body corporate other than as aforesaid, and the suppression of the same upon the first avoidance thereof.

The main distinction at law between a rector and a vicar is this: the rector has for the most part the right to ecclesiastical dues in his parish; whereas a vicar has generally an appropriator over him entitled to the best part of his profits, to whom, if appropriations had continued as in their origin, he would in effect have been perpetual curate with a standing salary. In pursuance of a series of statutes, however, which cannot here be specifically noticed^(l) many new districts for church purposes, and new parishes with cure of souls have, under the superintendence of the ecclesiastical commissioners, been formed; many of the smaller benefices are gradually being augmented^(m), and the designation of our clergy has in anomalous cases been determined. For it has recently been enacted⁽ⁿ⁾ that the incumbent of the church of every parish or new parish^(o) for ecclesiastical purposes, not being a rector, who is authorised to publish banns of matrimony in such church, and to solemnize therein

[*470] *marriages, churchings, and baptisms, and is entitled to take for his sole use and benefit the entire fees arising from the performance of such offices shall, "for the purpose of style and designation, but not for any other purpose, be deemed and styled the vicar" of such church or parish, and his benefice shall be styled a vicarage.

The method of becoming a parson or a vicar is much the same. To it there are four requisites: holy orders, presentation, institution, and induction. The method of conferring the holy orders of deacon and priest, according to the liturgy and canons, is foreign to the purpose of these Commentaries, any further than as they are necessary requisites to make a complete parson or vicar. By common law, a deacon, of any age, might be instituted and inducted to a parsonage or vicarage: but it was ordained by statute 13 Eliz. c. 12, that no person under twenty-three years of age, and in deacon's orders, should be presented to any benefice with cure; and if he were not ordained priest within one year after his induction, he should be *ipso facto* deprived: also by statute 13 & 14 Car. 2, c. 4, it was enacted that no person should be capable of being admitted to any benefice, unless he had been first ordained a priest; and so become, in the language of the law, a clerk in orders. Further, the 34th canon, A.D. 1603, prescribes that no bishop shall admit any person into sacred orders, except he, desiring to be a deacon, is three-and-twenty years old; and, to be a priest, four-and-twenty years complete; and this canon was affirmed by the statute 44 Geo. 3, c. 43, s. 1, which enacts that the admission of persons to be priests or deacons within the above ages respectively, "shall be void in law, as if such admission had not been made, and the person so admitted shall be wholly incapable of having, holding, or enjoying,

(l) These statutes are collected in Cripps' Law of Church and Clergy, 4th ed. vol. iii. chap. i.

(m) 26 & 27 Vict. c. 120.

(n) 81 & 82 Vict. c. 117, s. 2.

(o) As to which see the stat. 6 & 7 Vict. c. 87, explained and amended by 7 & 8 Vict. c. 94, and extended by 19 & 20 Vict. c. 104.

As to the annexation of tithes to district churches, see 28 Vict. c. 42.

or being admitted to any parsonage, vicarage, benefice or other ecclesiastical promotion or dignity whatsoever, in virtue of such his admission as deacon or priest respectively, or of any qualification *derived or supposed to be derived therefrom. Provided always, that no title to confer or present [*471] by lapse shall accrue by any avoidance or deprivation *ipso facto*, by virtue of this statute, but after six months' notice of such avoidance or deprivation given by the ordinary to the patron."

Any clerk may be presented(*p*) to a parsonage or vicarage; that is, the patron(*q*), to whom the advowson of the church belongs, may offer his clerk to the bishop of the diocese to be instituted. Of advowsons, and the right of presentation, being a species of private property, we shall find a more convenient place to treat in the second volume of these Commentaries.

It must suffice for the present to observe that an advowson is, by the law of England, a lay inheritance, its fruit or benefit being that, upon a vacancy of the living, the owner possesses a right to present to the bishop a person in holy orders (or who can obtain holy orders before admittance), to be by him admitted and instituted. The only obligation which the law imposes upon the patron in the exercise of this right is that he should present a fit person, and the duty of the bishop is to ascertain the fitness of the clerk presented to him(*r*). The bishop must satisfy himself that the presentee is of fit age, and in holy orders, and likewise as to his learning, his faith or orthodoxy, and his moral conduct.

The right of presentation to a benefice being, as above mentioned, a mere temporal right, it follows that if the patron presents a fit person who produces all the proofs of his fitness which the bishop can properly require, the patron may claim to have his clerk admitted, whereas if *for any reason determined upon by the bishop the clerk should prove unfit, the patron is [*472] entitled to notice thereof from the bishop, who could not legally collate his own clerk by lapse without giving it(*s*).

The remedy of the clerk against the bishop, if rejected on insufficient grounds, is by *duplex querela*, or rescript from the appellate court(*t*), directed to the bishop, and calling upon him to show cause why, by reason of his neglect to do justice, the right of institution is not devolved to the superior judge(*u*). The remedy of the patron as against the bishop, if his presentee be improperly rejected, is by action of *quare impedit*(*x*) at the common law, to try, 1st, whether the plaintiff had the right to present; and if so, 2ndly, whether he has presented a fit person.

If an action at law be brought by the patron against the bishop for refusing his clerk, the bishop must, by plea, assign the cause of such refusal, so that the temporal court may judge of its sufficiency. If the plea alleges unfitness, its truth will be determined by a jury, should the cause of unfitness alleged be a crime, or by the certificate of the metropolitan if it be insufficiency; and for the purpose of determining either of such issues, the court of common law, according as the case may be, either summons a jury, or sends a writ to the

(*p*) A layman may also be presented; but he must take priest's orders before his admission 1 Burn, Ecc. L. 9th ed. p. 144.

(*q*) If he be neither an alien, an outlaw, a lunatic, nor a Roman Catholic.

(*r*) *Per* Lord Chelmsford, *Bishop of Exeter v. Marshall*, L. R. 8 H. L. 45.

(*s*) *Per* Lord Chelmsford, L. R. 8 H. L. 49, 50.

(*t*) As to which, *vide post*.

(*u*) Cripps, *Law of Church and Clergy*, 4th ed. p. 548; *Gorham v. Bishop of Exeter*, Rep. by Mr. Moore.

(*x*) Stat. Westminster 2, c. 5.

metropolitan, commanding him in the queen's name to try the question, and to certify the result to the court. By the course of proceeding in *quare impedit*, accordingly, questions of law are left for the decision of the court of law, questions of fact for that of the jury, and questions of doctrine are submitted to the metropolitan(y).

[*473] If the bishop, having no objections to offer, admits the *patron's presentee, the clerk so admitted, after making the declarations and taking the oaths required by the undermentioned statutes(z), is next to be instituted by him; which is a kind of investiture of the spiritual part of the benefice: for by institution the care of the souls of the parish is committed to the charge of the clerk. When the ordinary is also the patron, and confers the living, the presentation and institution are one and the same act, and are called a collation to a benefice. By institution or collation the church is full, so that there can be no fresh presentation till another vacancy, at least in the case of a common patron: but the church is not full against the crown till induction: nay, even if a clerk is instituted upon presentation, the crown may revoke it before induction, and present another clerk(a). Upon institution also the clerk may enter on the parsonage-house and glebe, and take the tithes; but he cannot grant or let them, or bring an action for them till induction.

Induction is performed by a mandate from the bishop, usually directed to the archdeacon, who issues out a precept to other clergymen to perform it for him. It is done by giving the clerk corporal possession of the church, as by holding the ring of the door, tolling a bell, or the like: and is a form required by law, with intent to give all the parishioners due notice, and sufficient certainty of their new minister, to whom their tithes are to be paid. This therefore is the investiture of the temporal part of the benefice, as institution is of the spiritual. And when a clerk is thus presented, instituted, and inducted into a rectory, he is then, and not before, in full and complete possession, and is called in law *persona impersonata*, or parson imparsoned.

The rights of a parson as regards his tithes and ecclesiastical dues, fall more properly within the second volume of these Commentaries: and as to his duties, Rights and duties of parson. [*474] they are *principally of ecclesiastical cognizance; those only excepted which are laid upon him by statute, and are indeed so numerous, that it is impracticable to recite them here with a tolerable conciseness or accuracy. Some of them we may remark as they arise in the progress of our inquiries, but for the rest I must refer myself to such authors as have compiled treatises expressly upon this subject. I shall only just mention the article of residence, upon the supposition of which the law styles every parochial minister an incumbent(b).

Although an oath is not now as formerly required of any vicar in relation to residence on his vicarage(c), the maxim of law is, *vicarius non habet vicarium*: and, as the non-residence of the appropriators was the cause of the perpetual establishment of vicarages, the law judges it improper for them to defeat the end of their constitution, and by absence to create the very mischief which they were appointed to remedy: especially as, if any profits are to arise from putting

(y) *Per Willes, J., Bishop of Exeter v. Marshall*, L. R. 8 H. L. 40.

(z) 28 & 29 Vict. c. 122; 31 & 32 Vict. c. 72, s. 9.

(a) Co. Litt. 344.

(b) Co. Litt. 300.

(c) 1 & 2 Vict. c. 106, s. 61.

in a curate, and living at a distance from the parish, the appropriator, who is the real parson, has undoubtedly the elder title to them.

The law concerning non-residence and pluralities is now regulated by stats. 1 & 2 Vict. c. 106, and 13 & 14 Vict. c. 98, the former of which enacts(*d*) that if any spiritual person holding any benefice shall fail to keep residence on his benefice as directed by the act, he shall, when such absence exceeds three months and does not exceed six months, forfeit one-third part of the annual value of the benefice so neglected; when such absence exceeds six and does not exceed eight months, one-half part of such annual value; when such absence exceeds eight months, two-thirds of such annual value; and when such absence has been for the whole year, three-fourth parts thereof(*e*). *From the requirements of the above statute as to residence certain persons, [**475*] however, are exempted(*f*), and in particular cases the bishop at his discretion is empowered to grant licenses for non-residence(*g*).

With regard to pluralities, the effect of the two statutes last cited is that two benefices with cure of souls cannot be held together unless they are situated within three miles of each other, by the nearest road from church to church, and the net annual value of neither of them exceeds 100*l*. If the population of one benefice exceeds three thousand, another having a population of more than five hundred cannot be held with it, and no clergyman holding more than one benefice can take any other or any cathedral preferment(*h*). A dispensation from compliance with the above provisions may, in certain cases, be obtained from the arch-diocesan(*i*). If any spiritual person holding any benefice accepts another, and is admitted thereto contrary to the foregoing statutes, his previous benefice is at once vacated(*k*).

Although there is but one way whereby a person may become a rector or vicar: there are several ways by which he may cease to be such. 1. By death. *How rectors and vicars cease to be such.* 2. By cession, in taking another benefice. 3. By consecration; for, as before mentioned(*l*), when a clerk is promoted to a bishopric all his other preferments are void the instant that he is consecrated(*m*). 4. By resignation. But this is of no avail, till accepted by the ordinary, into whose *hands the resignation must be made. 5. By deprivation, [**476*] which will be considered in our fourth Volume.

VI. A curate is of the lowest degree in the church; being, as a vicar formerly was, an officiating temporary minister, instead of the proper incumbent.

(VI.) Curates. Though there are what are called perpetual curacies(*n*), where all the tithes are appropriated, and no vicarage endowed (having for

(*d*) Sect. 82.

(*e*) As to monitions and sequestrations in order to enforce residence, see 1 & 2 Vict. c. 106, sects. 54—57.

(*f*) Sects. 87—40.

(*g*) Sects. 42—51.

A residence beyond the boundaries of the parish is also permitted, where no fit personage house exists within the parish, ss. 83, 84.

(*h*) Dale, Clerg. Leg. Handbook, 4th ed. p. 195.

(*i*) 1 & 2 Vict. c. 106, sects. 5—7.

(*k*) 1 & 2 Vict. c. 106, s. 11; 13 & 14 Vict. c. 98, s. 7; Dale, *ubi supra*.

(*l*) *Ante*, p. 461.

(*m*) There was formerly a method by the favour of the crown of holding a previous living *in commendam*, but the stat. 6 & 7 Will. 4, c. 77, s. 18, enacted that no commendam should be in future held by any bishop.

(*n*) The tests for determining whether a place is a perpetual curacy or a chapelry are specified by Lord Hardwicke, *Att.-Gen. v. Brereton*, 2 Ves. 427.

Generally "where all the profits of the benefice, the tithes both great and small, are appropriated, so that both the rector and the vicar are, or may be, lay, there the curate is perpetual." Cripps Law of Church and Clergy, 4th ed. 172.

some particular reasons(o) been exempted from the operation of the statute 4 Hen. 4, c. 12(p), but instead thereof, such perpetual curate is appointed by the appropriator. His designation under the statute 31 & 32 Vict. c. 117, is that of vicar. The appointments and stipends of such curates are now regulated by the statute 1 & 2 Vict. c. 106(q).

A stipendiary curate ought to be licensed by the ordinary, and, before being so, must make the declaration prescribed by the 28 & 29 Vict. c. 122, ss. 3, 6, and when licensed, must conform to the requirements of sect. 8 of that statute.

Thus much of the clergy, properly so called. There are also certain inferior ecclesiastical officers of whom the common law takes notice; and concerning whom a few cursory remarks must suffice.

[*477] VII. Churchwardens are the guardians or keepers of the church, and legal representatives of the body of the *parish. They are sometimes appointed by the minister, sometimes by the parish, sometimes by both together, or in such other manner as custom directs(r). They are taken, in favour of the church, to be for some purposes a kind of corporation at the common law(s); that is, they are enabled, as churchwardens, to have a property in goods and chattels, and to bring actions for them, for the use and profit of the parish. Yet they may not waste the church goods; if they do so, they may be removed by the parish and then called to account by action at the common law. As to lands, or other real property, as the church, churchyard, &c., the churchwardens have no sort of interest therein; but if any damage is done thereto, the parson only or vicar shall have the action. Their office also is to repair the church, and propose rates for that purpose: of which, however, the payment is no longer compulsory(t). Further, it is for the churchwardens to see that everything necessary for the performance of divine service is provided, and that the churchyard is properly maintained and fenced. Churchwardens of a parish, or reputed parish, are *ex officio* overseers of the poor(u). They are empowered to keep all persons orderly during the performance of divine service, and to eject from the church, without unnecessary violence, any person interrupting it(x);(121) to which end it has been held that a churchwarden may justify the pulling off a man's hat, without being guilty of an assault or *trespass(y). There are other petty parochial powers committed to their charge by divers acts of parliament.

(o) 2 Burn, Eccl. L. 9th ed. 55 b. *et seq.*

(p) *Ante*, p. 467.

(q) If a non-resident incumbent neglect to appoint a curate, the bishop may appoint one under s. 75 of the above act, or if the spiritual duties of any benefice seem to him to be inadequately performed (see sects. 78, 105); as to the stipends of such curates, which must in no case be less than 80*l.* per annum; see sects. 88—92.

(r) As to the mode of electing church or chapelwardens under the church building acts, see Cripps, 4th ed. 198—9; Prideaux, Churchwardens, 10th ed. 15.

(s) By stat. 59 Geo. 3, c. 12, the church-

wardens and overseers of the poor are empowered to hold lands given for the benefit of the poor in the nature of a body corporate, and also all other buildings, lands, and hereditaments belonging to the parish. Also by 5 & 6 Wm. 4, c. 69, the guardians of the poor of every union or parish are incorporated and enabled to hold lands or hereditaments and other property for the benefit of the union or parish.

(t) Stat. 31 & 32 Vict. c. 109, s. 1.

(u) Prideaux, Churchwardens, 10th ed. 2, 3.

(x) *Burton v. Henson*, 10 M. & W. 165.

(y) *Hawe v. Planter*, 1 Saund. 18.

VIII. Parish clerks, being laymen, are regarded by the common law as persons who have freeholds in their office; and therefore, though they may be punished, yet they cannot be deprived, by ecclesiastical censures(*z*). They are, however, removable for wilful neglect or misbehaviour, under the statute 7 & 8 Vict. c. 59, s. 5. The parish clerk was formerly very frequently in holy orders, and may be so at this day(*a*). He is generally appointed by the incumbent(*b*), but by custom may be chosen by the inhabitants; and if such custom appears, the court of queen's bench will grant a *mandamus* to the archdeacon to swear him in, for the establishment of the custom turns it into a temporal or civil right(*c*). A parish clerk, if in holy orders, is licensed and removable in like manner as a stipendiary curate(*d*).

*CHAPTER XII.

[*479]

THE CIVIL STATE.

THE lay part of her majesty's subjects, or such of the people as are not comprehended under the denomination of clergy, may be divided into three distinct states, the civil, the military, and the maritime.

That part of the nation which falls under our first and most comprehensive division, the civil state, includes all orders of men, from the highest nobleman to the meanest peasant, who are not included either under our former division, of clergy, or under one of the two latter divisions, viz., the military and maritime states: it may indeed include individuals of the other three orders: since a nobleman, a knight, a gentleman, or a peasant, may become either a divine, a soldier, or a seaman.

The civil state consists of the nobility and the commonalty. Of the nobility, the peerage of Great Britain, or lords temporal, as forming (together with the bishops) one of the supreme branches of the legislature, I have before sufficiently spoken: we are here to consider them according to their several degrees, or titles of honour.

All degrees of nobility and honour are derived from the crown as their fountain(*a*): and the sovereign may at pleasure institute new titles.(122) Hence it is that all degrees of nobility are not of equal antiquity. Our English nobility now consist of dukes, marquises, earls, viscounts, and barons(*b*).

(a) 2 Roll. Abr. 284.

(a) Stat. 7 & 8 Vict. c. 59, sects. 2, 8.

(b) See stats. 6 & 7 Vict. c. 87; 19 & 20 Vict. c. 104, s. 9.

(c) Cro. Car. 589.

(d) Stat. 7 & 8 Vict. c. 59, s. 2.

The office of sexton is held for life or otherwise, according to custom, see 2 Roll.

Abr. 284; *Ile's Case*, 1 Ventr. 158. A woman may hold this office, Str. 1114.(a) 4 Inst. 363; *ante*, p. 824.(b) For the origin of these titles on the continent of Europe, and their subsequent introduction into this island, see Mr. Selden's *Titles of Honour*.

(122) "No title of nobility shall be granted by the United States; and no person holding any office of profit or trust under them shall, without the consent of the congress, accept of any present, emolument, office or title of any kind whatever from any king, prince or foreign state." U. S. Const., art. 1, § 9.

"No state shall * * * grant any title of nobility." *Ib.*, § 10. And whenever a foreigner is naturalized he must renounce all titles of nobility. See note 115, *ante*.

[*480] *1. A duke, though he be with us, in respect of his title of nobility, inferior in point of antiquity to many others, yet is superior to all of them in rank; his being the first title of dignity amongst civilians Duke. after the royal family(c). Among the Saxons the Latin name of dukes, *duces*, was very frequent, and signified, as among the Romans, the commanders or leaders of their armies, whom in their own language they called *heperoga* (d); and in the laws of Henry I. (as translated by Lambard) we find them called *heretochii*. But after the Norman conquest, which changed the military polity of the nation, our kings, themselves continuing for many generations dukes of Normandy, would not honour any subject with the title of duke, till the time of Edward III.; who, in the eleventh year of his reign created his son, Edward the black prince, duke of Cornwall; and many, of the royal family especially, were afterwards raised to the ducal rank(e). However, in the reign of queen Elizabeth, A.D. 1572(f), the whole order of dukes became extinct; though it was revived by her successor, who was remarkably prodigal of honours, in the person of George Villiers duke of Buckingham.

2. A marquis, *marchio*, is in the next degree of nobility. His office formerly was (for dignity and duty were never separated by our ancestors) to guard the Marquis. frontiers and limits of the kingdom: which were called the marches, from the Teutonic word, *marche*, a limit: such as, in particular, were the marches of Wales and Scotland, while each of these continued to be an enemy's country. *The persons who had command [*481] there, were called lords marchers, or marquises; whose authority was abolished by statute 27 Hen. 8, c. 27: though the title had long before become a mere ensign of honour; Robert Vere, earl of Oxford, being created marquis of Dublin, by Richard II. in the eighth year of his reign(g).

3. An earl has a title of nobility so ancient, that its origin cannot clearly be traced out. Thus much seems tolerably certain: that among the Saxons *ealdor-* Earl. *men*, quasi elder men, signified the same as *seniores* or *senatores* among the Romans; and that these dignitaries were also called *schiremen*, because they had each of them the civil government of a several division or shire. On the irruption of the Danes, the name was changed to *eorles*, which, according to Camden(h), signified the same in their language. In Latin they were called *comites* (a title first used in the empire) from being the king's attendants: "*a societate nomen sumpserunt, reges enim tales sibi associant(i).*" After the Norman conquest they were for some time called counts or countees, from the French; but they did not long retain that name themselves, though their shires are thence called counties to this day. The name of earls or *comites* is now become a mere title, they having nothing to do with the government of the county; which is devolved on the lord lieutenant, and on the sheriff, the earl's deputy, or *vice-comes*(j). In writs, commissions, and other formal instruments, a peer of the degree of an earl is usually styled

(c) Camden, Britan. tit. *Ordines*.

(d) This is apparently derived from the same root as the German *hertzog*, the ancient appellation of dukes in that country. Seld. Tit. Hon. 2, l. 22.

(e) This order of nobility was instituted by Edw. III., in 1337, about a year before his claiming to be king of France, "in order to inflame the military ardour and ambition of

his earls and barons." Henry, Hist. of England, viii. 135.

(f) Camden, Britan. tit. *Ordines*; Spelman, Gloss. 191.

(g) 2 Inst. 5.

(h) Britan. tit. *Ordines*.

(i) Bracton, l. 1, c. 8; Flet. l. 1, c. 5.

(j) *Ante*, p. 404.

by the sovereign "our trusty and well-beloved cousin:" an appellation as ancient as the reign of Henry IV.: who being either by his wife, his mother, or his sisters, actually related or allied to every earl then in the kingdom, artfully and constantly acknowledged that connection in his letters and other public acts: *whence the usage has descended to his successors, though the [*482] reason for it has long since failed.

4. The title of *vice-comes* or viscount was made use of as an arbitrary title of honour, without any shadow of office pertaining to it, by Henry VI.; who, in the eighteenth year of his reign, created John Beaumont a peer, by the title of viscount Beaumont, which was the first instance of the kind(*k*).

5. A baron's is the most general title of nobility; originally indeed every one of the peers of superior rank had a barony annexed to his other titles(*l*). But it has sometimes happened that, when an ancient baron has been raised to a new degree of peerage, in the course of a few generations the two titles have descended differently; one perhaps to the male descendants, the other to the heirs general; whereby the earldom or other superior title has subsisted without a barony: and in modern times earls and viscounts have been created without annexing a barony to their other honours: so that now the rule does not hold universally, that all peers are barons. The origin of baronies has occasioned great inquiries among our English antiquaries, and cannot with certainty be determined. It has, however, been surmised, that for some period after the conquest every title of nobility was connected with or attached to land, and that in the reign of king John, and for some portion of that of his son, the legislative assembly consisted exclusively of tenants *in capite* of the crown, and depended exclusively on tenure; but it seems fairly presumable that the right by tenure to be summoned to the house of peers was abandoned in the ensuing reign of Edward I., if not expressly abrogated by law, and that afterwards every peer of the realm was considered to be entitled to his dignity as a personal right, either by express grant of the crown or by usage, creating a prescriptive right, in its nature personal not territorial(*m*). *Inasmuch as a writ of summons to parliament with a sitting created a barony by writ, it may well be that the right to sit therein by tenure [*483] was gradually disregarded, and it is clear that the alienage of a barony by tenure could sit in parliament only when summoned by the crown(*n*).

Peers are now created by writ, or by letters patent, either independent of or followed by a writ of summons(*o*); and a peer who claims by prescription must suppose either a writ or patent made to his ancestors; though by length of time it has been lost. The creation by writ is a summons to attend the house of peers, by the style and title of that barony, which the sovereign is pleased to confer: creation by patent is a royal grant to a subject of any dignity and degree of peerage. The creation by writ is the more ancient way; but a man is not ennobled thereby, unless he actually takes his seat in the house of lords(*p*): and therefore the most usual and surest way is to grant the dignity by patent, which enures to a man and his heirs according to the limitations thereof, though

(*k*) 2 Inst. 5.

(*l*) 2 Inst. 5, 6.

(*m*) *Per* Lord Cranworth, *The Berkeley Peerage*, 8 H. L. Cas. 95.

(*n*) *Per* Lord St. Leonards, 8 H. L. Cas. 97.

(*o*) See *per* Lord Cranworth, *The Wensleydale Peerage*, 5 H. L. Cas. 965.

(*p*) See *The Wharton Peerage*, 12 Cl. & F. 295.

he never himself makes use of it(*q*). It is, however, frequent to call up the eldest son of a peer to the house of lords by writ of summons, in the name of his father's barony: and in that case there is no danger of his children's losing the nobility in case he never takes his seat: for they will succeed to their grandfather. A man or woman may be ennobled, and yet the dignity may descend only to some particular heirs: as where a peerage is limited to a man, and the heirs male of his body by Elizabeth his present lady, and not to such heirs by any former or future wife. It is not, however, as yet competent to the crown to grant a life peerage which shall enable its holder to sit and vote in parliament(*r*); though in this respect an amplification of the prerogative seems to be imminent.

[*484] *Let us next take a view of some of the principal incidents attending our nobility, exclusive of their capacity as members of parliament, and as hereditary counsellors of the crown; which we have before considered. And first we must observe, that for certain crimes, viz., treason, felony, or misprision of either(*s*), a nobleman shall be tried by his peers. The great are especially obnoxious to popular envy: were they to be judged by the people, they might be in danger from the prejudice of their judges. As to peeresses, there was no precedent for their trial when accused of treason or felony, till after Eleanor duchess of Gloucester, wife of the lord protector, was accused of treason and found guilty of witchcraft, in an ecclesiastical synod, through the intrigues of cardinal Beaufort. This very extraordinary trial gave occasion to a special statute, 20 Hen. 6, c. 9, declaring(*t*) the law to be, that peeresses, either in their own right or by marriage, shall be tried before the same judicature as peers of the realm(*u*). If a woman, noble in her own right, marries a commoner, she still remains noble, and shall be tried by her peers: but if she be only noble by marriage, then by a second marriage with a commoner, she loses her dignity; for as by marriage it is gained, by marriage it is also lost(*x*). Yet if a duchess dowager marries a baron, she continues a duchess still; for all the nobility are *pares*, and therefore there has been no degradation(*y*). The privileges of peers has been elsewhere noticed(*z*); but we may observe that their honour was formerly so highly tendered by the law, that it was more penal to spread false reports of them and certain other great officers of the realm, than of other men: scandal against them having been called [*485] by the peculiar name of *scandalum magnatum*, and *subjected to peculiar punishments by divers ancient statutes(*a*).

A peer cannot lose his nobility, unless by death, attainder, or special act of the legislature; though in the reign of Edward IV. George Nevile duke of Bedford was degraded by act of parliament(*b*), on account of his poverty, which rendered him unable to support his dignity(*c*). But

(*q*) Co. Litt. 18.
(*r*) *The Wensleydale Peerage*, 5 H. L. Cas. 958.

(*s*) For a misdemeanor a peer is tried like a commoner, *post*, vol. iv.

(*t*) Moor, 769; 2 Inst. 50; 6 Rep. 52; Staundf. P. C. 152.

(*u*) See *The Duchess of Kingston's Case*, 20 St. Tr. 355.

(*x*) Dyer, 79; Co. Litt. 16.

(*y*) 2 Inst. 50.

(*z*) *Ante*, pp. 195, 198.

(*a*) 3 Edw. 1, c. 34; 2 Ric. 2, st. 1. c. 5; 12 Ric. 2, c. 11; *post*, vol. iii.

(*b*) 4 Inst. 355.

(*c*) The preamble to the act is remarkable; "forasmuch as oftentimes it is seen, that when any lord is called to high estate, and hath not convenient livelihood to support the same dignity, it induceth great poverty and indigence, and causeth oftentimes great extortion, embracery, and maintenance to be had; to the great trouble of all such countries where such estate shall happen to be; therefore, &c."

this is a singular instance: which serves at the same time, by having happened, to show the power of parliament; and by having happened but once, to show how tender the parliament has been, in exerting so high a power. It has been said(*d*), indeed, that if a baron wastes his estate, so that he is not able to support the degree, the sovereign may degrade him: but it is now settled(*e*), that a peer cannot be degraded by parliament(*f*).

The commonalty, like the nobility, are divided into several degrees(*g*); and as the lords, though different in rank, yet all of them are peers in respect of their nobility, so the commoners, though some are greatly superior to others, yet all are in law peers or *pares* in respect of their want of nobility(*h*).

Now therefore as regards personal dignity, a knight of the order of St. George, or of the garter, first instituted *by Edward III., A. D. 1344(*i*), ranks [*486] next after the nobility. Next (but not till after certain Knights. official dignitaries, follows a knight banneret; who indeed by statutes 5 Ric. 2, st. 2, c. 4, and 14 Ric. 2, c. 11, is ranked next to barons; and his precedence before the younger sons of viscounts was confirmed to him by order of King James I., in the tenth year of his reign(*k*). But that he may be entitled to this rank, he must have been created by the sovereign in person, in the field, under the royal banners, in time of open war(*l*). Else he ranks after baronets; who are the next in order; the baronetage being a dignity of inheritance, created by letters patent, and usually descendible to the issue male. It was first instituted by king James I., A. D. 1611; in order to raise a competent sum for the reduction of the province of Ulster in Ireland; for which reason every baronet has the arms of Ulster superadded to his family coat. Next follow knights of the bath; an order instituted by king Henry IV. and revived by king George I. They are so called from the ceremony of bathing the night before their creation. The last of these inferior nobility are knights bachelors; the most ancient, though the lowest order of knighthood amongst us; for we have an instance(*m*) of king Alfred's conferring this order on his son Athelstan. The custom of the ancient Germans was to give their young men a shield and a lance in the great council: this was equivalent to the *toga virilis* of the Romans: before this they were not permitted to bear arms, but were accounted as part of the father's household; after it, as part of the community(*n*). Hence some derive the usage of knighting, which has prevailed all over the western world, since its reduction by colonies from those northern heroes. Knights are called in Latin, *equites aurati*; *aurati* from the gilt spurs they wore; and *equites* because they served on horseback. They are also *called in our law [*487] *militēs*(*o*), because they formed a part of the royal army, in virtue of their feudal tenures; one condition of which was, that every one who held a knight's fee immediately under the crown (which in Edward II.'s time(*p*))

(*d*) Moor, 678.

(*e*) *Earl of Shrewsbury's Case*, 12 Rep. 107; *Knowles's Case*, 12 Mod. 58.

(*f*) See *per* Lord St. Leonards, 8 H. L. Cas. 100.

(*g*) The dignity, next beneath the baronage, was anciently that of *valvasor*: he was a feudatory, who did not hold immediately of the crown. See Serj. Manning's *Serviens ad Legem*, 185, 219. The title is now quite out of use.

(*h*) 2 Inst. 29.

(*i*) Seld. Tit. Hon. b. 2, c. 5, s. 41.

(*k*) *Ib.* b. 2, c. 11, s. 8.

(*l*) 4 Inst. 6.

(*m*) Will. Malmsh. lib. 2.

(*n*) Tac. de Morib. Germ. 13.

(*o*) As to the meaning of this word, see Forsyth, Hist. Tr. Jury App. 1.

(*p*) Stat. De Milit. 1 Edw. 2.

amounted to 20*l. per annum*) was obliged to be knighted, and attend the king in his wars, or was fined for non-compliance. The exertion of this prerogative as an expedient to raise money in the reign of Charles I. gave great offence; though warranted by law, and the example of queen Elizabeth; but it was by the statute 16 Car. 1, c. 16, abolished; and this kind of knighthood has, since that time, fallen somewhat into disregard, though it is still conferred as a mark of royal favour upon persons who have benefited the public, or who have distinguished themselves by proficiency in science, literature, or art.

The foregoing, sir Edward Coke says(*q*), are all the names of dignity in this kingdom, esquires and gentlemen being only names of worship. But before these last the heralds rank, serjeants at law, and doctors in the .
 Serjeants at law,
 and doctors. three learned professions(*r*).

(*q*) 2 Inst. 667.

(*r*) The rules of precedence in England may be reduced to the following table: in which those marked * are entitled to the rank here allotted them, by statute 31 Hen. 8, c. 10,—marked †, by statute 1 Will. & M. c. 21,—marked ‡, by letters patent, 9, 10, and 14 Jac.

1, which see in Seld. Tit. of Hon. II 5, 46. and II 11, 8,—marked ‡, by ancient usage and established custom.

As to precedence, see Camden's Britan. tit. *Ordines*; Milles's Catalogue of Honour, edit. 1610; Chamberlayne's Present State of England, part 3, chap. 8; Dod's Peerage.

TABLE OF PRECEDENCE.

The Prince of Wales.		* ———— Durham.
* The sovereign's younger sons and grandsons.		* Bishop of Winchester.
* ———— brothers.		* Bishops.
* ———— nephews.		* Secretary of state, if a baron.
* ———— uncles.		* Barons.
* Archbishop of Canterbury(1).		† Speaker of the house of commons.
* Lord Chancellor.		Treasurer of the household.
* Archbishop of York.		Comptroller of the household.
——— Armagh.		Master of the horse.
——— Dublin.		Vice-chamberlain of the household.
* Lord president of the council.	} if baron. above all peers of their own degree.	Secretary of state, if not a baron.
* Lord privy seal.		† Viscounts' eldest sons.
* Lord great chamberlain.		† Earls' younger sons.
But see private stat.		† Barons' eldest sons.
1 Geo. 1, c. 8.		Knights of the garter.
* Earl marshal.		Privy councillors.
* Lord steward of the household.		Chancellor of the exchequer.
* Lord chamberlain of the household.		Chancellor of the duchy of Lancaster.
* Dukes.		Chief justice of the queen's bench.
* Marquises.		Master of the rolls.
† Dukes' eldest sons.		Chief justice of the common pleas.
* Earls.		Chief baron of the exchequer(2).
† Marquises' eldest sons.		Lords justices,
† Dukes' younger sons.		Vice-chancellors.
* Viscounts.		Judges of the queen's bench.
† Earls' eldest sons.		——— common pleas.
† Marquises' younger sons.		Barons of the exchequer.
* Bishop of London.		Judge of the court of probate(3).
		Commissioners in bankruptcy.
		Knights bannerets royal.
		Viscounts' younger sons.

(1) It is said, that before the conquest, by a constitution of pope Gregory, the two archbishops were equal in dignity, and in the number of bishops subject to their authority; and that William the Conqueror thought it prudent to give precedence and superiority to the archbishop of Canterbury; but Thomas, archbishop of York, was unwilling to acknowledge his inferiority to Lanfranc, archbishop of Canterbury, and appealed to the pope, who referred the matter to the king and barons; and in a council held at Windsor Castle, they decided in favour of the archbishop of Canterbury; see Godw. Comm. de Præsul. 665. But the archbishop of York long afterwards refused to acquiesce in this decision, for bishop Godwin relates a curious and ludicrous struggle which took place in the reign of Henry II., between Roger, archbishop of York, and Richard, archbishop of Canterbury, for the chair on the right hand of the pope's legate. (*Ib.* 79.) The distinction in rank between these two prelates is thus indicated; that the archbishop of Canterbury is primate of all England, and the archbishop of York is primate of England.

(2) See stat. 5 Vict. c. 5.

(3) See stats. 20 & 21 Vict. c. 77, s. 8; 22 & 23 Vict. c. 61, s. 3.

*Esquires and gentlemen are confounded together by sir Edward [*488] Coke, who observes(s), that every esquire is a *gentleman, and [*489] a gentleman is defined to be one *qui arma gerit*, who bears Esquires and gentlemen. coat armour, the grant of which was thought to add gentility to a man's family. It is indeed a matter somewhat unsettled, what constitutes the distinction, or who is a real esquire; for no estate, however large, *per se* confers this rank upon its owner. Camden, who was himself a herald, reckons up four sorts of esquires(t): 1. The eldest sons of knights, and their eldest sons in perpetual succession(u). 2. The eldest sons of younger sons of peers, and their eldest sons in like perpetual succession: both which species of esquires sir Henry Spelman entitles *armigeri natalitii*(x). 3. Esquires created by letters patent from the crown, or other investiture, and their eldest sons. 4. Esquires by virtue of their offices: as justices of the peace, and others who bear any office of trust under the crown. To these may be added the esquires of knights of the bath, each of whom constitutes three at his installation: and all foreign peers; *for not only these, but the eldest sons of peers of Great Britain, though frequently titular lords, are only esquires in the law, [*490] and are so described in legal proceedings(y). As for gentlemen, says sir Thomas Smith(z), they be made good cheap in this kingdom: for whosoever studieth the laws of the realm, who studieth in the universities, who professeth the liberal sciences, and (to be short) who can live idly, and without manual labour, and will bear the port, charge, and countenance of a gentleman, he shall be called master, and shall be taken for a gentleman.

A yeoman is one having free land of forty shillings by the year; who was anciently thereby qualified to serve on juries, vote for knights of the shire, and do any other act, for which the law requires one who is *probus et legalis homo*(a).

Yeomen.

The rest of the commonalty are technically designated labourers.

Labourers.

(s) 2 Inst. 668.

(t) 2 Inst. 668.

(u) 2 Inst. 667.

(x) Gloss. 48.

(y) 8 Inst. 30; 2 Inst. 667.

(z) Commonw. of England, b. 1, c. 20.

(a) 2 Inst. 668.

Barons' younger sons.
Baronets.
Knights bannerets.

Various Orders.

† Knights of the bath.
† Knights bachelors.
† Baronets' eldest sons.
† Knights' eldest sons.
† Baronets' younger sons.
† Knights' younger sons.

‡ Serjeants at law(4).
‡ Masters in Lunacy(5).
‡ Doctors of Divinity.
——— Law.
——— Medicine.

† Esquires.
† Gentlemen.
† Yeomen.
† Tradesmen.
† Artificers.
† Labourers.

(4) As to the precedence of serjeants at law, see 7 Car. & P. 571, note (a).

(5) See stat. 8 & 9 Vict. c. 100.

[*491]

*CHAPTER XIII.

THE MILITARY AND MARITIME STATES.

THE military state will here be taken to include all such persons as are peculiarly appointed for the safeguard and defence of the realm, by service upon land.

Military state.

Our laws and constitution did not originally know any such state as that of a perpetual standing soldier, bred up to no other profession than that of war(a); and it was not till the reign of Henry VII. that the kings of England had so much as a guard about their persons.(123)

In the time of our Saxon ancestors, the military force of this kingdom was in the hands of the dukes or heretochs, who were constituted through every province and county in the kingdom; and were taken out of the principal nobility. Their duty was to lead and regulate the English armies, with a very unlimited power. And because of this great power they were elected by the people in their full assembly, or folkmote, following still that old fundamental maxim of the Saxon con-

(a) Regular troops, however, of some sort must have been maintained in those fortified places, where some show of defence has been always kept up; as the Tower of London, Portsmouth, the castle of Dover, the fort of Tilbury, and, before the union of the Crowns, Berwick and some other places on

the Scottish border. Little is now known as to the nature of these garrisons; except that they were chiefly accustomed to the use of artillery, and that their whole number was insignificant, and probably at no time equal to resist any serious attack.

(123) In a country like ours, where the right to keep and bear arms is unquestioned, and where the volunteer forces are so efficient, a large standing army is entirely unnecessary. The settled principles of the nation and the will of the people upon this subject have been incorporated into the fundamental law.

"A well-regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed." U. S. Const. Amendments, art. 2. "No soldier shall, in time of peace, be quartered in any house without the consent of the owner; nor in time of war, but in a manner to be prescribed by law. U. S. Const. Amendments, art. 3. "The congress shall have power * * * to raise and support armies; but no appropriation of money to that use shall be for a longer term than two years; to provide and maintain a navy, to make rules for the government and regulation of the land and naval forces; to provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions; to provide for organizing, arming and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by congress." U. S. Const., art. 1, § 8. "No state shall, without the consent of congress, * * * keep troops or ships of war, in time of peace * * * or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay." U. S. Const., art. 1, § 10. "The president shall be commander-in-chief of the army and navy of the United States, and of the militia of the several states, when called into the actual service of the United States." U. S. Const., art. 2, § 2. The constitutions of the several states have many of the foregoing provisions inserted in them. And besides this, congress has enacted a large body of laws relating to the army and the navy. So in each of the states there are laws relating to the military service. And to them resort must be had when it is important to ascertain the provisions of any of these statutes.

stitution, that where any officer was entrusted with such power, as if abused might tend to the oppression of the people, that power *was delegated [*492] to him by a vote of the people themselves(b). So, too, the ancient Germans, the ancestors of our Saxon forefathers, had their dukes as well as kings, with an independent power over the military, as the kings had over the civil state. The dukes were elective, the kings hereditary: or in the words of Tacitus(c) "*reges ex nobilitate, duces ex virtute sumuntur*;" in constituting their kings, the family or blood-royal was regarded, in choosing their dukes or leaders, warlike merit: just as Cæsar relates of their ancestors in his time, that whenever they went to war, by way either of attack or defence, they elected leaders to command them(d). The large share of power, thus conferred by the people, though intended to preserve the liberty of the subject, was perhaps unreasonably detrimental to the prerogative of the crown; and we find a very ill use made of it by Eadric, duke of Mercia, in the reign of king Edmund Iron-side, who, by his office of duke or heretoch, was entitled to a large command in the king's army, and by his repeated treacheries at last transferred the crown to Canute the Dane.

King Alfred is by some thought first to have settled a national militia in this kingdom, or, at all events, by his prudent discipline to have made all the subjects of his dominion soldiers; but we are unfortunately left in the dark as to the particulars of this his so celebrated regulation; though, from what was last observed, the dukes seem to have been left in possession of too large and independent a power; which enabled duke Harold, on the death of Edward the Confessor, though a stranger to the royal blood, to mount, for a short space, the throne of this kingdom, in prejudice of Edgar Atheling, the rightful heir.

Upon the Norman conquest, the feudal law was introduced here in all its rigour, the whole of which was built *up on a military plan. I shall [*493] not now enter into the particulars of that constitution, The military part of the feudal system. which belongs more properly to the next volume of our Commentaries; but shall only observe, that in consequence thereof all the lands in the kingdom were divided into what were called knight's fees, in number above sixty thousand; and for every knight's fee a knight or soldier, *miles*, was bound to attend the king in his wars, for forty days in a year; in which space of time the campaign was generally finished, and a kingdom either conquered or victorious. By this means the king had, without any expense, an army of sixty thousand men always ready at his command. And accordingly we find a special clause(e) in the charter of William the Conqueror, which in the king's name commands and firmly enjoins the personal attendance of all knights and others; "*quod habeant et teneant se semper in armis et equis, ut decet et oportet: et quod semper sint prompti et parati ad servitium suum integrum nobis explendum et peragendum, cum opus adfuerit, secundum quod debent de feodis et tenementis suis de jure nobis facere.*" This personal service was, in the reign of Henry II., first allowed to be commuted into a pecuniary payment, and military tenures were abolished by 12 Car. 2, c. 24.

In the mean time we are not to imagine that the kingdom was left wholly

(b) See Bede, Eccl. Hist. l. 5, c. 10.

(c) De Morib. Germ. 7.

(d) "*Quum bellum civitas aut illatum de-*

fendit aut infert, magistratus qui ei bello praesint delinquantur." De Bell. Gall. l. 6, c. 22.

(e) Sect. 8; see Co. Litt. 75, 76; Anc. L. and Inst. Eng. p. 212.

without defence in case of domestic insurrections, or the prospect of foreign invasion. Besides those who by their military tenures were bound to perform forty days' service in the field, first the assize of arms, enacted ^{On the statutes of armour.} (f) 27 Hen. 2, and afterwards the statute of Winchester (g), under Edward I., obliged every man, according to his estate and degree, to provide a determinate quantity of such arms as were then in use, in order to keep the peace; and constables were appointed in all hundreds by the latter statute to [*494] see that such arms were provided. These weapons were *changed by the statute 4 & 5 Ph. & M. c. 2, into others of more modern service; but both this and the former provisions were repealed in the reign of James I. (h). While they continued in force, however, it was usual from time to time for our princes to issue commissions of array, and send into every county officers in whom they could confide to muster an array (or set in military order) the inhabitants of every district; and the form of the commission of array was settled in parliament in the 5 Hen. 4, so as to prevent the insertion therein of any new penal clauses (i). But it was also provided (k) that no man should be compelled to go out of the kingdom at any rate, nor out of his shire but in case of urgent necessity; nor should provide soldiers unless by consent of parliament. About the reign of king Henry VIII., or his children, lieutenants began to be introduced (l), as standing representatives of the crown, to keep the counties in military order; for we find them mentioned as known officers in the statute 4 & 5 Ph. & M. c. 3, though they do not seem to have been then universal, for Camden [*495] speaks of them (m) in the time of queen Elizabeth, as *magistrates constituted in "troublesome times" especially; but the introduction of these commissions of lieutenancy, which contained in substance the same powers as the old commissions of array, caused the latter to fall into disuse.

In this state things continued, till the repeal of the statutes of armour in the reign of king James I. (n): after which, when king Charles I. had, during his northern expeditions, issued commissions of lieutenancy, and ^{The militia under Charles I.} exerted some military powers, which, having been long exercised, were thought to belong to the crown, it became a question in the long parliament, how far the power of the militia did inherently reside in the king; being now unsupported by any statute, and founded only upon immemorial usage. This question, agitated with great heat and resentment on both sides, became at length the immediate cause of the fatal rupture between the king and his parliament: the two houses not only denying this prerogative of the crown, the legality of which perhaps might be somewhat doubtful (o); but also seizing into

(f) Hoved. A. D. 1181.

(g) 18 Edw. 1, c. 6.

(h) Stat. 1 Jac. 1, c. 25; 21 Jac. 1, c. 28.

(i) Rushworth, part 8, pp. 662, 667; see 8 Rym. 374, &c.

(k) Stat. 1 Edw. 3, stat. 2, cc. 5, 7; 25 Edw. 3, stat. 5, c. 8. The former of these enactments was intended to put a stop to the proclamations, which, especially in the reigns of Edw. I. and Edw. II. (Rym. Fœd. passim), had been issued to the sheriffs, directing them to notify to all persons of sufficient estate that they must hold themselves ready to attend the king whenever he should require their service. These arbitrary conscriptions being thus checked by the parliament, Edw. III. had recourse to another mode of levying sol-

diers, without his own cost, by calling on every county and principal town to furnish a specified number of troops. Against this, the parliament provided a remedy in the latter of the above-cited statutes, which enacts, "that no man shall be constrained to find men at arms, hoblers, nor archers, other than those who hold by such service, if it be not by common consent and grant in parliament." Both these statutes were recited and confirmed by 4 Hen. 4, c. 13. See Hall. Const. Hist. vol. ii. 11th ed. p. 130.

(l) 15 Rym. 75.

(m) Brit. 159, edit. 1610.

(n) 1 Jac. 1, c. 25, s. 7; 21 Jac. 1, c. 28, s. 11.

(o) It was clearly contrary to the statutes of Edw. 3 and Hen. 4, though it seemed to be,

their own hands the entire power of the militia, of the legality of which step there could never be any doubt at all.

Soon after the restoration of king Charles II., when the military tenures were abolished, it was thought proper to ascertain the power of the militia, to recognize the sole right of the crown to govern and command them, and to put the whole into a more regular method of military subordination(*p*); and the order in which the *militia now stands by law is principally built upon the statutes which were then enacted. [*496] It is true that each of these statutes has, for the most part, been repealed; but many of their provisions have, with the addition of some new regulations, been re-enacted.

The present militia system is mainly regulated by 42 Geo. 3, c. 90, as altered and amended by many subsequent acts, the last of which is 32 & 33 Vict. c. 13.

The present militia laws. The general scheme of the legislature has been to discipline a certain number of the inhabitants of every county, chosen by lot for five years(*q*); and officered by the lord lieutenant, the deputy lieutenants, and other principal landholders, under a commission from the crown. They are not compellable to march out of their counties, unless in case of invasion or actual rebellion within the realm (or any of its dominions or territories(*r*)), nor in any case compellable to march out of the kingdom. They are to be exercised at stated times; and their discipline in general is liberal and easy; though, when called out into actual service, they are subject to the rigour of martial law, as necessary to keep them in order. This is the constitutional security which our laws provided for the public peace, and for protecting the realm against foreign or domestic violence.(124)

in some degree, sanctioned by the 4 & 5 Ph. & M. c. 3; which, without repealing or advertising to those statutes, seems to recognize the right of the crown to levy men for service in war, by imposing penalties on all who absent themselves from the musters held for that purpose. See Hall. Const. Hist. 11th ed. vol. ii. pp. 128—135.

(*p*) 18 Car. 2, st. 1, c. 6; 14 Car. 2, c. 3; 15 Car. 2, c. 4.

(*q*) The militia is now raised by voluntary enlistment, and the power of enrolling by ballot has not been exercised for many years, having been suspended from time to time by various acts, from 10 Geo. 4, c. 10, to 31 & 32 Vict. c. 111.

(*r*) 16 Geo. 3, c. 3.

(124) In pursuance of the constitution of the United States, congress has provided, "That whenever the United States shall be invaded, or be in imminent danger of invasion from any foreign nation or Indian tribe, it shall be lawful for the president of the United States to call forth such number of the militia of the state, or states, most convenient to the place of danger, or scene of action, as he may judge necessary to repel such invasion, and to issue his orders for that purpose, to such officers of the militia as he shall think proper. And in case of an insurrection in any state, against the government thereof, it shall be lawful for the president of the United States, on application of the legislature of such state, or of the executive (when the legislature cannot be convened), to call forth such number of the militia of any other state or states as may be applied for, as he may judge sufficient to repress such insurrection." Act of Congress, Feb. 28, 1795; 1 Stat. at Large, 421, § 1.

"Whenever, by reason of unlawful obstructions, combinations or assemblages of persons, or rebellion against the authority of the United States, it shall become impracticable, in the judgment of the president of the United States, to enforce, by the ordinary course of judicial proceedings, the laws of the United States within any state or territory of the United States, it shall be lawful for the president of the United States to call forth the militia of any or all the states of the Union, and to employ such parts of the land and naval forces of the United States as he may deem necessary to enforce the faithful execution of the laws of the United States, or to suppress such rebellion, in whatever state or territory thereof

In addition to the militia, large bodies of troops were organized during the French war in the reign of George III., consisting principally of voluntary infantry, called volunteers, and partly of voluntary cavalry, called Yeomanry. yeomanry(s). These troops consisted entirely of persons serving voluntarily, and as they were not called on to leave their homes, or to serve except for short periods for the purpose of being drilled near their places of residence, *the service was not found burdensome, and the country had [*497] the advantage of having ready in case of invasion, a considerable number of men trained to arms. Soon after the conclusion of peace, most if not all of these volunteers were disbanded, but various troops of yeomanry are still kept up. They are under the provisions of stat. 44 Geo. 3, c. 54, as amended by subsequent acts.

For many years there were, besides the yeomanry, scarcely any voluntary troops in England, but towards the end of the year 1859 large numbers of men enrolled themselves in volunteer rifle corps, and some in volunteer Volunteers. corps of artillery, engineers, and cavalry. These troops, having increased up to the present time, now number about two hundred thousand men. The volunteers are regulated by the stat. 26 & 27 Vict. c. 65. They are not obliged to leave the kingdom; they may quit their corps, when not on active military service, on giving fourteen days' notice, and are only liable to be called out in case of actual or apprehended invasion. When on active military

(e) McCulloch's Brit. Emp. 3rd ed. ii. 456.

the laws of the United States may be forcibly opposed, or the execution thereof forcibly obstructed." Act of Congress, July 29, 1861; 12 Stat. at Large, 281, §§ 1, 7.

Under these statutes the president of the United States is the exclusive and the final judge as to the necessity of calling out the militia. *Martin v. Mott*, 12 Wheat. (U. S.) 19, 29.

The government of a state, by its legislature, has the power to protect itself from destruction by armed rebellion, by declaring martial law; and the legislature is the sole judge of the existence of the necessary exigency. *Luther v. Borden*, 7 How. (U. S.) 1, 45.

The power to suspend the writ of *habeas corpus* during the rebellion was conferred by act of congress of March 8, 1861. 12 Stat. at Large, 755. Although the writ of *habeas corpus* may be suspended, and martial law proclaimed, it does not follow that all persons may be tried by a military commission, in all places and under all circumstances. Military commissions organized during the late civil war, in a state not invaded and not engaged in rebellion, in which the federal courts were open, and in the proper and unobstructed exercise of their judicial functions, had no jurisdiction to try, convict, or sentence for any criminal offense, a citizen who was neither a resident of a rebellious state, nor a prisoner of war, nor a person in the military or naval service; and congress could not invest them with any such power. *Ex parte Milligan*, 4 Wall. (U. S.) 2, 121-127.

The guaranty of a trial by jury, contained in the constitution, was intended for a state of war as well as a state of peace; and is equally binding upon rulers and people, at all times and under all circumstances. *Ex parte Milligan*, 4 Wall. (U. S.) 2, 121-127. And in a state in which the federal authority had been unopposed during the rebellion, and the federal courts were open for the trial of offenses and the redress of grievances, it was held, that the usages of war could not, under the constitution, afford any sanction for the trial there of a citizen in civil life, who was not connected with the military or the naval service, by a military tribunal, for any offense whatever. *Ex parte Milligan*, 4 Wall. (U. S.) 2, 121-127. And a citizen who had been thus tried, convicted, and sentenced to death, was held to be entitled to his discharge from any such sentence. *Ex parte Milligan*, 4 Wall. (U. S.) 2, 121-127. See also *Ex parte Yerger*, 8 Wall. (U. S.) 85. Cases arising in the land or the naval forces, or in the militia, in time of war or public danger, are excepted from the necessity of presentment and indictment by a grand jury; and the right to a trial by jury, in such cases, is, during such service, surrendered. *Ex parte Yerger*, 8 Wall. (U. S.) 85.

service (and then only) they fall under the provisions of the mutiny act, and are liable to military discipline.

To return to our former system, when the nation was engaged in war, more veteran troops and more regular discipline were esteemed to be necessary, than could be expected from a mere militia. And therefore at such times more rigorous methods were put in use for the raising of armies, and the due regulation and discipline of the soldiery: but such methods were looked upon only as temporary excrescences bred out of the distemper of the state, and not as any part of the permanent and perpetual laws of the kingdom. We find it indeed laid down(*t*), that if a lieutenant, or other having commission of martial authority, should in time of peace hang or otherwise execute any man by colour of martial law, this is murder, for it is against *magna carta*(*u*). The petition of right(*x*) *moreover enacts, that no soldier [*498] shall be quartered on the subject without his own consent, and that no commission shall issue to proceed within this land according to martial law. And whereas, after the Restoration, king Charles II. kept up about five thousand regular troops, by his own authority, for guards and garrisons; which king James II. by degrees increased to no less than thirty thousand, all paid from his own civil list; it was made one of the articles of the bill of rights(*y*), that the raising or keeping a standing army within the kingdom in time of peace, unless with the consent of parliament, is against law.

But as the fashion of keeping standing armies (which was introduced by Charles VII. in France, A.D. 1445(*z*)) has long prevailed in Europe, it has also, for many years past been annually judged necessary by our legislature, for the safety of the kingdom, the defence of the possessions of the crown of Great Britain, and the preservation of the balance of power, to maintain even in time of peace a standing body of troops, under the command of the crown. An act of parliament is therefore annually passed, for the purpose of allowing the maintenance of a body of troops, whose number is specified therein, and who are *ipso facto* disbanded at the expiration of every year, unless continued by parliament. This annual statute, called the Mutiny Act(*a*), has been now passed for many years, with very slight alterations, except as regards the number of the troops to be maintained. The preamble of this statute, after reciting that the raising or keeping a standing army in time of peace without the consent of parliament is illegal(*b*), and that it is adjudged necessary that a body of forces should be continued for the safety of the kingdom, and that no man can be forejudged of life or limb, or subjected, in time of peace, to any kind of *punishment within this realm by martial law(*c*), or in any other manner than by judgment of [*499] his peers, according to the laws of the realm, and that it is requisite for the sake of discipline, that the army should be under a stricter régime, proceeds to enact that the sovereign may make articles of war for the government of the army, though such articles cannot subject any person to punishment extending to life or limb, or penal servitude, except so far as the act itself allows. It then enumerates the persons subject to the act, viz., all the commissioned and non-

(*t*) 3 Inst. 52.

(*u*) John, c. 43; Hen. 3, c. 29.

(*x*) 3 Car. 1, c. 1; see also stat. 31 Car. 2, c. 1.

(*y*) Stat. 1 Will. & M. st. 2, c. 2.

(*z*) Robertson, Charles V. i. 94.

(*a*) The last Mutiny Act is stat. 32 & 33 Vict.

c. 4.

(*b*) Bill of Rights, 1 Will. & M. st. 2, c. 2.

(*c*) Petition of Right, 3 Car. 1, c. 1.

commissioned officers and privates in the army, together with various civilians, while serving in military establishments. The principal offences punishable under this act with death or penal servitude are mutiny, communication with the enemy in war time, delivering up any fort, garrison, &c., desertion, sleeping on duty, striking a superior officer, and embezzlement of stores. The act provides that all persons subjected to it are liable to be tried by the civil tribunals for ordinary crimes, and makes provision for the billeting of troops.

Although soldiers are placed under stricter discipline and severer restrictions than most other subjects of the realm, yet they enjoy some peculiar advantages, among which may be mentioned pensions allowed for the relief of soldiers who are sick, hurt, and maimed: not forgetting the royal hospital at Chelsea, for such as are worn out in their duty.(125) No private soldier or non-commissioned officer is liable to be taken out of the service by arrest for any debt under 30*l.*, or for not supporting any relative or child, whom a person under other circumstances would be bound by law to support, or for not paying any sum he may be ordered to pay under an affiliation order(*d*). Soldiers in actual military service may make nuncupative wills, and dispose of their goods, wages, and [*500] other personal chattels, without those forms and solemnities, which *the law requires in other cases(*e*). Our law does not indeed extend this privilege so far as did the Roman law; which carried it to an extreme bordering on the ridiculous. For if a soldier, at the point of death, wrote anything in bloody letters on his shield, or in the dust of the field with the sword, it was a very good military testament(*f*). And thus much for the military state, as acknowledged by the laws of England(*g*).

The maritime is nearly related to the military state. The royal navy of England has ever been its greatest defence and ornament; it is its ancient and natural strength; the floating bulwark of the island; an arm, more-
Maritime state. over, from which, however strong and powerful, no danger can ever be apprehended to liberty: and accordingly it has been assiduously cultivated, even from the earliest ages. To so much perfection had our naval reputation attained in the twelfth century, that the code of maritime laws, which are called the laws of Oleron, and are received by European nations as the ground and substruction of their marine constitutions, was confessedly compiled by our king Richard I., at the isle of Oleron, on the coast of France, then part of the possessions of the crown of England(*h*). And yet, so vastly inferior were our ancestors in this point to the present age, that even in the maritime reign

(*d*) 32 & 38 Vict. c. 4, s. 40.

(*e*) Stat. 29 Car. 2, c. 3, ss. 19, 22; 5 Will. & M. c. 21, s. 4; 7 Will. 4 & 1 Vict. c. 26, s. 11.

(*f*) *Si milites quid in clypeo literis sanguine suo rutilantibus adnotaverint, aut in pulvere inscripserint gladio suo ipso tempore quo, in prælio, vitam sortem derelinquunt, hujusmodi voluntatem stabilem esse oportet.* Cod. 6, 21, 15.

(*g*) To increase the number of troops in time

of emergency, two bodies of reserved troops have been formed; one formed under stat. 30 & 31 Vict. c. 110, consisting of retired soldiers, of out-pensioners of Chelsea Hospital, and of out-pensioners at Greenwich Hospital who have served in the Royal Marines; and another constituted by 30 & 31 Vict. c. 111, consisting of such of the militia as may be willing to serve in the army.

(*h*) 4 Inst. 144.

(125) The United States government has made liberal provision for the payment of pensions to those who have been disabled in the course of military service in the land or naval forces; and for the widows and infant children of such as have been killed, or have died during such service.

of queen Elizabeth, sir Edward *Coke(i) thinks it matter of boast, that the royal navy of England then consisted of three-and-thirty [*501] ships.

Many laws have been made for the supply of the royal navy with seamen; for their regulation when on board; and to confer privileges and rewards on them during and after their service.

And first, for their supply. The power of impressing sea-faring men for the sea service by commission from the crown has been a matter of some dispute, and submitted to with great reluctance; but it has clearly and <sup>Modes of sup-
plying the navy.</sup> learnedly been shown by sir Michael Foster(k), that the practice of impressing and granting powers to the admiralty for that purpose is of very ancient date, and has been uniformly continued by a regular series of precedents to the present time; whence he concludes it to be part of the common law(l). The difficulty once felt upon this subject arose doubtless partly from the fact that no statute has expressly declared this power to be in the crown, though many of them very strongly imply it(m). And, by other statutes too numerous to be mentioned, especial protections have been allowed to seamen in particular circumstances to prevent their being liable to impressment.

Irrespective of this method of impressing (which is only defensible on the ground of public necessity, to which all private considerations must give way), the navy is supplied by voluntary enlistment, and, by 22 & 23 Vict. c. 40, a useful force has been constituted called the royal naval reserve. This force is composed of volunteers from *the merchant service, who are subject to twenty-eight days' training in the year, and are liable in times of [*502] necessity to serve for three years on being called on to do so by royal proclamation, which period may be extended to two years more. The proclamation calling them forth must be communicated to parliament if sitting, and declared in council if parliament be not sitting. Further, by 26 & 27 Vict. c. 69, masters and mates in the merchant service may be accepted as officers in the naval reserve.

The method of ordering seamen in the royal fleet, and keeping up a regular discipline there, is directed by certain express rules and articles, first enacted <sup>Articles of
the navy.</sup> by the authority of parliament soon after the Restoration(n): but since new modelled and altered by various statutes, the last of which at present governing our navy is the 29 & 30 Vict. c. 109. The provisions of this statute are in many respects similar to those of the Mutiny Act, though a distinction must here be noticed—that whereas the acts for the government of the army have been annual, those regulating the navy have not been so limited in duration. Whence this distinction arose, it might be hard to assign a reason: unless it proceeded from the establishment of the navy being perpetual, which rendered a permanent law for its regulation expedient; and the temporary duration of the army, which subsisted only from year to

(i) 4 Inst. 50.

(k) Fost. Rep. 154.

(l) See also Comb. 245; Barr. Stat. 3rd ed. 300; Broom's Const. Law, pp. 116—119.

(m) The stat. 2 Rich. 2, c. 4, speaks of marines being arrested and retained for the king's service, as of a thing well known and practised without dispute: and it provides a

remedy against their running away. By 2 & 3 Ph. & M. c. 16, if any waterman, who used the river Thames, should hide himself during the execution of any commission of pressing for the king's service, he was liable to heavy penalties. See also 5 Eliz. c. 5.

(n) 13 Car. 1, stat. 1, c. 9.

year. But whatever was apprehended at the first enacting of a mutiny act, the regular renewal of our standing force at the entrance of every year has made this distinction idle. For, if from experience past we may judge of future events, the army is now lastingly engrafted into the British constitution; subject, however, to this condition, that any branch of the legislature may annually put an end to its legal existence, by refusing to concur in its continuance.

[*503] The privileges conferred on sailors are nearly the same *as those conferred on soldiers; with regard to relief when maimed, wounded, or superannuated, either by pensions, or by admission into the royal hospital at Greenwich(*o*); and with regard to the power of making nuncupative testaments(*p*). Moreover no seaman under the rank of a commissioned officer can be arrested for a debt unless it was contracted before he entered the naval service(*q*).

Besides soldiers and sailors, there is in the pay of the crown a body of forces named the royal marines, who are principally intended for service on board ship, though they do duty likewise on land. These troops when on board vessels of the royal navy are, like sailors, under the provisions of the Naval Discipline Act; but when doing duty on land, in merchant vessels, or in any situation in which they do not come within the provisions of that act, they are regulated by a statute similar to the mutiny act, which is passed annually, and entitled "An act for the regulation of her Majesty's royal marine forces while on shore"(*r*). This act gives to marines the same protection from arrest that soldiers enjoy(*s*).

We have seen that, by various enactments, persons belonging to the army, navy, and royal marines are placed under a stricter discipline and more stringent regulations than other subjects of the crown, and the military law which governs them is often, though incorrectly, spoken of as martial law. This term, however, is sometimes used in another sense, as indicating an abnegation of all law save the will of the commanding officer in war *time(*t*).

[*504] It is in reference to martial law taken in this latter sense, and supposed to be built upon no settled principles, but entirely arbitrary in its decisions, that sir Matthew Hale(*u*) observed, "in truth and reality it is not a law, but something indulged rather than allowed as a law"(*x*). He goes on, also, to say, that its only excuse is the necessity of discipline in the army(*y*), and that therefore it was only to extend to members of our own or of the enemy's army, and was never to be exercised in time of peace when the courts were open(*z*). It would

(*o*) The in-pensioners at Greenwich Hospital are now much reduced in number, owing to a power given to substitute out-pensions as a preferable mode of relief. 28 & 29 Vict. c. 89.

(*p*) To prevent frauds on sailors it is enacted that no will made by any seaman or marine, under the rank of a commissioned officer, shall be effectual to pass any wages, prize money, bounty, or other money payable by the admiralty, or any effects in their charge, unless certain formalities are complied with. 28 & 29 Vict. c. 78.

(*q*) 29 & 30 Vict. c. 109, s. 97.

(*r*) The last such act is the 32 & 33 Vict. c. 5.

(*s*) Sect. 56.

(*t*) The late Duke of Wellington is reported to have said in the House of Lords that martial law was neither more nor less than the will of the general in command, that in fact martial law meant no law at all. 115 Parl. Deb. 880.

(*u*) Hist. Com. Law, c. 2.

(*x*) See M'Arthur on Courts-Martial, 4th ed. vol. i. c. 3, p. 33.

(*y*) Sir M. Hale, it will be remembered, wrote this when standing armies in peacetime were illegal, and when annual mutiny acts were unknown.

(*z*) Smith, De Rep. Ang. l. 2, c. 4; Brodie, Brit. Emp. vol. 1, pp. 204, *et seq.*

scem, in spite of opinions to the contrary, that martial law, thus understood, cannot exist in England(a); if, however, its exercise here were ever lawful, necessity alone could justify it(b).

*CHAPTER XIV.

[*505]

MASTER AND SERVANT.

HAVING thus commented on the rights and duties of persons as standing in the public relations of magistrates and people, the method originally marked out now leads us to consider their rights and duties in private economical relations.

The four great relations in private life are, 1st, That of master and servant: which is founded in convenience, whereby a man is directed to call in the assistance of others, where his own skill and labour will not be sufficient to answer the cares incumbent upon him(a). 2ndly, That of husband and wife: which is founded in nature, but modified by civil society: the one directing man to continue and multiply his species, the other prescribing the manner in which that natural impulse must be confined and regulated. 3rdly, That of parent and child: which is consequent on marriage, being its principal end and design. It is by virtue of this relation that infants are protected, maintained, and educated; though since the parents, on whom such care is primarily incumbent, may be snatched away by death before they have completed their duty, the law has provided another relation, viz., that of guardian and ward; which is a kind of artificial parentage, in order to supply the deficiency, whenever it happens, of the natural. To the relation of guardian and ward allusion will occasionally be made in ensuing volumes, the three other relations mentioned shall here be treated of in order.

*In discussing the relation of master and servant, we shall consider, I., the several sorts of servants, and how this relation is created and destroyed; II., the incidents of service and the effect of this relation with regard to the parties themselves; and, III., its effects with regard to other persons. [*506]

I. As to the several sorts of servants; it has been formerly observed(b) that pure and proper slavery does not, nay cannot, subsist in England; that is, such whereby an absolute and unlimited power is given to the master over the life and fortune of the slave. And indeed it is repugnant to reason, and the principles of natural law, that such a state should subsist anywhere.(126) The three origins of the right of

(a) See *per* Lord Loughborough, *Grant v. Gould*, 2 H. Bla. 69, 99.

(b) See the charge of Cockburn, C. J., to the Grand Jury in *Reg. v. Nelson*, pp. 84, 85, A. D. 1867.

As to the kind of necessity which might avail to justify an act *prima facie* illegal, see Broom's Constitutional Law, p. 732.

(a) See Puff. Lib. 6, cap. 3, s. 4.

(b) *Ante*, p. 151.

(126) In the United States, where slavery so long existed, there has been a great change effected, and slavery, as an institution, has been entirely abolished.

"Neither slavery nor involuntary servitude, except as a punishment for crime whereof

slavery, assigned by Justinian(c), are all of them built upon false foundations(d) As, first, slavery is said to arise "*jure gentium*," from a state of captivity in war; whence slaves are called *mancipia, quasi manu capti*. The conqueror, say the civilians, had a right to the life of his captive, and, having spared that, has a right to deal with him as he pleases. But it is an untrue position, when taken generally, that by the law of nature or nations a man may kill his enemy; he has only a right to kill him in particular cases; in cases of absolute necessity, for self-defence; and it is plain this absolute necessity could not have subsisted, where a person was reduced to the condition of a slave, since the capturing victor did not actually kill him, but made him prisoner. War, indeed, gives no other right over a prisoner, than merely to disable him from doing us harm, by

(c) *Servi autem aut nascuntur, aut fiunt; participandum sese venundari passus est. nascuntur ex ancillis nostris: fiunt aut jure Inst. 1. 3. 4. gentium, id est, ex captivitate; aut jure civili, (d) Montesq. Sp. L. xv. 2. cum liber homo major æ annis ad pretium*

the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." U. S. Const. Amendment, art. 13, § 1. "Congress shall have power to enforce this article by appropriate legislation." *Ib.*, § 2.

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the law." U. S. Const. Amendment, art. 14, § 1. " * * * But neither the United States, nor any state, shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slaves; but all such debts, obligations and claims shall be held illegal and void." *Ib.*, § 4. "The congress shall have power to enforce, by appropriate legislation, the provisions of this article." *Ib.*, § 5.

"The right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any state, on account of race, color, or previous condition of servitude." U. S. Const. Amendment, art. 15, § 1. "The congress shall have power to enforce this article by appropriate legislation." *Ib.*, § 2.

It may be useful to give, in this connection, some of the acts of congress which affect the condition and rights of those who were formerly slaves, or those of other colored persons. By act of congress of April 9, 1866, 14 Stat. at Large, 27, § 1, it is provided: "That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without any regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall have the same right, in every state and territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding."

So by act of congress of May 31, 1870, 16 Stat. at Large, 140, § 1, it is provided: "That all citizens of the United States who are or shall be otherwise qualified by law to vote at any election by the people in any state, territory, district, county, city, parish, township, school district, municipality, or other territorial subdivision, shall be entitled and allowed to vote at all such elections, without distinction of race, color, or previous condition of servitude; any constitution, law, custom, usage, or regulation of any state or territory, or by or under its authority, to the contrary notwithstanding." The enforcement of these statutes is duly provided for by penalties, punishments, and the use of the United States officers, army and navy, if needed for that purpose.

confining his person; it does not give a right to kill, torture, abuse, plunder, or even enslave an enemy, when the war is over. Since, therefore, the right of making slaves by captivity *depends on a supposed right of slaughter, that foundation failing, the consequence drawn from it must fail likewise. But, secondly, it is said that slavery may begin "*jure civili*;" when one man sells himself to another. This, if only meant of contracts to serve or work for another, is very just: but when applied to strict slavery, in the sense of the laws of ancient Rome, is also incorrect. Every sale implies a price, a *quid pro quo*, an equivalent given to the seller in lieu of what he transfers to the buyer: but what equivalent can be given for life and liberty, both of which (in absolute slavery) are held to be in the master's disposal? The seller's property also, the very price he seems to receive, devolves *ipso facto* to his master the instant he becomes his slave. In this case, therefore, the buyer gives nothing, and the seller receives nothing; of what validity then can a sale be, which destroys the very principles upon which all sales are founded? Lastly, we are told, that besides these two ways by which slaves "*fiunt*," or are required, they may also be hereditary; "*servi nascuntur*;" the children of acquired slaves are *jure natura*, by a negative kind of birthright, slaves also. But this, being built on the two former rights, must fall together with them. If neither captivity, nor the sale of one's self, can by the law of nature and reason reduce the parent to slavery, much less can they reduce the offspring.

Upon these principles the law of England abhors, and will not endure the existence of, slavery within this nation; so that when an attempt was made to introduce it by statute 1 Edw. VI. c. 3, which ordained that all idle vagabonds should be marked on the breast with a hot iron, should be made slaves, and fed upon bread, water, or small drink, and refuse meat; should wear a ring of iron round their necks, arms, or legs; and should be compelled by beating, chaining, or otherwise, to perform the work assigned them, were it never so vile; the spirit of the nation could not brook this condition even in the most *abandoned rogues; and therefore this statute was two years afterwards repealed(e). And it is settled(f), that a slave, the instant he lands in England, becomes thus far a freeman; that our law will protect him in the enjoyment of his person and his property. [*508]

Yet, as there must always be different ranks in society, and as the poor must always have recourse to labour as a means of obtaining subsistence, the law recognizes a state of servitude founded on contract to be lawful. The duration of this contract must be regulated by the parties themselves, and however strictly the law may interpret, and however jealously it may look upon, a contract to serve for life, there is no reason for saying that it is necessarily illegal(g), at any rate, if it be entered into by one who is *sui juris* at the time(h).

1. The first sort of servants which we shall mention as acknowledged by the laws of England, are menial servants; so called from their being *intra mœnia*, or domestics; a definition which applies to gardeners, grooms, and others(i), if they reside within the curtilage or domain of their master, though not actually in his house. The contract between a menial ser-

(e) 3 & 4 Edw. 6, c. 16, ss. 1, 2.

(f) *Sommersett's Case*, 20 St. Tr. 1; Broom's Const. Law, 65.

(g) *Wallis v. Day*, 2 M. & W. 278; Note to *Sommersett's Case*, Broom's Const. Law, 115.

(h) See *Williams v. Brown*, 8 B. & P. 69.

(i) *Nowlan v. Ablett*, 2 Cr. M. & R. 54; also to a huntsman, though not residing within the curtilage. *Nicoll v. Greaves*, 17 C. B. N. S. 27.

vant and his master arises upon the hiring, and may be either expressed in terms, or implied by custom(j).(127) If the hiring be general without any

(j) *Metzner v. Bolton*, 9 Exch. 518.

(127) In the United States there is no such distinction as that stated in the text in relation to contracts for personal services. By our law such contracts are all regarded as standing upon an equality as to construction and as to the rights of the employer and employee. There are cases of bailments, and of professional services, which stand upon the principles applicable to those cases. But with regard to personal services proper, the law speaks but one language for all parties.

In relation to hiring, it is always a question of fact whether there was a hiring, and if so, for what length of time, and upon what terms; and the rights of the parties are then governed by the general rules of law applicable to all other contracts. The terms "master" and "servant" are frequently used in legal discussions, and they usually have a definite signification when used in reference to the rights and liabilities of the parties. And yet there are cases in which the question whether the employer was a "master," in such a sense as to render him liable for the negligence of the employed, has seriously perplexed the courts.

In ordinary cases, if services are rendered by one person for another, at his request, the law will imply a promise to pay a reasonable compensation for such services as are rendered, in the absence of any express agreement upon the subject. But the circumstances of the case may be such that no such implied promise will arise. As an instance of this, it is held that a daughter who remains at home, after arriving at the age of twenty-one years, and continues to perform the same duties in the family as before that time, and receiving the same advantages, will not be entitled to wages upon any implied promise. *Andrus v. Foster*, 17 Vt. 556; *Dye v. Kerr*, 15 Barb. 444; *Conger v. Van Aernum*, 43 id. 602; *Davis v. Goodenow*, 27 Vt. 715; *Ridgway v. English*, 2 Zab. 409; *Munger v. Munger*, 33 N. H. 581; *Leidig v. Coover's Ex'rs*, 47 Penn. St. 534.

The rule is the same as to a son. *Risor v. Johnson*, 1 Cart. (Ind.) 100; *Hussey v. Roundtree*, 1 Busb. L. 110; *Prickett v. Prickett's Ex'rs*, 20 N. J. Eq. (5 C. E. Gr.) 478; *Ridgway v. English*, 2 Zab. 409; *Zerbe v. Miller*, 16 Penn. St. 488.

The law will not imply a promise to pay for board or services, as among the members of the same family and persons more or less intimately or remotely related, where they are living together as one household, and nothing else appears. A stepfather who assumes the relation to the infant son of his wife by a former husband, and who faithfully discharges the duties of that relation by receiving such child into his family, and educating and supporting him on the same footing as his own children by a former wife, is not liable for wages, unless upon an express promise to pay them, even though the infant's services were worth more than the cost of his education and support. *Williams v. Hutchinson*, 3 N. Y. (3 Comst.) 312; *Mulhern v. McDavitt*, 82 Mass. (16 Gray) 404. The rule is the same as to a stepdaughter. *Lantis v. Frey*, 14 Penn. St. 201.

So where an infant nephew, who is out of a home, is received into a family, and is provided with food and clothing, and works in the same way as the children of the family, there will be no implied contract to pay wages. *Defrance v. Austin*, 9 Penn. St. 309; *Weir v. Weir*, 3 B. Monr. 647. See *Partlow v. Cooke*, 2 R. I. 451, as to services by a niece for an aunt.

Adopted children have the same right to compensation that natural children have, and no other or greater. *Lumay v. Vantyne*, 40 Vt. 501.

A minor who was indentured as an apprentice, and has served in that capacity, cannot recover wages, although the indentures are declared invalid, and the minor discharged from them, because it is evident that there was no intention to pay wages, and therefore no implied promise to pay can arise in such a case. *Maltby v. Harwood*, 12 Barb. 478. See, also, *Griffin v. Potter*, 14 Wend. 209.

Whether there was an agreement to pay compensation is a question of fact in such cases. *Hart v. Hart's Adm'r*, 41 Mo. 441; *Green v. Roberts*, 47 Barb. 521; *Adams v. Adams' Adm'r*, 23 Ind. 50; *Partlow v. Cooke*, 2 R. I. 451.

Services voluntarily performed for another person, without his knowledge or request,

particular time either expressly or impliedly (*k*) limited, the law construes it to be a hiring for a year (*l*), subject however by custom to the condition that it may be determined by either party, on giving a month's notice or paying a month's wages (*m*). This *custom however is strictly confined to menial ser- [*509] vants, and does not apply to those occupying a superior position, such as that of governess (*n*), clerk (*o*), or warehouseman (*p*); nor to those whose situation is not domestic, such as a labourer in husbandry, or a farm bailiff (*q*). A menial servant is however not exempted from the general rule of being liable to

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| (<i>k</i>) <i>Ib.</i> | (<i>o</i>) <i>Beeson v. Collyer</i> , 4 Bing. 309. |
| (<i>l</i>) Co. Litt. 42 b. | (<i>p</i>) <i>Fawcett v. Cash</i> , 5 B. & Ad. 904. |
| (<i>m</i>) <i>Robinson v. Hindman</i> , 8 Esp. 235. See | (<i>q</i>) <i>Louth v. Drummond</i> , cited Smith's Mas- |
| <i>Fennings v. Tisdal</i> , 1 Exch. 295. | ter and Servant, 2nd ed., 52; and in <i>Nicoll v.</i> |
| (<i>n</i>) <i>Todd v. Kerrich</i> , 8 Exch. 151. | <i>Greaves</i> , 17 C. B. N. S. 27, 31. |

though beneficial to the latter, will not furnish a ground of action. *Bartholomew v. Jackson*, 20 Johns. 28; *Ehle v. Judson*, 24 Wend. 97; *Frear v. Hardenbergh*, 5 Johns. 272; *Allen's Adm'r v. Richmond College*, 41 Mo. 302.

Where services are rendered by one person for another, upon a mutual understanding that compensation therefor is to be made by will, and no such provision is made by will, an action to recover the value of the services will be sustained. *Robinson v. Raynor*, 28 N. Y. (1 Tiff.) 494.

But if there is no such contract, express or implied, and the services are performed in the mere hope of a provision in a will for a compensation, no action will lie, although no such provision be made. *Martin v. Wright's Adm'r*, 13 Wend. 460; *Eaton v. Benton*, 2 Hill, 578; *Lee v. Lee*, 6 Gill. & Johns. 309; *Little v. Dawson*, 4 Dall. 111.

A woman who has lived with a man in the supposition that she was his wife, when she was not, because the marriage was void on account of his having a wife at the time of the second marriage, cannot recover of his executor for the services rendered while living with him. *Cropsey v. Sweeney*, 27 Barb. 310; S. C., 7 Abb. Pr. 129.

So a woman who lives with a man in a state of concubinage cannot recover compensation for services performed for him, without proof of a contract of hiring. *Swires v. Parsons*, 5 Watts & Serg. 357.

The length of time for which a hiring shall continue may be fixed by express contract, or may be implied from circumstances. If the contract is express, the time will be limited by that. In other cases the facts and circumstances will enable a court or jury to fix it according to the evidence.

A contract to work for a specified sum per month, but not mentioning the term of service, is a hiring by the month. *Beach v. Mullin*, 34 N. J. L. 343.

A continuance in the employment of the hirer, with his consent, and after the termination of the time specified in the agreement, is equivalent to a new hiring upon the same terms. *Vail v. Jersey Little Falls Manuf'g Co.*, 82 Barb. 564; *Grover, etc., Machine Co. v. Bulkley*, 48 Ill. 189.

If the contract is an oral one, and it is, by its terms, to continue for a term longer than one year, it will be void by the statute of frauds. *Drummond v. Burrell*, 13 Wend. 307; *Shute v. Dorr*, 5 Id. 204; *Jones v. Hay*, 52 Barb. 501; *Hinckley v. Southgate*, 11 Vt. 428; *Tuttle v. Sweett*, 31 Me. 555; *Pitcher v. Wilson*, 5 Mo. 46; *Kelly v. Terrell*, 26 Ga. 551; *Hill v. Hooper*, 1 Gray (Mass.), 131; *Emery v. Smith*, 46 N. H. 155.

If, however, the terms of the contract are such that it may be performed within a year, it will be valid. *Russell v. Slade*, 12 Conn. 455; *Roberts v. Rockbottom Co.*, 7 Metc. (Mass.) 46; *Hill v. Jamieson*, 16 Ind. 125; *Bell v. Hewitt*, 24 Id. 280; *Rogers v. Brightman*, 10 Wis. 55; *Foster v. McO'Brien*, 18 Mo. 88. See *Peter v. Compton*, 1 Smith's Lead. Cas. 432.

Where services are rendered under an oral contract to work for three years, which is therefore void by the statute, yet no action can be maintained to recover their value, unless the employer refuses to go on with the contract; and if he is willing to perform on his part, there can be no implied promise by him to pay for the services rendered under the express oral contract. *Galein v. Prentice*, 45 N. Y. (6 Hand) 163.

discharge at any moment for misconduct or disobedience of lawful orders; and in such case he is not entitled to a month's wages(*r*), nor can he claim payment for the time during which he may have actually served, if thus dismissed before the period for which he was originally hired(*s*), and at a time when no wages were actually due(*t*). (128)

Although the servant has no right to a character(*u*), (129) yet, if the master assume to give the character of a servant, he must give it *bond fide*; for he who gives a false character, charging the servant with faults without just cause, and with a malicious design to injure him, is liable to an action(*x*); proof of malice is, however, necessary to support such action, though where the character given

- (*r*) *Turner v. Mason*, 14 M. & W. 112; *Robinson v. Hindman*, 8 Esp. 235. conduct is no answer to a claim for them. See *Taylor v. Laird*, 1 H. & N. 266.
 (*s*) *Turner v. Robinson*, 5 B. & Ad. 789; *Spain v. Arnott*, 2 Stark. N. P. C. 256. (*u*) *Carrol v. Bird*, 3 Esp. 201.
 (*t*) If wages have become due, but have been left unpaid, a subsequent dismissal for mis- (*x*) *Rogers v. Clifton*, 3 B. & P. 587; *Pattison v. Jones*, 8 B. & C. 578.

(128) There are several grounds upon which a servant may be discharged by his master. Intoxication to such an extent that a servant is thereby unfitted for the discharge of his duties, is a good ground for his dismissal by his master. *Gonsolis v. Gearhart*, 31 Miss. 585; *Huntingdon v. Clafin*, 38 N. Y. (11 Tiff.) 182; 6 Trans. App. 168; 10 Bosw. 262.

If the person employed is entirely incompetent to perform in a proper manner the work he undertakes to do, he may be discharged. *Horton v. McMurtry*, 5 Hurlst. & Norm. 667.

The refusal of a servant to execute the lawful commands of his master is a sufficient ground for his dismissal. *Spain v. Arnott*, 2 Stark. 256; *Lilley v. Elwin*, 11 Q. B. 742; 17 L. J. Q. B. 182.

But under an ordinary contract of hiring by the day, the laborer is not bound to do more than a day's work for the purpose of completing a particular piece of work upon which he may be employed. *Wyngert v. Norton*, 4 Mich. 286.

If the hiring is for a definite period, and the master discharges the servant before the expiration of the term, and without a legal excuse or cause, he will be liable for the resulting damages. *Costigan v. Hudson River R. R. Co.*, 2 Denio, 609; *Cox v. Adams*, 1 Nott. & McCord, 284; *Sherman v. Champlain Transp. Co.*, 31 Vt. 162; *Stewart v. Walker*, 14 Penn. St. 293; *Miller v. Goddard*, 34 Me. 103.

Generally, the measure of damages is the amount which was to have been paid, if the services had been rendered, subject to a deduction for such amount as the servant has earned elsewhere in the mean time. *Ib.*

So on the other hand, if the servant leaves his master before the expiration of the time agreed upon, he will forfeit his right to any compensation for the services previously rendered. *Lantry v. Parks*, 8 Cow. 63; *Galvin v. Prentice*, 45 N. Y. (6 Hand) 162; *Coe v. Smith*, 1 Carter (Ind.), 267; *Hawkins v. Gilbert*, 19 Ala. 54; *Swaney v. Moore*, 22 Ill. 63; *Rice v. Dwight Manuf'g Co.*, 2 Cush. 80.

Where the party contracting to serve is an infant, and he leaves the service before the expiration of the time agreed upon, an exception to the general rule is recognized, because he is not bound by his contract, and may, therefore, recover for his services, without deducting any thing for the damages occasioned by his leaving the service. *Derocher v. Continental Mills*, 58 Me. 217; 4 Am. Rep. 286; *Luskin v. Mayall*, 25 N. H. 82; *Thomas v. Dike*, 11 Vt. 273; *Vent v. Osgood*, 19 Pick. 572; *Whitmarsh v. Hall*, 3 Denio, 875.

(129) A master is under no obligation to give a servant a testimonial of character. And if he states or writes to a third person what he thinks or knows of the servant, no action will lie, even though the statements are not true, unless it is shown that the false statement was made with malice. *Fowles v. Bowen*, 30 N. Y. (3 Tiff.) 20; *Ormeby v. Douglass*, 37 N. Y. (10 Tiff.) 477; 5 Trans. App. 100; *Easley v. Moss*, 9 Ala. 266; *White v. Nicholls*, 8 How. (U. S.) 266.

is false, slight circumstances may suffice as evidence of it(y). It is clear however that the master owes a duty to a person about to engage a late servant, which compels him to make full and true, if he make any, answer *to an [*510] inquiry as to character(z); consequently, where there is no proof of malice, such communication is privileged(a).

2. An apprentice (from *apprendre*, to learn,) is usually bound for a term of years, by deed indented, or indenture, to serve his master, and to be maintained and instructed by him.(130) This is usually done to a person in Apprentices. trade, in order that the apprentice may learn a business; and

(y) *Kelly v. Partington*, 4 B. & Ad. 700; (a) *Child v. Affleck*, 9 B. & C. 408; *Edmondson v. Stephenson*, Bull. N.P. 8; *Weatherston v. Hawkins*, 1 T. R. 110; *Taylor v. Hawkins*, 16 Q. B. 308.
(z) *Child v. Affleck*, 9 B. & C. 408; *Gardner v. Slade*, 13 Q. B. 796.

(130) In the United States contracts of apprenticeship are neither so frequent nor so important as in England. The contract is in writing, and usually under seal; and it is construed like any other writing, by the ordinary rules of law relating to contracts. As the apprentice is a minor, the contract is not only executed by the minor, but by his father or guardian, who covenants as to the service; while the master covenants to teach, to supply necessities, and to pay or compensate in the manner agreed upon.

In New York an infant is not bound by the indenture of apprenticeship, unless he signs it; and if it is informal or defective, no one but the infant can take advantage of it, if executed by the father or guardian. *McDoules, in matter of*, 8 Johns. 328; *Fowler v. Hollenbeck*, 9 Barb. 309; *Doane v. Covel*, 56 Me. 527; *Page v. Marsh*, 36 N. H. 305. At common law the parent might bind the infant an apprentice, and the statute merely controls and limits the authority by requiring the infant to be a party to the deed. *Ib.*; *People ex rel. Barbour v. Gates*, 43 N. Y. (4 Hand) 40. And if the father is dead, or not capable of giving a legal consent, the mother may do so. *Ib.*

The father of an illegitimate child cannot authorize it to be bound out, against the wishes of the mother, if she is able to support it. *Timmins v. Lacy*, 30 Tex. 115.

Where a minor apprentice becomes entitled to bounty money by reason of his enlistment as a soldier, such money belongs to himself, and not to his master. *Kelly v. Sprout*, 97 Mass. 169; *United States v. Bainbridge*, 1 Mason, 84.

Where the contract provided that the parents of the apprentice were to have a specified sum for clothing for the minor, and were to board him at a specified price during his apprenticeship, where all the parties resided in the same place, it was held that it was a breach of the contract for the master to remove into another state so that the boy could not reside at home. *Walters v. Morrow*, 1 Houston (Del.) 527. Ordinarily the master cannot remove from the state where the apprentice was bound, and take the latter with him, unless the indentures provide for this, or the nature of the service requires it, as in the case of a seafaring life. *Commonwealth v. Edwards*, 6 Binn. 202; *Coffin v. Bassett*, 2 Pick. 357; *Vickers v. Pierce*, 12 Me. 315; *Randall v. Rutch*, 12 Pick. 107.

An omission to specify the trade or employment which the apprentice is to learn does not render the indentures void. *Fowles v. Hollenbeck*, 9 Barb. 309.

The contract of apprenticeship is one of personal trust, and is not assignable, so as to bind the apprentice. *Tucker v. Magee*, 18 Ala. 99; *Hall v. Gardner*, 1 Mass. 172; *Stringfield v. Heiskell*, 2 Yerg. 546; *Stewart v. Ricketts*, 2 Hum. 151; *Hudnut v. Bullock*, 8 Marsh. 300; *Martin v. Rice*, 2 Browne, 191; *Putrill v. Vaun*, 8 Md. 402. Yet the master may bind himself to a third person that the apprentice will serve him. *Guilderland v. Knox*, 5 Cow. 363. And a change of residence and a service by the apprentice will, after the legal time, gain him a settlement in the town where he may reside. *Guilderland v. Knox*, 5 Cow. 363.

A master has a right to use moderate correction in case of an offending apprentice. *Commonwealth v. Baird*, 1 Ashm. 267.

But the apprentice is not bound to remain with the master after cruel and inhuman treatment. *McGrath v. Herndon*, 2 Monr. 82; S. C. again, 4 id. 480, 481. See *Miller v. Stewart*, 12 La. An. 170.

sometimes a large sum is given with him, as a premium for instruction. Though an apprentice is generally bound by his father or friend, yet the binding is not valid, unless he personally execute the indenture(*b*), though the contract of apprenticeship may be entered into by an infant, as the law considers it to be for his benefit(*c*). To the above rule as to consent there is an exception in the case of a child whose parents are unable to maintain him(*d*); for such a child may be apprenticed without his own consent(*e*), by the overseers(*f*) in a parish not included in a union, and by the guardians(*g*) of the poor in one which is so included; in the former case the consent of two justices being necessary(*h*), though not so in the latter(*i*). The justices were formerly sole judges of the persons to whom parish apprentices should be bound, and these persons were [*511] obliged to receive them(*k*), but it has since been enacted that no one can be compelled to take an apprentice against his will(*l*).

The contract of apprenticeship may (provided the indentures be cancelled(*m*)), be determined by consent of the parties to it, though if the apprentice be an infant at the time, it is necessary that the determination be for his benefit(*n*). Such a contract is also determined by the bankruptcy of the master(*o*), or his death(*p*) (unless there be a covenant for continuing the service with his executors(*q*)); or by the death of the apprentice. Justices of the peace, moreover, and courts of quarter sessions, who have under various statutes(*r*) jurisdiction in cases of apprenticeship, may order the discharge of an apprentice, and a return of part of the premium paid on his being apprenticed.

3. Labourers constitute a third class of servants; they are generally hired by the day or the week, and do not live *intra mœnia*, as part of the family. Concerning labourers, various statutes have made regulations(*s*).

(*b*) *R. v. Cromford*, 8 East, 25; *R. v. Arnesby*, 3 B. & Ald. 584.

(*c*) *Newbury v. St. Mary's, Reading*, Foley, P. L. 154; *R. v. Arundel*, 5 M. & S. 257.

(*d*) 43 Eliz. c. 2, ss. 1, 5.

(*e*) No child can be apprenticed without his consent to a chimney-sweeper, 4 & 5 Will. 4, c. 35; or to the sea service, 17 & 18 Vict. c. 104, ss. 141—145.

(*f*) 56 Geo. 3, c. 139, s. 1.

(*g*) 7 & 8 Vict. c. 101, s. 12.

(*h*) *R. v. Bloomsbury*, 4 E. & B. 520.

(*i*) Except in the case of an apprentice to the sea service, 17 & 18 Vict. c. 104, s. 142; 43 Eliz. c. 2, ss. 1, 5.

(*k*) 8 & 9 Will. 3, c. 30, s. 5; *Anon.* Salk. 67; *Minchamp's Case*, Salk. 491.

(*l*) 7 & 8 Vict. c. 101, s. 13.

(*m*) *R. v. Bow*, 4 M. & S. 388.

(*n*) *R. v. Weddington*, Burr. S. C. 766; *R. v. Spawnton*, ib. 801.

(*o*) 12 & 13 Vict. c. 106, s. 170.

(*p*) *Baxter v. Burfield*, 2 Str. 1266.

(*q*) *Cooper v. Simmons*, 7 H. & N. 707.

(*r*) See 20 Geo. 2, c. 19, s. 8, *et seq.*; 6 Geo. 3, c. 25, ss. 1—3; 82 Geo. 3, c. 57; 83 Geo. 3, c. 55, s. 1; 4 Geo. 4, c. 29; c. 34, ss. 1, 2; 5 & 6 Vict. c. 7.

(*s*) By various provisions of the statute 5 Eliz. c. 4, all single men between twelve

Where an apprentice is employed by a third person without the knowledge or consent of the master, the master is entitled to all the apprentice's earnings, whether such third person did or did not know that he was an apprentice. *Hiatt v. Gülder*, 6 Ired. 450; *Hays v. Borders*, 1 Gilm. 46; *McKay v. Bryson*, 5 Ired. 216; *James v. Le Roy*, 6 Johns. 274; *Munsey v. Goodwin*, 8 N. H. 272; *Bowes v. Tibbets*, 7 Greenl. 457; *Conant v. Raymond*, 2 Aik. 246; *Stout v. Woody*, 68 N. C. 37.

But in an action for enticing an apprentice away from his master, or for harboring him, a knowledge of the apprenticeship by the defendant must be shown, to authorize a recovery. *Stuart v. Simpson*, 1 Wend. 376; *Caughey v. Smith*, 47 N. Y. (2 Sick.) 244; *Butterfield v. Ashley*, 6 Cush. 249; 2 Gray, 254; *Ferguson v. Tucker*, 2 Har. & Gill. 182. It must be shown that an actual state of service was then existing, and that the solicitation of the defendant was the cause of such leaving of the master's service. *Ib.*

4. Within a fourth class of servants, though acting in a superior capacity, may be included a steward, a factor, *and a bailiff; each of whom the law sometimes considers as a servant, *pro tempore*, with [*512] regard to such of his acts as affect his master's or employer's property. A steward, factor or bailiff is however generally looked on rather as being the agent than the servant of his master or employer, for upon the relation of principal and agent are founded all the mutual rights, duties, and liabilities of these parties(*t*).

Besides these four sorts of servants, may be mentioned (5) clerks and shopmen, who, however confidentially they may be employed, are servants in the eye of the law; (6), merchant seamen, the law relating to whose contracts, hiring, service, and remuneration has been consolidated by the statute 17 & 18 Vict. c. 104, ss. 109—290, amended by 25 & 26 Vict. c. 63, ss. 5—24; also (7) persons working in mills and factories, or mines(*u*) and collieries, concerning whom the legislature has made various provisions, prohibiting the employment of females, and regulating that of boys, in the latter(*x*); and regulating that of women and children in the former(*y*).

II. We have next to consider the manner in which this relation of master and servant affects either party to it. And, first, by apprenticeship under indentures, a person gains a settlement in that parish wherein he last served forty days(*z*). Formerly a person having served seven years as apprentice to any trade had an exclusive right to *exercise that trade in any part of England(*a*). This law as regards the exclusive part of it, was by turns looked upon as a hard law, or as a beneficial one, according to the prevailing humour of the times: which occasioned many resolutions in the courts of law concerning it; however, these resolutions in general rather confined than extended the restriction. No trades were held to be within the statute, but such as were in being at the making of it(*b*): for trading in a country village, apprenticeships were said to be not requisite(*c*); and following the trade seven years, without any effectual prosecution (either as a master or a servant), was held sufficient without an actual apprenticeship(*d*).

years old and sixty, and married ones under thirty years of age, and all single women between twelve and forty, not having any visible livelihood, were compellable by two justices to go out to service in husbandry or certain specific trades, for the promotion of honest industry: and no master could put away his servant, or servant leave his master, after being so retained, either before or at the end of his term, without a quarter's warning, unless upon reasonable cause to be allowed by a justice of the peace, though they might part by consent, or make a special bargain. However repugnant this old statute may be to modern notions, and however obsolete its provisions may have become, portions of it seem never to have been repealed. Stamp, Index to Stats., 8rd ed. p. 899.

See, also, stat. 1 Jac. 1, c. 6.

(*t*) There are various statutes regulating the employment and duties of factors and brokers, among which may be mentioned 6 Ann. c. 16; 57 Geo. 3, c. 1x; 4 Geo. 4, c. 83;

6 Geo. 4, c. 94; 3 & 4 Will. 4, c. 52, s. 144; 5 & 6 Vict. c. 89; 24 & 25 Vict. c. 96, ss. 78, 79.

(*u*) See stat. 23 & 24 Vict. c. 151; *Wilson v. Merry*, L. R. 1 Sc. App. 896.

(*z*) 5 & 6 Vict. c. 90.

(*y*) 3 & 4 Will. 4, c. 103; 4 & 5 Will. 4, c. 1; 7 & 8 Vict. c. 15; 8 & 9 Vict. c. 29; 10 & 11 Vict. cc. 29, 70; 13 & 14 Vict. c. 54; 16 & 17 Vict. c. 104; 19 & 20 Vict. c. 88; 23 & 24 Vict. c. 78; 24 & 25 Vict. c. 117; 26 & 27 Vict. c. 38; 27 & 28 Vict. cc. 48, 98; 30 & 31 Vict. c. 103. The employment of women and children in workshops is now regulated by 30 & 31 Vict. c. 146.

(*a*) *Ante*, p. 438.

(*b*) Stat. 5 Eliz. c. 4, s. 24.

(*c*) *R. v. Slaughter*, Ld. Raym. 514; *Pride v. Stubbs*, 2 Camp. 897.

(*d*) *Anon*, 1 Ventr. 51; *R. v. French*, 2 Keb. 588.

(*e*) *Wallen v. Holton*, 1 W. Bl. 233; *Smith v. Armourers' Co.*, Peake, N. P. C. 148.

At last the restrictions thus imposed on trade were repealed by 54 Geo. 3, c. 96; and afterwards by sect. 14 of the Municipal Corporation Reform Act (5 & 6 Wm. 4, c. 76), exclusive rights of trading in boroughs, &c. were also abolished. But these acts do not extend to the city of London, where several customs and bye-laws, excluding other than freemen from trading within the city, still exist.

A master may by law correct his apprentice for negligence or other misbehaviour(e), provided it be done with moderation(f): though if a master or master's wife beats any other servant of full age, it is a good cause of departure(g).*

A master is obliged to find medical attendance for his apprentice(h), though [*514] not for his menial servant(i);(131) yet *if the servant fall ill it is neither a cause for turning him away, nor for abating his wages(k); and if he is attended by a surgeon with the authority, express or implied, of his master, the master may be liable to pay for this attendance(l), and cannot call on the servant to repay him(m). And it has been enacted that, if any master who is legally liable to provide food, clothing, or lodging for an apprentice or servant, shall wilfully refuse or neglect to do so, or shall maliciously do anything to endanger the life, or permanently injure the health of such apprentice or servant, he will be guilty of a misdemeanour punishable by imprisonment or penal servitude(n).

It is now settled that, in general, a servant takes his employment with its ordinary risks(o), and cannot claim compensation for any accident that befalls him whilst engaged in it: unless such accident is caused by the master's negli-

(e) *Gylbert v. Fletcher*, Cro. Car. 179; and per Holroyd, J., *Winstone v. Lynn*, 1 B. & C. 460, 469; 1 Hawk. P. C. 483; Lamb. Eiren. 120.

(f) *R. v. Keller*, 2 Show. 289.

(g) *F. N. B.* 168; Bro. Abr. tit. Labourers, 51.

(h) *R. v. Smith*, 8 C. & P. 153.

(i) *Wennall v. Adney*, 3 B. & P. 247; *Cooper*

v. Phillips, 4 C. & P. 581; *Newby v. Wiltshire*, 2 Esp. 739.

(k) Dalt. Just. c. 58; *Sellen v. Norman*, 4 C. & P. 80. See *Cuckson v. Stones*, 1 E. & E. 248.

(l) *Cooper v. Phillips*, 4 C. & P. 581.

(m) *Sellen v. Norman*, 4 C. & P. 80.

(n) 24 & 25 Vict. c. 100, s. 26.

(o) *Priestly v. Fowler*, 3 M. & W. 1.

(131) In case of the sickness of an apprentice, his master is bound to provide proper medicine and attendance, at his own expense. *Easley v. Craddock*, 4 Rand. 423.

But it has been held that the master of an apprentice is not liable, without special contract, for medicine administered to, and attendance on, his apprentice, where the master did not send for the physician, and where the services were not rendered under his roof. *Percival v. Nevill*, 1 Nott & McCord, 452. So it has been held that no action lies by a physician against a master for medicine and attendance on a slave of his, without his knowledge or request, in a case not requiring instant and immediate assistance. *Dunbar v. Williams*, 10 Johns. 249. Where the indentures provide that the master shall furnish medical attendance, as they usually do, very few questions will be likely to arise.

In contracts for performing personal service, for a specified time, it will be a sufficient excuse for a non-performance that the party engaging to do the work was prevented by sickness from doing so, and he may recover upon a *quantum meruit*. *Wolfe v. Howes*, 20 N. Y. (6 Smith) 197; *Coe v. Smith*, 4 Ind. 79; *Allen v. McKibbin*, 5 Mich. 449; *Patrick v. Putnam*, 27 Vt. 759; *Thomas v. Woodruff*, 2 Speers (So. Car.), 148; *Seaver v. Morse*, 20 Me. 619.

But the compensation of an agent or servant, employed under a special contract, where the complete performance is prevented by his sickness and death, is not confined to a *quantum meruit*, but is to be measured by the contract. *Clark v. Gilbert*, 26 N. Y. (12 Smith) 279.

* See ante, note 130.

gence(p).(132) Among the ordinary risks so taken, must be included the chance of sustaining injury from the negligence of such of his fellow servants as are engaged in the same employment as himself; and if the master have

(p) *Roberts v. Smith*, 2 H. & N. 213; *Williams v. Clough*, 8 H. & N. 258; *Paterson v. Wallace*, 1 Macq. H. L. Cas. 748.

(132) The rule stated in the text is very generally applied and enforced in this country. It is not limited to any particular kind of business or employment. F. was employed to do chores at the house of B. She went into the wash-room and found a tub into which she put a skirt which she was directed to wash. B.'s wife brought a pailfull of water from the stove, and poured it into the tub, and needing more water, F. procured it in a dipper. F. then put her hands into the tub, drew the skirt against the rubbing board, and in so doing cut her hand severely with a piece of glass; yet it was held, that B. was not liable for the injury. *Flynn v. Beebe*, 98 Mass. 575.

Where an employee works in a foundry having a piece of insufficient machinery, which is unsafe, to his knowledge, he will take the risk of all injuries resulting from such machinery while he is engaged in his work. *McGlynn v. Brodie*, 31 Cal. 376. And so of any other defective machinery. *Hayden v. Smithville, etc., Co.*, 29 Conn. 548; *Wonder v. Baltimore & Ohio R. R. Co.*, 32 Md. 411; S. C., 8 Am. Rep. 143; *Wright v. New York Central R. R. Co.*, 25 N. Y. (11 Smith) 562; *Fraser v. Penn. R. R. Co.*, 88 Penn. St. 104; *Mad River, etc., R. R. Co. v. Barber*, 5 Ohio St. 541, 552; *Bussell v. Laconia Manuf. Co.*, 48 Me. 113; *Loonam v. Brockway*, 28 How. 472; 3 Rob. 74; *Laning v. New York Central R. R. Co.*, 49 N. Y. (4 Sick.) 521.

But where a railroad company continues in use a dangerous locomotive, after notice of its dangerous condition, it is liable to one of its servants who is injured while engaged in running such engine, if he was ignorant of such defects. *Keegan v. Western R. R. Corporation*, 8 N. Y. (4 Seld.) 175.

A person in the sole employ of one railroad company, who is injured by the cars of another company, which is permitted by the former to use its track, is not precluded from recovering damages on the ground that he is in the same general employ with the servants of the latter. *Cattawissa R. R. Co. v. Armstrong*, 49 Penn. St. 186; *Smith v. N. Y. & Harlem R. R. Co.*, 19 N. Y. (5 Smith) 127.

A police officer is not a servant of the city which appoints him, in any such sense as to take away his right of action against it for an injury sustained by reason of a defective highway. *Kimball v. Boston*, 1 Allen (Mass.), 417.

While the servant is required to assume the ordinary risks of the employment in which he is engaged, it does not follow that he must take these risks under any and all circumstances. It is the duty of the employer to use reasonable care for the safety of those engaged in his service. And if he has knowledge that the servant is exposed to risks in consequence of defects in machinery or other things used in his business, and he does not take proper measures to render them safe, he will be liable to his servant who is injured in consequence, if the latter was ignorant of the defect or danger. The legal implication is, that the employer will adopt suitable instruments and means with which to carry on his business, and where injuries to servants or workmen happen by reason of improper and defective machinery and appliances used in the prosecution of the work, the employer is liable, provided he knew, or might have known, by the exercise of reasonable care, that the apparatus was unsafe. *Gibson v. Pacific R. R. Co.*, 46 Mo. 163; S. C., 2 Am. Rep. 497; *Illinois Central R. R. Co. v. Welch*, 52 Ill. 183; S. C., 4 Am. Rep. 593; *Snow v. Housatonic R. R. Co.*, 8 Allen (Mass.), 441; *Coombs v. New Bedford Cordage Co.*, 102 Mass. 572; S. C., 8 Am. Rep. 506; *Harrison v. Central R. R. Co.*, 2 Vroom (N. J.), 293; *Nashville, etc., R. R. Co. v. Elliott*, 1 Cold. (Tenn.) 611; *Thayer v. St. Louis, etc., R. R.*, 22 Ind. 26; *Fisfield v. Northern R. R.*, 42 N. H. 225; *Ryan v. Fowler*, 24 N. Y. (10 Smith) 410.

Where there are several servants in the employ of the same master, and one of the servants is injured by the negligence of another, while employed in the course of the common employment, the master will not ordinarily be liable for the injury. *Warner v. Erie Railway Co.*, 39 N. Y. (12 Tiff.) 468; *O'Connell v. Baltimore, etc., R. R. Co.*, 20 Md. 212; *Thayer v. St. Louis, etc., R. R. Co.*, 22 Ind. 26; *Beaulieu v. Portland Co.*, 48 Me. 291; *McDermott v.*

taken reasonable care in selecting proper persons, he is not answerable for their negligence(*q*). The broad rule upon this subject being that for a personal hurt done to the servant whilst engaged in his master's business, the master is not liable unless there be negligence on his part in that which he, the master, has contracted or undertaken with his servant to do(*r*).

[*515] *By several statutes(*s*) justices of the peace have had jurisdiction given them over labourers and artificers, including servants in husbandry, though not menial servants(*t*), and could formerly enforce payment of wages as against an employer, and discharge the servant from employment on non-fulfilment by the master of his contract. The justices could only summon the master to appear before them, but if it was alleged that the servant had been guilty of misconduct, or had unlawfully absented himself from work, they might, without any notice, issue a warrant for his immediate apprehension, and, on the offence being duly proved, commit him to hard labour for any period not exceeding three months. The harshness of our law in thus dealing with the servant has been partly remedied by the statute 30 & 31 Vict. c. 141, which enacts that the proceedings against the servant, as well as against the master, shall commence by summons, that compensation or a fine shall be awarded in the first instance, that imprisonment in lieu thereof shall be a total discharge of compensation, and that no subsequently accruing wages shall be appropriated to pay it. The previous punishment of imprisonment for three months, without the option of a fine, can now only be inflicted in cases of aggravated misconduct.

(*q*) *Hutchinson v. York*, N. and B. R. C., 5 Ex. 848; *Wigmore v. Jay*, *ib.* 854; *Wiggett v. Fox*, 11 Ex. 833; *Tarrant v. Webb*, 18 C. B. 797.

(*r*) *Wilson v. Merry*, L. R. 1 Sc. App. 326, 332 (where the law upon the subject is reviewed); *Bartons Hill Coal Co. v. Reid*, 3 Macq. H. L. Cas. 266, 262; *Feltham v. England*, L. R. 2 Q. B. 33.

(*s*) 20 Geo. 2, c. 19; 6 Geo. 3, c. 25; 4 Geo. 4, cc. 29, 34.

Persons enumerated in the last of the above-mentioned acts are "a servant in husbandry, or any artificer, calico printer, handicraftsman, miner, collier, keelman, pitman, glassman, potter, labourer, or other person." (*t*) *Kitchen v. Shaw*, 6 A. & E. 729; where the words "other persons" were held to mean persons *ejusdem generis*.

Pacific R. R. Co., 30 Mo. 115; *Chamberlain v. Milwaukee, etc.*, R. R. Co., 11 Wis. 238; *Illinois, etc.*, R. R. Co. v. *Cox*, 21 Ill. 20; *Ponton v. Wilmington, etc.*, R. R. Co., 6 Jones' Law (N. C.), 245; *Whaalan v. Mad River, etc.*, R. R. Co., 8 Ohio St. 249.

But if the master employs incompetent and improper servants, with a knowledge of their unfitness, and they negligently cause an injury to another servant of his while employed about his business, the latter, if ignorant of the unfitness of the other servants, may maintain an action against the master for the injury. *Laning v. New York Central R. R. Co.*, 49 N. Y. (4 Sick.) 521; *Paulmier v. Erie R. R. Co.*, 34 N. J. L. 151; *Cayser v. Taylor*, 10 Gray (Mass.), 274; *McMahon v. Davidson*, 12 Minn. 357; *Illinois, etc.*, R. R. Co. v. *Jewell*, 46 Ill. 99.

Where two servants of a common master are employed upon the same work, and one of them, without authority from his employer, directs the other to use a machine for a dangerous and improper purpose, for which it was not intended or provided, and he complies and thereby receives an injury, the employer will not be held liable. *Felch v. Allen*, 98 Mass. 572. But, where an employee of a railway company, hired to labor in a particular service, and no other, is compelled by a fellow employee of such company to labor at a business much more perilous than that for which he is engaged, and while thus laboring receives an injury, the company is liable for the damages occasioned by the injury. *Chicago, etc.*, R. R. Co. v. *Harnely*, 28 Ind. 28.

The question of negligence, whether on the part of master or servant, is a question of fact. *Ardesco Oil Co. v. Gilson*, 68 Penn. St. 146; *Laning v. New York Central R. R. Co.*, 49 N. Y. (4 Sick.) 521.

The provisions of our criminal law relating to combinations amongst workmen being elsewhere considered(*u*), we shall here merely observe that, no workman seems to be punishable for joining in a strike so long as it is conducted peaceably, and no subsisting contract of service is *violated. The fact, however, of combinations of this sort not being illegal in [*516] the sense of being punishable by law, does not render them so far legal as to prevent the courts from refusing to enforce an agreement made in pursuance of such combination as being in restraint of trade and therefore void(*x*).

To a servant, other than an apprentice, wages become due according to the agreement, either express or implied(*y*), under which he serves, and slight evidence would suffice to entitle the servant to recover on a *quantum meruit* whatever a jury might think his services to be fairly worth(*z*). A contract to pay wages is not, however, necessarily inferred from a contract of service, as board and lodging, either with(*a*) or without(*b*) instruction, may be a sufficient remuneration for it. A restriction, however, is imposed on the power of master and servant to agree as to the terms of service, by the truck act(*c*), which prohibits various work people therein enumerated(*d*) from receiving wages otherwise than in the current coin of the realm. This act, however, does not extend to domestic servants, nor to servants in husbandry(*e*).

III. Let us, lastly, see how strangers may be affected by this relation of master and servant: or how a master may behave towards others on behalf of his servant; and what a servant may do on behalf of his master.

III. How third parties are affected by the relation of master and servant or apprentice.

And first, the master may maintain (that is, abet and assist) his servant, and the servant may maintain his master in an action at law against a stranger: whereas, *in general, it is an [*517] offence against public justice to encourage suits and an-

mosities, by helping to bear the expense of them, and is called in law maintenance(*f*). A master also may bring an action against any man for beating or seducing his servant(*g*); (133) but in each such case he must assign, as a

(*u*) *Post*, vol. iv. p. 190.

(*x*) *Hilton v. Eekersley*, 6 E. & B. 47, 66; see also *Hornby v. Close*, L. R. 2 Q. B. 153.

(*y*) See *Lamburn v. Cruden*, 2 M. & Gr. 253; *Alfred v. Fitzjames*, 3 Esp. 3.

(*z*) *Bryant v. Flight*, 5 M. & W. 114.

(*a*) *R. v. Shinfield*, 14 East, 541.

(*b*) *Forde v. Morley*, 1 Fost. & F. 496;

Davies v. Davies, 9 C. & P. 87.

(*c*) 1 & 2 Will. 4, c. 87.

(*d*) *Id.* s. 19. See *Chawner v. Cummings*, 8 Q. B. 311; *Sharman v. Saunders*, 13 C. B. 166.

(*e*) Sect. 20.

(*f*) 2 Roll. Abr. 116.

(*g*) *Post*, vol. lii.

(133) A stepfather who has adopted the illegitimate daughter of his wife, and taken her in and brought her up in his family, may maintain an action for her seduction. *Bracy v. Kibbe*, 81 Barb. 273. But the action is founded upon the loss of service, and to maintain it, there must be the actual or constructive relation of master and servant. *Bartley v. Richtmyer*, 4 N. Y. (4 Comst.) 88; *Dain v. Wycoff*, 7 N. Y. (3 Seld.) 191.

Where a servant is employed for a specified term, and a third person entices or seduces such servant to leave the service before the expiration of the term, an action will lie in favor of the master against such third person. *Haight v. Badgeley*, 15 Barb. 499. But to sustain the action, it must appear that there was some contract or some other right or relation which gave the master a right to the services of such servant. *Campbell v. Cooper*, 84 N. H. 49. And it must be the act or enticement of the defendant that caused the servant to leave, or the action will not lie. *Butterfield v. Ashley*, 6 Cush. 249; 3 Gray, 254; *Stuart v. Simpson*, 1 Wend. 376. If the servant is under no legal obligation to remain with the master, he cannot maintain the action. *Campbell v. Cooper*, 84 N. H. 49. Nor will an action lie for hiring a servant upon the condition that he shall commence work after the termination of his contract with his present employer. *Glass Manufactory v. Binney*, 4 Pick. 425.

special reason for so doing, his own damage by the loss of service; and this loss must be proved upon the trial(*h*); and, when proved, the jury may give damages for the loss sustained, not only to the time of action brought, but down to the time when, as it appears by evidence, the servant may be expected to recover ability to perform his duties(*i*). A master likewise may justify an assault in defence of his servant, and a servant in defence of his master(*k*): the master, because he has an interest in his servant, not to be deprived of his service; the servant, because it is part of his duty, for which he receives his wages, to stand by and defend his master(*l*).

If any person knowingly entices away a servant or apprentice(*m*), or retains him in his service after due notice that he is under an unexpired contract of service(*n*), he is, in either case, liable to an action at suit of the master. Indeed, it would seem that the master may, in this case, maintain an action for damages as well against the servant as against his new master, though if the latter was unaware of the former service, he is not liable unless he afterwards refuse to restore the servant upon information and demand(*o*). Moreover, the master [*518] *may, if he choose, waive the tort, and bring his action for whatever the servant has earned while unlawfully in the service of another(*p*). It is not, however, actionable to persuade a servant to leave his master, or enter into a new service after the expiration of the term for which he has contracted(*q*). The foundation upon which all this doctrine is built, seems to be that every man has a right to the service of his domestics; acquired by the contract of hiring, and purchased by giving them wages.

As for those things which a servant may do on behalf of his master, they seem all to proceed upon the general principle of agency, by which the master is answerable for the act of his servant, if done by his command, either expressly given or implied: *nam, qui facit per alium, facit per se*(*r*). Therefore, if the servant commit a trespass by the command or encouragement of his master, the master shall be guilty of it(*s*), though the servant is not thereby excused, for he is only to obey his master in matters that are honest and lawful(*t*). If an innkeeper's servant rob his guests, or a carrier's servant steal the goods entrusted to his master; in either case the master is bound to restitution(*u*). for as there is a confidence reposed in him, that he will take care to provide honest servants, his negligence is a kind of implied consent to the robbery; *nam, qui non prohibet, quod prohibere potest, assentire videtur*(*x*). (134) For-

(*h*) *Robert Marys' Case*, 9 Rep. 113; *Hall v. Hollander*, 4 B. & C. 660.

(*i*) *Hodsoll v. Stallebrass*, 11 A. & E. 801.

(*k*) *Post*, vol. iii. Lamb. Eiren. 121; 2 Roll. Abr. 546; *Tickell v. Read*, Loft, 215.

(*l*) In like manner, by the laws of king Alfred, c. 42, a servant was allowed to fight for his master, a parent for his child, and a husband, father, or son, for the chastity of his wife, daughter, or mother. *Anc. Laws and Inst. Eng.* p. 40.

(*m*) *Reg. v. Daniel*, 6 Mod. 99, 182. See *Lumley v. Gye*, 2 E. & B. 216.

(*n*) *Blake v. Lanyon*, 6 T. R. 221.

(*o*) F. N. B. 167, 168.

(*p*) *Ex parte Landsdown*, 5 East, 88, and *Eades v. Vanderput*, cited in note thereto; *Foster v. Stewart*, 3 M. & S. 191; *Lightly v. Clouston*, 1 Taunt. 112.

(*q*) *Nichol v. Martyn*, 2 Esp. 732.

(*r*) 4 Inst. 109; *Broom, Leg. Max.* 4th ed. 784.

(*s*) *Fost.* 125. See *Eaton v. Swansea Water-works Co.*, 17 Q. B. 267.

(*t*) *R. v. Woodburn*, 16 St. Tr. 54.

(*u*) *Noy's Max.* c. 43. *Jones on Bailments*, 91, 94, 95, 103, 104.

(*x*) 2 Inst. 305.

(134) The question how far a master is bound by the acts or omissions of his servant is one of much practical importance. The reason why the master is liable at all in such cases is, that the act or omission of the servant is legally the act or omission of the master, when acting by the authority of the latter, either express or implied. Whatever the master does,

merly, indeed, innkeepers (except for loss, to which the gross carelessness of their guests had contributed,) and common carriers were looked upon as insurers of the goods entrusted to their care; and *though they have both [*519] been, to a certain extent, relieved from this liability by statute, yet in

or neglects to do, by his servant, who is acting as his representative, is chargeable to him on the ground that he directed the servant's conduct. And, in every case where the servant has done or omitted acts in accordance with his master's instructions, it is clearly just that the latter should be legally responsible for the consequences. There are instances in which the master directs certain things to be done, while he does not point out the mode of doing them. And, as a general rule, the master will be liable for the acts of the servant when they were done in his service. While, on the other hand, it is also a general rule that the master is not responsible for the wrongful acts of the servant when done out of the scope of his authority, or when they were willfully done of his own wrong. In some cases the servant seems to have a discretionary power as to the manner in which he shall act, and, when the master confers such an authority, he will be liable for the consequences of its exercise. And perhaps the best way to illustrate the general liability of the master will be to state some of the points decided. A railroad conductor who attempts to seize articles of property which are in the hands of a passenger on the cars, for the purpose of enforcing the payment of fare, will render the corporation liable to an action of assault and battery. *Ramsden v. Boston & Albany R. R. Co.*, 104 Mass. 117; S. C., 6 Am. Rep. 200. So if he wrongfully ejects a passenger who has paid his fare, or uses unjustifiable force in ejecting a passenger who has not paid his fare, and injures him by a blow or a kick, or by compelling him to jump off while the train is in motion, the corporation is liable. *Moore v. Fitchburg R. R. Co.*, 4 Gray, 465; *Hewett v. Swift*, 3 Allen, 420; *Holmes v. Wakefield*, 12 Id. 580; *Goddard v. Grand Trunk Railway Co.*, 57 Me. 202; S. C., 2 Am. Rep. 39; *Pennsylvania R. R. Co. v. Vandiver*, 42 Penn. St. 365; *Higgins v. Waterlot Turnp. & R. R. Co.*, 46 N. Y. (1 Sick.) 23; S. C., 7 Am. Rep. 293; *Sanford v. Eighth Avenue R. R. Co.*, 23 N. Y. (9 Smith) 343; *Isaac v. Third Avenue R. R. Co.*, 47 N. Y. (3 Sick.) 123; *Duggins v. Watson*, 15 Ark. 118.

But a railroad company will not be liable for the acts of a baggage-master, when a passenger applies to him to have a trunk checked, and because it is not promptly done uses threatening and abusive language to him, and he in return strikes the passenger. *Little Miami R. R. Co. v. Wetmore*, 19 Ohio St. 110; S. C., 2 Am. Rep. 873. Nor is a master liable for the malicious and willful act of his servant which is done without his direction or assent, although while in his employment. *Fraser v. Freeman*, 43 N. Y. (4 Hand) 566; S. C., 3 Am. Rep. 740. In the last case the plaintiff's intestate was shot and killed by M. while in the defendant's employment, and while the defendant and M. and another servant were endeavoring, under a claim of right, to enter upon the premises of the intestate, but there was no evidence that the fatal shot was fired by the express direction or assent of the defendant. For a willful and malicious trespass of a servant not commanded or ratified by the master, but perpetrated to gratify the private malice of the servant under mere color of discharging the duty which he has undertaken for his master, no action will lie against the master. *Bearsville, etc., R. R. Co. v. Baum*, 26 Ind. 70; *Thames Steamboat Co. v. Housatonic R. R. Co.*, 24 Conn. 40; *Cox v. Keahey*, 86 Ala. 340; *Vanderbilt v. Richmond Turnpike Co.*, 2 N. Y. (2 Comst.) 479; *Wesson v. Seaboard, etc., R. R. Co.*, 4 Jones' Law (N. C.), 379.

A master is not liable for the torts of a servant done out of the course of his employment, when he is no longer under the master's direction or control. *Yates v. Squires*, 19 Iowa, 26; *Yerger v. Warren*, 81 Penn. St. 319.

The negligence of the servant in the course of his employment is the negligence of the master, and he is liable for the consequences. The act of a driver or brakeman of a street car in assisting passengers to get on board is in the course of his employment, and makes the principal liable for negligence in its performance. *Drew v. Sixth Avenue R. R. Co.*, 26 N. Y. (12 Smith) 49.

A master is liable for the act of his servant which is a trespass, although it occurred through the neglect or unskillfulness of the servant, if done within the scope of his business. *Andrus v. Howard*, 36 Vt. 248; *Luttrell v. Hazen*, 3 Sneed. (Tenn.) 20.

A master who directs his servant to kindle a fire for the purpose of clearing land will be

such case, it is expressly provided that this relief shall not extend to robberies committed by their own servants(y). So, likewise, if the drawer at a tavern sells a man bad wine, whereby his health is injured, he may bring an action against the master(z): for although the master did not expressly order the servant to sell it to that person in particular, yet his permitting him to draw and sell it at all amounts impliedly to a general command.(135)

(y) *Post*, vol. iii. pp. 233, 242.

(z) 1 Roll. Abr. 95.

liable for the consequences which result, although the servant does not follow his instructions. *Armstrong v. Cooley*, 5 Gilm. 509.

Where the servants of a railroad company, in the course of their employment of running the cars, negligently scatter coals from the engine which cause a fire that extends to the land of a third person and burn his property, the road will be liable. *Webb v. Rome, Watertown, etc., R. R. Co.*, 49 N. Y. (4 Sick.) 420.

The test of a master's responsibility for the acts of his servant is, whether it was done in the prosecution of the master's business; not whether it was done in accordance with the instructions of the master to the servant. And, therefore, if the servant, while engaged in the prosecution of the master's business, deviates from his instructions as to the manner of doing it, this will not relieve the master from liability for the servant's acts. *Cosgrove v. Ogden*, 49 N. Y. (4 Sick.) 255. The fact that a parent living upon a quiet street, where few vehicles pass, permits a child six years of age to go unattended upon the streets, does not constitute negligence *per se*. *Cosgrove v. Ogden*, 49 N. Y. (4 Sick.) 255. The question of negligence is one of fact for a jury. *Cosgrove v. Ogden*, 49 N. Y. (4 Sick.) 255; *Ihl v. Forty-second street, etc., R. R. Co.*, 47 N. Y. (2 Sick.) 317.

But while a master is liable civilly for the fraud, negligence, or other wrongful act, done in the transaction of his business, he is not liable for a willful injury committed by the servant, unless he acts by the express or implied authority of the master; and therefore the master is not liable where the clerks in a store called in a policeman and directed him to arrest and examine the person of a lady suspected of stealing goods. *Mali v. Lord*, 89 N. Y. (12 Tiff.) 381; S. C., 7 Trans. App. 174. So where the keeper of a toll bridge keeps a vicious dog, which is not needed or directed by the bridge owner to be kept, and it bites a person lawfully crossing the bridge, the owner of the bridge will not be liable. *Baker v. Kinsey*, 38 Cal. 631. The owner of a dog is not liable for the willful act of his servant in setting him on the cattle of a third person, even though he stood near, if the servant did not act by his command, and especially if the owner, as soon as he was cognizant of the servant's act, called off his dog. *Steele v. Smith*, 3 E. D. Smith, 321. The lessor of a ferry is not liable for the torts of the lessee or his servants. *Norton v. Wiswall*, 28 Barb. 618.

A servant who is injured by the negligence or misconduct of a fellow-servant cannot maintain an action against the master for such injury. *Weger v. Pennsylvania R. R. Co.*, 55 Penn. St. 460; *King v. Boston, etc., R. R. Corp.*, 9 Cush. 112; *Coon v. Syracuse and Utica R. R. Co.*, 5 N. Y. (1 Seld.) 492.

The right to terminate a contract may be reserved to either or both parties; and where the servant agreed to work for the master for a specified time at certain wages, but it was agreed that if either party became dissatisfied he might abandon the contract, this will not justify the servant in leaving on the pretense that he had other business to attend to, if there was no allegation of dissatisfaction; and he will forfeit the wages previously earned if he quits the service. *Monell v. Burns*, 4 Denio, 121.

A settlement with a party for his services for a particular month, or other period of time, is *prima facie* evidence of payment for all labor or services previously performed by him. *Sherman v. Clater*, 3 Head (Tenn.), 445. Where the party rendering the services gives a note to the employer after they were rendered, and subsequently pays the note, the presumption will be that all prior services were paid for. *Duguid v. Ogilvie*, 3 E. D. Smith, 527; 1 Abb. Pr. 145; *DeFreest v. Bloomingdale*, 5 Denio, 304; *Lake v. Tyssen*, 6 N. Y. (2 Seld.) 461.

(135) See note 134.

Though in the above and many other cases the master is civilly liable for the act of his servant, yet in general he is not criminally responsible for it(*a*). This rule, however, is open to exceptions, and in some peculiar circumstances a master has been held even criminally liable for the acts of his servant, though done without his knowledge, and even against his express command, as for an infringement of the revenue laws(*b*), or a public nuisance(*c*), and before the statute 6 & 7 Vict. c. 96, s. 7, the proprietor of a newspaper might have been indicted for a libel published in it by his servant without his authority or sanction(*d*).

In like manner, whatever a servant is permitted to do in the usual course of his business, is impliedly done in virtue of a general command. If I pay money to a banker's servant, or to a shopman over the counter(*e*); the banker or shopkeeper is answerable for it: if I pay it to a clergyman's or a physician's servant, whose usual business is not to receive money for his master, and he embezzles it, I might have to pay it over again. If the servant of a horsedealer warrants a horse without the owner's *knowledge, and even against his orders, the owner is bound; for this transaction comes within the [*520] business of the servant of a horsedealer(*f*); but if a huntsman, gamekeeper, or butler affected to let a farm, or the servant of a private gentleman to warrant a horse, in these cases the master would not be bound if he did not authorize the sale, or if he forbade the warranty(*g*).

Persons who are usually employed to transact business for a man, are *quoad hoc* his servants, and the principal must answer for their conduct; for the law implies that they act under a general command; and without such a doctrine as this no mutual intercourse between man and man could subsist with any tolerable convenience. If I usually deal with a tradesman by myself, or constantly pay him ready money, I am not answerable for what my servant buys upon credit; for here is no implied order to the tradesman to trust my servant: but if I usually send him upon trust, or sometimes on trust and sometimes with ready money, I am answerable for all he buys; for the tradesman cannot possibly distinguish when he comes by my order, and when upon his own authority(*h*).

Further, although a master is not liable for the wilful trespass of his servant, unless done by his command, express or implied(*i*), yet if a servant, by his negligence, does any damage to a stranger, the master may have to answer for his neglect; thus, if a smith's servant lames a horse while he is shoeing him, or a carrier's servant loses a parcel, in each of these cases an action lies against the master(*k*). But in any of these cases the damage must *be done while the servant is actually employed in the master's service; otherwise the [*521] servant shall alone answer for his own misbehaviour. On this principle it has been held that if a servant, in driving or returning from driving his master, or going anywhere on his master's business, negligently injure a third person, the

(*a*) *R. v. Huggins*, 2 Str. 882.

(*b*) *R. v. Dixon*, 3 M. & S. 11.

(*c*) *Reg. v. Stephens*, L. R. 1 Q. B. 703.

(*d*) *R. v. Gutch*, M. & M. 433. See *Colburn v. Patmore*, 1 C. M. & R. 78.

(*e*) *Kaye v. Brett*, 5 Exch. 269, 274. See *Barrett v. Deere*, M. & M. 200; *Wilmott v. Smith*, 5. 238; *Per Maule, J., Smith v. Hull Glass Co.*, 11 C. B. 897, 928.

(*f*) *Howard v. Sheward*, L. R. 2 C. P. 148; *Pickering v. Bush*, 15 East, 38, 45.

(*g*) *Fenn v. Harrison*, 3 T. R. 757, 760.

(*h*) Dr. & Stud. d. 2, c. 42. Noy's Max. c. 44. *Anon.* 1 Show. 95; *Nickson v. Brohan*, 10 Mod. 109; *Hiscock v. Greenwood*, 4 Esp. 174; *Rusby v. Scarlett*, 5 Id. 76.

(*i*) *M' Manus v. Crickett*, 1 East, 106; *Lyons v. Martin*, 8 A. & E. 512.

(*k*) *Williams v. Cranston*, 2 Stark. 82.

master is liable(*l*); though he is not so if the servant at the time were using his master's horse and carriage for his own purpose(*m*). Upon this principle, also, by the common law(*n*), if a servant kept his master's fire negligently, so that his neighbour's house was burned down thereby, an action lay against the master; because this negligence happened in his service; otherwise, if the servant, going along the street with a torch, by negligence set fire to a house; for there he was not in his master's immediate service, and must himself have answered the damage personally. And this would seem to be the law still, for though it has been enacted(*o*) that no action shall lie against any person in whose house a fire shall begin accidentally, yet the court of queen's bench decided that the word "accidentally" did not apply to fires caused by the negligence of either the owner or any of his servants(*p*). (136)

[*522] A master would also be chargeable in damages if his *domestic servant cast anything out of his house into the street or common highway, to the damage of an individual, or to the common nuisance of the public(*q*); for the master has the superintendence and charge of all his household. And this agrees with the civil law(*r*); which holds that the *pater familias*, in this and similar cases, "*ob alterius culpam tenetur, aut servi, aut liberi*."

We may observe, that in cases such as have here been put, the master may be frequently a loser by the trust reposed in a servant, but never can be a gainer; he may be answerable for his servant's misbehaviour, but cannot shelter himself from punishment by laying the blame on his agent. The reason of this is still uniform and the same; that the wrong done by the servant is looked upon in law as the wrong of the master himself; and it is a standing maxim, that no man shall be allowed to take advantage of his own wrong(*s*).

(*l*) *Patten v. Rea*, 2 C. B. N. S. 606.

(*m*) *Goodman v. Kennell*, 3 C. & P. 187; *Joel v. Morrison*, 6 C. & P. 501, 503; *Sleath v. Wilson*, 9 C. & P. 807.

(*n*) *Noy's Max.* c. 44; *Dr. & Stud. d.* 2, c. 42.

(*o*) By 14 Geo. 3, c. 78, s. 86, re-enacting with some extension of place, 6 Anne, c. 58, s. 7. By both these acts, it is provided that if such fire happens through the negligence of any servant (whose loss is commonly very little), such servant shall forfeit 100*l*. to be distributed among the sufferers; and, in default of payment, shall be committed, and kept to hard labour for eighteen months.

Upon a similar principle, by the law of the

twelve tables at Rome, a person by whose negligence any fire began, was bound to pay double to the sufferers; or, if he was not able to pay, was to suffer a corporal punishment. *Tab. vii. cap. 6.*

(*p*) *Williter v. Phippard*, 11 Q. B. 847. See *per* Lord Lyndhurst, *Viscount Canterbury v. Att. Gen.* 1 Phill. 806, 815; *Vaughan v. Menlove*, 4 Scott, 244.

(*q*) *Noy's Max.* c. 44; *Turberville v. Stamps*, 1 *Ld. Raym.* 264.

(*r*) *Inst.* 4, 5, 1.

(*s*) *Nullus commodum capere potest de injuriâ suâ propriâ.* *Co. Litt.* 148 b; *Broom's Leg. Max.* 4th ed. 275, *et seq.*

*CHAPTER XV.

[*523]

HUSBAND AND WIFE.

THE second private relation of persons is that created by marriage, and includes the reciprocal rights and duties of husband and wife; or, as our older law-books call them, of *baron* and *feme*. In the consideration of which we shall, in the first instance, enquire how marriages may be contracted or made; shall next point out the manner in which they may be dissolved; and shall, lastly, take a view of the legal effects and consequences of marriage, and of its dissolution.

We must at once remind the reader, by way of preface, that formerly, the ecclesiastical courts(a), and those courts only, had jurisdiction in matrimonial causes, and possessed the exclusive power of annulling incestuous and other unscriptural marriages, though as such courts were supposed to act only *pro salute animæ*, their power generally ceased at the death of the parties implicated. This authority, claimed by the clergy in former times, when Roman Catholicism was the state religion, remained in the spiritual courts till A. D. 1857, when it was taken from them by the statute 20 & 21 Vict. c. 85, which established the "Court for Divorce and Matrimonial Causes"(b).

I. Even before the above-mentioned act was passed, our law considered marriage as it now considers it, in no *other light than as a civil con- [*524]
(I.) How marriage may be contracted. tract(c).(137) And, regarding it in this light, our law treats it as it does other contracts: allowing it to be good and valid

(a) As to the present jurisdiction of which, *post*, vol. iii.

(c) Upon this point, see Lord Stowell's judgment in *Dalrymple v. Dalrymple*, 2 Hagg. Con. Rep. 64.

(b) The jurisdiction of this court, and the effect of the various acts amending the 20 & 21 Vict. c. 85, are considered in vol. iii.

(137) In the United States, the rules of the common law upon this subject have been very generally adopted, and in a legal point of view marriage is regarded as a civil contract, governed by the same general principles as other contracts. But, unlike other contracts, it is indissoluble except by the death of one of the parties, or by a decree made by competent authority, and for causes sanctioned by the law.

The rules of the common law relating to marriage are few and simple. That law requires no ceremony, no solemnization by minister, priest, or magistrate; and a marriage is complete where there is a full, free, and mutual consent by parties who are capable of contracting the relation, even though not followed by cohabitation. *Caujolle v. Ferrie*, 23 N. Y. (9 Smith) 90, 106; *Jackson v. Winne*, 7 Wend. 47; *Bissell v. Bissell*, 55 Barb. 325; 7 Abb. Pr. (N. S.) 16; *Clarke v. Clarke*, 10 N. H. 383; *Londonderry v. Chester*, 2 id. 268; *Demarest v. Fishby*, 3 A. K. Marsh. 368; *State v. Murphy*, 6 Ala. 765.

No form of words is necessary in solemnizing the marriage contract. A bow of the head, in response to the proper interrogatory, may indicate assent as well as the words "yes," or "I do." *People v. Taylor*, 1 Mich. (N. P.) 198; *Graham v. Bennett*, 2 Cal. 503.

But intention is an essential ingredient of the contract of marriage; and, therefore, a marriage ceremony performed in jest does not make the parties husband and wife, even though the ceremony was performed by a justice of the peace, who was in doubt at the time whether the parties were in jest or in earnest. *McClurg v. Terry*, 21 N. J. Eq. 235. See *Aymar v. Roff*, 8 Johns. Ch. 49.

A promise to marry in future, though followed by cohabitation as man and wife, is not a

in all cases, where the parties at the time of making it were, in the first place, willing to contract; secondly, able to contract; and, lastly, actually did contract, in the proper forms and solemnities required by law.

First, the parties must be willing to contract. (138) "*Consensus non concu-*

valid marriage. *Cheney v. Arnold*, 15 N. Y. (1 Smith) 345; *Duncan v. Duncan*, 10 Ohio St. 181. See *Letters v. Cady*, 10 Cal. 533. Where the female is under fourteen years at the time of her marriage, and she continues to live with the husband as man and wife after she reaches that age, it will be a valid marriage at common law. *Koonce v. Wallace*, 7 Jones' Law (N. C.), 194. See *Hantz v. Sealey*, 6 Binn. 405.

In several of the states there are statutes regulating marriages, and in some cases imposing penalties for a disregard of the statute; but, if the statute does not declare marriages void for not complying with it, a marriage which is valid at the common law will be valid even though the statute has not been observed. *Campbell v. Gullatt*, 43 Ala. 67; *Hargroves v. Thompson*, 81 Miss. (2 George) 211; *State v. Robbins*, 6 Ired. 23; *Parton v. Hervey*, 1 Gray (Mass.), 119; *Londonderry v. Chester*, 2 N. H. 268; *Clayton v. Wardell*, 4 N. Y. (4 Comst.) 230.

There are cases, however, which hold that if the act is forbidden under a penalty, the contract will be void. *Liegnia v. Buxton*, 2 Greenl. 102; *Bashaw v. State*, 1 Yerg. (Tenn.) 177; *Holmes v. Holmes*, 1 Abb. (U. S.) 525.

An action for a breach of marriage promise is founded upon the mutual promises of the parties, which must be shown to exist before a right of action is established. *Standiford v. Gentry*, 32 Miss. 477; *Allard v. Smith*, 2 Metc. (Ky.) 297. The evidence requisite for that purpose need not be discussed in this place. See *Hotchkins v. Hodge*, 38 Barb. 117; *Sprague v. Craig*, 51 Ill. 288; *Thurston v. Cavenor*, 8 Clarke (Iowa), 155; *Waters v. Bristol*, 26 Conn. 398.

If one of the parties to a contract of marriage is a female infant, and the other an adult, the infant may hold the other party to the contract, although not legally bound herself by the agreement. *Hunt v. Peake*, 5 Cow. 475; *Willard v. Stone*, 7 id. 22.

A married man who enters into a contract of marriage with a female who does not know of his marriage, will be liable for a breach of marriage promise. *Coover v. Davenport*, 1 Heisk. (Tenn.) 368.

An action for a breach of marriage promise will lie at once, upon a positive refusal to perform the contract, although the time of performance has not arrived. *Burtis v. Thompson*, 42 N. Y. (3 Hand) 246; *Frost v. Knight*, L. R., 7 Exch. 111; S. C., 1 Eng. Rep. 218.

A man who, by false representations, induces a female to marry him when he is not competent to enter into the marriage relation, because he had formerly been married to a woman who had procured a divorce, but was still living, will be liable to an action for damages. *Blossom v. Barrett*, 86 N. Y. (10 Tiff.) 434; 5 Trans. App. 36.

It is a good defense to an action for a breach of marriage promise to show that the plaintiff, previous to the time of making the promise, fraudulently concealed from the defendant the fact that she had been delivered of a bastard child. *Bell v. Eaton*, 28 Ind. 468; *Reynolds v. Reynolds*, 3 Allen (Mass.), 805; *Baker v. Baker*, 13 Cal. 87; *Morris v. Morris*, Wright, 630; *Guilford v. Oxford*, 9 Conn. 321; *Scott v. Shufeldt*, 5 Paige, 43. Or if she was a lewd character, of which he was ignorant at the time of the promise. *Burnett v. Simpkins*, 24 Ill. 264; *Goodall v. Thurman*, 1 Head (Tenn.), 209; *Berry v. Bakeman*, 44 Me. 164. But as to this latter point, see *Reynolds v. Reynolds*, 3 Allen (Mass.), 807; *Scroggins v. Scroggins*, 3 Dev. 535; *Leavitt v. Leavitt*, 13 Mich. 352; *Baker v. Baker*, 13 Cal. 87.

A promise of marriage, made after seduction has been effected, and in consequence thereof, is not thereby rendered invalid. *Hotchkins v. Hodge*, 38 Barb. 117.

But a promise of marriage made in consideration of illicit intercourse is not binding. *Goodall v. Thurman*, 1 Head (Tenn.), 209.

(138) In all valid contracts consent is an essential element. The assent must be free from illegal restraint, and it must be given by one who has legal capacity to enter into the contract. And where a marriage is entered into while one of the parties is under duress, the contract is void and will be set aside by the courts on application in due season by the injured party. *Ferlat v. Gojrn*, Hopk. 478; *Collins v. Collins*, 2 Brews. (Penn.) 515; *Robertson v. Cole*, 13 Tex. 356; *Clark v. Field*, 18 Vt. 460.

But a marriage contracted through fear of imprisonment is not void, when the fear was

bitus, facit nuptias" is the maxim of the Roman law in this case(d): and it was adopted by the common lawyers(e), who indeed have borrowed (especially in ancient times) almost all their notions of the legitimacy of marriage from the canon and civil laws.

Secondly, the parties must be able to contract.(139) In general all persons

(d) Dig. 50, 17, 30.

(e) Co. Litt. 38.

not imposed as an inducement to the marriage, but arose from the arrest and prosecution of the party for bastardy. *Williams v. State*, 44 Ala. 24; *Jackson v. Winne*, 7 Wend. 47. But where a white female is pregnant with a child begotten by a negro, and she makes oath that a white man is the father, who is arrested upon the charge, and believing that the child is his, marries her, he will be relieved upon proving that the child is a mulatto. *Scott v. Shufeldt*, 5 Paige, 43; *Barden v. Barden*, 3 Dev. 548. But see *Foss v. Foss*, 12 Allen (Mass.), 26.

A marriage, procured by a gross fraud which would avoid any other contract, may be decreed invalid by the courts, if relief is sought promptly, and before a consummation of the marriage by copulation. *Clark v. Field*, 13 Vt. 480; *Robertson v. Cole*, 12 Tex. 356; *Keyes v. Keyes*, 22 N. H. 553.

An infant under the legal age of consent, and who does not understand the nature, consequences or duties of married life, will not be bound by a marriage ceremony. *Aymar v. Roff*, 3 Johns. Ch. 49; *Warwick v. Cooper*, 5 Sneed (Tenn.), 659. See *People v. Slack*, 15 Mich. 193.

So a marriage is invalid where one of the parties has not sufficient understanding to comprehend the nature of the contract. *True v. Ranney*, 21 N. H. 52; *Middleborough v. Rochester*, 12 Mass. 363; *Rawdon v. Rawdon*, 28 Ala. 565; *Foster v. Means*, 1 Spear's Eq. (So. Car.) 569; *Johnson v. Kincade*, 2 Ired. Ch. 470.

But the same degree of capacity or mind which will enable a party to make a valid deed or will, will be sufficient to enable him to contract matrimony. *Atkinson v. Medford*, 46 Me. 510; *Cole v. Cole*, 5 Sneed (Tenn.), 57; *Middleborough v. Rochester*, 12 Mass. 363.

An insane person cannot contract a valid marriage while in that condition, and unable to understand the nature of his acts. *Cole v. Cole*, 5 Sneed (Tenn.), 57; *Keyes v. Keyes*, 22 N. H. 553; *Wightman v. Wightman*, 4 Johns. Ch. 343; *Jaques v. Public Administrator*, 1 Brd. & C. 499; *Doe v. Roe*, 1 Edm. Sel. Cas. 344; *Crump v. Morgan*, 3 Ired. Eq. 91.

So of one so stupefied by intoxication as not to be capable of understanding, at the time, the nature of the transaction. *Clement v. Mattison*, 3 Rich. (So. Car.) 93; *Menkins v. Lightner*, 18 Ill. 282. But such a marriage, of an insane person, duly solemnized, and followed by cohabitation, though voidable, must be set aside during his life-time, and if this is not done his widow will be entitled to dower. *Wiser v. Lockwood*, 42 Vt. 720.

The consent of parents or of a guardian is sometimes important in the case of an infant's marriage. Where a statute provides that males of eighteen and females of sixteen may be joined in marriage, but requires the consent of parents or guardian, if the male is under twenty-one and the female under eighteen, the marriage of a female of sixteen, without the consent of her parents will bind her, and the contract cannot be dissolved on account of the want of this consent. *Fitzpatrick v. Fitzpatrick*, 6 Nev. 63.

By the common law the age of consent is twelve in females, and fourteen in males, and a marriage between two infants who are above those ages is valid without the consent of their parents or guardians, notwithstanding the statute gives a penalty if a magistrate or minister solemnizes the marriage of a female under eighteen or a male under twenty-one years of age. *Parton v. Herey*, 1 Gray, 119; *Warwick v. Cooper*, 5 Sneed (Tenn.), 659; *Bennett v. Smith*, 21 Barb. 439.

A statute which prohibits the marriage of any minor without "the consent of the parent, or guardian, or other person having the care or government of such minor," limits the power to consent to one person, and that one is the person who has the care or government of the minor at the time. And where there is a guardian, the parent cannot consent so as to justify the person who joins the minor in marriage. *Vaughn v. McQueen*, 9 Mo. 330.

(139) As to the marriage of infants, lunatics, and other persons whose capacity to make contracts may be doubtful, see notes 137, 138.

are able to contract themselves in marriage, unless they labour under some particular disabilities, and incapacities, the nature of which we have next to consider.

These disabilities were formerly divided into two sorts, first, those which were canonical, and therefore sufficient to avoid the marriage in the spiritual court; and secondly, those which were created, or at any rate were enforced by municipal law. The canonical disabilities had this particularity, that in our law, they only made the marriage voidable, and not *ipso facto* void, until sentence of nullity had been obtained. Such were pre-contract; consanguinity, or relation by blood; and affinity, or relation by marriage; and some particular corporal infirmities. Of these, the disability of pre-contract has been abolished, as we shall presently see, and the others are now cognisable in the temporal courts, and generally make the marriage in itself utterly void.

These canonical disabilities were either grounded upon the express words of divine law, or supposed to be plainly *deducible from it; it therefore [*525] being sinful in the persons who labour under them to attempt to contract matrimony together, such persons were subjected to the ecclesiastical magistrate's coercion; in order to separate the offenders, and inflict penance for the offence, *pro salute animarum*. Such marriages, however, not being void *ab initio*, but voidable only by sentence of separation, were esteemed valid to all civil purposes, unless separation was actually made during the life of the parties. For, after the death of either of them, the courts of common law would not suffer the spiritual courts to declare such marriages to have been void; because such declaration could not tend to the reformation of the parties(*f*). And therefore, when a man had married his first wife's sister, and after her death the bishop's court was proceeding to annul the marriage and bastardize the issue, the court of king's bench granted a prohibition *quoad hoc*; but permitted them to proceed to punish the husband for incest(*g*).

Pre-contract was also held to constitute a disability, but by stat. 32 Hen. 8, c. 38, among other provisions which will be hereafter referred to, all impediments arising from pre-contracts to other persons were abolished and declared of no effect, unless they had been consummated with bodily knowledge: in which case the canon law held such a contract to constitute a marriage *de facto*. This branch of the statute was repealed by 2 & 3 Edw. 6, c. 23, but as the 13th section of 26 Geo. 2, c. 33, expressly provides, "that in no case whatsoever shall any suit or proceeding be had in any ecclesiastical court in order to compel a celebration of any marriage *in facie ecclesie* by reason of any contract of matrimony whatever, whether *per verba de præsenti* or *per verba de futuro*, any law or usage to the contrary notwithstanding," it would appear that the statute of Henry VIII. is not only revived but extended, and that the disability by pre-contract is abolished, whether there has been consummation or not.

*All the disabilities for marriage now existing have been created, or [*526] at least are enforceable by the municipal laws. And though some of them may be grounded on natural law, they owe their efficacy to the laws of the land. These civil disabilities, with two exceptions(*h*), make the contract void *ab initio*, and not merely voidable; that is, they do not dissolve a

(*f*) Co. Litt. 88; 2 Phill. 16.
(*g*) 2 Salk. 548.

(*h*) That is to say, want of age, and certain physical infirmities.

contract already formed, but they render the parties incapable of performing any contract at all: they do not put asunder those who are joined together, but they previously hinder the junction. And if any persons under these legal incapacities come together, it is a meretricious, not a matrimonial, union.

1. The first of these legal disabilities is a prior marriage, or the having another husband or wife living; in which case, besides the penalties consequent upon it as a felony, the second marriage is to all intents and purposes void(*i*): polygamy being contrary to the spirit of the New Testament, and the policy of all prudent states, especially in these northern climates. And Justinian, even in the climate of modern Turkey, is express(*k*), that "*duas uxores eodem tempore habere non licet*."(140)

2. The next legal disability is want of age.(141) This is sufficient to render voidable other contracts, on account of the imbecility of judgment in the infant who contracts: *a fortiori*, therefore, it ought to avoid this, the most important contract of any. Therefore, if a boy under fourteen, or a girl under twelve years of age, marries, this marriage is only inchoate and imperfect; and when either of them comes to the age of consent aforesaid, they may disagree and declare the marriage void, without any divorce or sentence in a court. This is founded on the civil law. But the canon law paid a greater regard to the constitution, than the age of the parties(*l*): for if they were *habiles ad matrimonium*, it was a good marriage, *whatever their age might be. [*527] And in our law it is so far a marriage that, if at the age of consent the contracting parties agree to continue together, they need not be married again(*m*). If the husband be of years of discretion, and the wife under twelve, when she comes to years of discretion he may disagree as well as she; for in this contract the obligation must be mutual; both must be bound, or neither: and so it is, *vice versa*, when the wife is of years of discretion, and the husband under(*n*). This doctrine does not, however, extend beyond the actual marriage contract, referred to the ages of fourteen and twelve; for it has long been settled that if one of two parties to a contract to marry *in futuro*, be under twenty-one, and the other above that age, the former only can maintain an action for a breach of the promise, without being exposed to a plea of infancy, for such a contract is voidable by the minor on attaining majority(*o*). (142)

3. A third incapacity is want of reason; without a competent share of which neither can the matrimonial nor any other contract be valid.(143) It was for-

(i) Bro. Abr. tit. Bastardy, pl. 8.

(k) Inst. l. 10, 6.

(l) Decretal. Greg. l. 4, tit. 2, cap. 3.

(m) Co. Litt. 79.

(n) *Ib.*

(o) *Holt v. Ward*, 2 Str. 987; *Warwick v. Bruce*, 2 M. & S. 205, 209.

(140) One ground of incompetency to contract marriage is that one of the parties has a living wife or husband at the time of entering into the second marriage; and when this is the case, the second marriage is entirely void. *Appleton v. Warner*, 51 Barb. 270; *Smith v. Woodworth*, 44 id. 198; *Commonwealth v. Hunt*, 4 Cush. 99; *Heffner v. Heffner*, 23 Penn. St. 104; *Martin v. Martin*, 23 Ala. 86; *Gaines v. Relf*, 12 How. (U. S.) 473; *Sellers v. Davis*, 4 Yerg. (Tenn.) 508; *Jones v. State*, 5 Blackf. 141.

Impotency in a husband does not render a marriage by him void *ab initio*, but only avoidable by sentence of separation, and until such sentence, it is to be deemed valid and subsisting. *Smith v. Morehead*, 6 Jones' Eq. (N. C.) 360.

(141) See notes 137, 138.

(142) See note 137.

(143) See notes 137, 138.

merly adjudged, that the issue of an idiot was legitimate, and consequently that his marriage was valid(*p*). A strange determination! since consent is absolutely requisite to matrimony, and neither idiots nor lunatics are capable of consenting to anything. And therefore the civil law judged much more sensibly when it made deprivation of reason a previous impediment; though not a cause of divorce, if it happened after marriage(*q*). And modern resolutions have adhered to the reason of the civil law, by determining that the marriage of a lunatic, not being in a lucid interval, was absolutely void(*r*). But as it [*528] might *be difficult to prove the exact state of the party's mind at the actual celebration of the nuptials, the statute 15 Geo. 2, c. 30, provided that the marriage of a lunatic (if found lunatic under a commission, or committed to the care of trustees by any act of parliament), before he or she is declared of sound mind by the lord chancellor or the majority of such trustees, shall be void.

4. There is another disability, viz.: in respect of relationship, whether by consanguinity or affinity. By statute 32 Hen. 8, c. 38, it is declared, that all persons may lawfully marry, but such as are prohibited by God's law; and that all marriages contracted by lawful persons in the face of the church, and consummated with bodily knowledge and fruit of children, shall be indissoluble. And, (because, by the Roman Catholic church, various degrees of kindred were made impediments to marriage, which impediments were often, however, bought off for money) it is declared by the same statute, that nothing (God's law excepted) shall impeach any marriage, but within the Levitical degrees, the farthest of which is that between uncle and niece(*s*). Therefore, the marriages now prohibited, are those between parties related to each other, either by consanguinity or affinity, within the third degree inclusive(*t*). Marriages between parties who are in the fourth or any higher degree are lawful; as between first cousins, a nephew and a great aunt, or a niece and her great uncle. Relationship by affinity always arises from the marriage of one of the parties so related, but it extends only to the *consanguinei* of each party respectively(*u*). Thus a husband is related by affinity to all the *consanguinei* of his wife, and *vice versâ* a wife to all the *consanguinei* of her husband; and consequently a man cannot [*529] marry the sister of his deceased *wife(*u*), or her aunt, or niece, or daughter by a former husband(*v*). But a man may marry his brother's wife's sister, and a widower may marry the widow of his wife's brother, for no relationship or affinity whatever exists between the parties.(144)

5. Lastly, the parties must not only be willing and able to contract, but actually must contract themselves in due form of law to make a good civil marriage. Any contract made, *per verba de præsenti*, or in words of the present

(*p*) 1 Roll. Abr. 357.

(*q*) Dig. 28, tit. 1, 8, and tit. 2, 16.

(*r*) *Turner v. Meyers*, 1 Hag. Con. Rep. 414; *Hancock v. Peaty*, L. R. 1 P. & D. 335.

(*s*) Gilb. Rep. 158; Levit. c. xviii. For a table of Levitical degrees, see Burn's Eccl. Laws, tit. Marriage, and Gibs. Cod. tit. 22, c. 1.

(*t*) Gibs. Cod. tit. 22, c. 1.

(*u*) Gibs. Cod. tit. 22, c. 1. For table of consanguinity, see vol. ii.

(*v*) *Brook v. Brook*, 9 H. L. Cas. 193; *Fenton v. Livingstone*, 3 Macq. Sc. App. Cas. 497.

(*w*) 2 Phill. 18, 359.

(144) The several states provide by statute such rules as they deem proper upon this subject, and those statutes, with the decisions under them, must be consulted when the law of any particular state is in question. See Taylor on Inf. & Cov. 837; 1 Bish. on Marr. & Div. § 318, note 2.

tense, in the presence of, and with the assistance of a priest in holy orders, was a valid marriage at common law, before the statute 26 Geo. 2, c. 33 (A.D. 1753); indeed there are authorities to the effect that such a contract was a valid marriage without the presence of a priest, though it is more than doubtful whether such would be held to be the case now(*w*). (145)

From the passing of the above mentioned statute, till A.D. 1822, it was held that no marriage was valid which was not celebrated in some parish church or public chapel, (unless by dispensation from the archbishop of Canterbury). It must also have been preceded by publication of banns, or by licence from the spiritual judge(*x*); in the latter case, however, the consent of parents or guardians was necessary when either party was a minor, unmarried previously. Many other formalities were *likewise prescribed by the act; the neglect of which, though penal, did not invalidate the marriage. [* 530]

As the law then stood, we may upon the whole collect, that no marriage by the temporal law was *ipso facto* void if celebrated by a person in orders,—in a parish church, or public chapel, (or elsewhere by special dispensation)—in pursuance of banns or a licence,—between single persons,—not being within the prohibited degrees of relationship,—consenting(*y*),—of sound mind,—and of the age of twenty-one years; or of the age of fourteen in males and twelve in females, with consent of parents or guardians, or without in case of widowhood. And no marriage was voidable by the ecclesiastical law, after the death of either of the parties, nor during their lives, unless for the canonical impediments of consanguinity and of affinity, or corporal imbecility, subsisting previous to the marriage.

The rigid enforcement of the above rules having led to much inconvenience, the provisions of the act of Geo. II. were first relaxed by 3 Geo. 4, c. 75, and then by 4 Geo. 4, c. 76; and as those acts still rendered it necessary for all persons, except Quakers and Jews, to be married according to the rites of the established church, further relaxations in favour of non-conformists of all descriptions were made by 6 & 7 Will. 4, c. 85, which has since been amended by subsequent enactments(*z*).

With regard to the forms now requisite, the subject may be most conveniently regarded under the following divisions: 1. Marriages by the established church; and 2. Other marriages(*z*).

1. For the legal constitution of any marriage solemnised according to the forms of the established church, it is necessary that it either be preceded by the publication of banns for three Sundays in the parish church or public *chapel of the parish or chapelry (or of each parish or chapelry, if more than one) in which the parties to be married shall dwell; or be authorised by a licence or registrar's certificate. [* 531]

(*w*) See *Reg. v. Millis*, 10 Cl. & F. 534; *Beamish v. Beamish*, 9 H. L. Cas. 274; where the authorities are collected.

(*x*) It was held to be essential to a marriage, that it be performed by a person in holy orders (Salk. 119); though the intervention of a priest to solemnise this contract is merely *juris positivus*, and not *juris naturalis aut divini*: it being said that Pope Innocent III., first ordained the celebration of marriage in the church (Moor, 170), before which it was totally a civil contract. And in the times of the

commonwealth, all marriages were performed by justices of the peace; and these marriages were declared valid, without any fresh solemnisation, by stat. 12 Car. 2, c. 33.

(*y*) See *Pield's Marriage Annulling Bill*, 2 H. L. Cas. 48.

(*z*) The account in the text of the present form in which marriages are to be solemnised is taken from the Report issued 4th July, 1868, by the Royal Commission on the Laws of Marriage.

A marriage founded on banns can only be solemnised in one of the churches or chapels in which the banns have been published(*a*), and banns cannot lawfully be published in all churches or chapels, but only in parish churches, and in other churches or chapels specially authorised by episcopal licence(*b*), or order in council(*c*).

Although banns are intended as a security against clandestine and unlawful marriages, the law has given the clergyman no express power to call for or compel information as to the age, kindred, history, or other circumstances of parties unknown to him; except that he may, if he think fit, require from them seven days' notice, with a statement of their names, places of abode within his parish or chapelry, and length of residence in such places of abode(*d*), though legal penalties may be incurred by a false statement of any of such particulars.

Of licences there are two kinds: a common licence, which is granted by the ordinary through his chancellor and surrogates; and a special licence, which is granted only by the archbishop of Canterbury(*e*).

For the latter no fixed period of residence is necessary; it authorises marriage at any hour of the day or night, and in any place, whether consecrated or not(*f*). It is granted only on special grounds, and for a pecuniary payment so large as to be prohibitory to persons who are not affluent. The granting of special licences being of comparatively rare occurrence, has no general influence on the marriage laws of this country(*g*).

[*532] *A common licence may be obtained by any person who is prepared to make the requisite payments, and to declare on oath that one of the parties to be married, has, for the preceding fifteen days had his, or her, usual place of abode within the parish or district, in the church or chapel of which the marriage is to be solemnised; that there is no lawful impediment to the marriage known to the deponent, and, (if either party be a minor, not previously married) that the consent of the proper parent or guardian (if any) has been obtained(*h*). The only penalty expressly imposed by law for the false statement of any of these particulars is forfeiture (to be enforced, if necessary, in chancery) of any pecuniary benefits which the party might take under the marriage. No further inquiry is made by the surrogate; no kind of publicity is given to the application; and no interval of time is required to elapse between the application or the grant of the licence, or between the grant of the licence, and the solemnisation of the marriage.

The conditions on which a superintendent registrar's certificate for marriage by a clergyman of the established church may be obtained, are identical with those required for the other modes of solemnisation, which may take place under the registrar's certificate, and will be hereafter specified. The clergy of the established church are not bound, but they are at liberty to solemnise marriage under these certificates(*i*); a small portion, however, only of church marriages being so celebrated.

A marriage by common licence, or by a clergyman under a registrar's certi-

(*a*) 4 Geo. 4, c. 76, s. 2.
 (*b*) 4 Geo. 4, c. 76, ss. 2, 3.
 (*c*) 59 Geo. 3, c. 134, s. 6; 7 & 8 Vict. c. 56, s. 4.
 (*d*) 4 Geo. 4, c. 76, s. 7.
 (*e*) 25 Hen. 8, c. 21, ss. 3, 4; 4 Geo. 4, c. 76, s. 20; 6 & 7 Will. 4, c. 85, s. 1.
 (*f*) See Shelford on Marriage, 260.
 (*g*) On an average, about twelve special licences are issued yearly from the Faculty Office.
 (*h*) 4 Geo. 4, c. 76, ss. 10, 14.
 (*i*) 6 & 7 Will. 4, c. 85, s. 1; 19 & 20 Vict. c. 119, s. 11.

cate, must be solemnised in a church or chapel named in the licence, or within the district of the registrar. And every church marriage requires for its celebration the ministry of a duly ordained clergyman (the presence of a civil registrar not being required); and such marriage (unless by special licence) must be *celebrated between the hours of 8 and 12 o'clock A.M.(*k*); and, further, the law directs that it be attested by two witnesses besides [*533] the officiating minister(*l*).

2. Our law offers to persons who may not desire to be married according to the rites of the established church, the alternative of marriage, according to 2. Marriages their own religious usages(*m*), or marriage by a purely civil ceremony(*n*). Whichever alternative be chosen, certain preliminary other than those by the established church. proceedings are required to be taken in the office of the superintendent registrar, which stand in place of the banns or licences of the established church; and the presence of a civil registrar at the solemnisation of the marriage is, in all cases, required(*o*), except when the marriage is according to the usages of Quakers or of Jews(*p*).

These preliminary requirements are as follows:—

The parties intending to marry must give notice(*q*) to the superintendent registrar of each district (if more than one) in which they reside, accompanied by statutory declarations stating (subject to the penalties of perjury(*r*) if the statement be false) various particulars more numerous and precise than those required for a church licence. A notice book is kept in the superintendent registrar's office, in which copies of all such notices must be entered, and which is open to public inspection at reasonable times(*s*). The Notice.

marriage may take place either upon the certificate or upon the licence of the superintendent registrar. In the former case the notice must state a previous residence of at least seven days within the district, and a copy of the notice must be "suspended in some conspicuous place" in the superintendent registrar's office, during *twenty-one successive [*534] days next after entry in the notice book(*t*).

In the latter case, the declaration must show a residence in the district for at least fifteen days next before the notice; and a licence, authorising an immediate marriage, may issue on the second day after the entry in the notice book(*u*).

If one of the parties reside in Ireland or Scotland, notice to the Irish registrar, followed by his certificate according to the Irish marriage law, or a due publication of banns in Scotland, is accepted as equivalent to an English notice and certificate.

The certificate or licence specifies the place where the marriage is to be solemnised, which may be either the office of the superintendent registrar himself, or a registered building(*x*), or, in the case of a person professing to be a Quaker or a Jew, a place where marriages are celebrated according to the usages of either body. Place of marriage.

(*k*) 4 Geo. 4, c. 76, s. 21.
(*l*) 4 Geo. 4, c. 76, s. 23.
(*m*) 6 & 7 Will. 4, c. 85, s. 20.
(*n*) 6 & 7 Will. 4, c. 85, s. 21.
(*o*) 6 & 7 Will. 4, c. 85, s. 20.
(*p*) 6 & 7 Will. 4, c. 85, ss. 2, 16; 19 & 20 Vict. c. 119, ss. 20—22.
(*q*) 6 & 7 Will. 4, c. 85, s. 4; 19 & 20 Vict. c. 119, ss. 3, 4.

(*r*) 19 & 20 Vict. c. 119, ss. 2, 18.
(*s*) 6 & 7 Will. 4, c. 85, s. 5.
(*t*) 6 & 7 Will. 4, c. 85, s. 4; 19 & 20 Vict. c. 119, s. 4.
(*u*) 6 & 7 Will. 4, c. 85, s. 12; 19 & 20 Vict. c. 119, s. 9.
(*x*) Every separate building, certified under 52 Geo. 3, c. 155, as a place of religious worship (see also 18 & 19 Vict. c. 81), may, under

If the marriage be in a registered building, it must (as a general rule) be within the district, or one of the districts in which the notice was given; but the certificate or licence may authorise its solemnisation in the usual place of worship of the parties (if not more than two miles beyond the limits of the district), or in a registered building within the nearest district in which the ceremonies which they wish to be adopted are used, upon special cause being shown [*535] by certain forms of declaration *prescribed by statute(y) for cases in which adherence to the general rule might be inconvenient or impracticable. No marriage can be solemnised under the registrar's certificate in any church or registered place of worship, without the consent of the minister of such church or place of worship(z).

Every marriage in the registrar's office must be solemnised in the presence of the superintendent registrar; and every marriage in a registered building must be solemnised in the presence of one of the registrars under his superintendence(a). Both in the registrar's office and in a registered building the marriage must be solemnised in the presence of two witnesses, and between 8 and 12 o'clock A. M., and the parties must declare that they take each other as husband and wife knowing of no lawful impediment(b). No other form of solemnisation is prescribed: the addition of any kind of religious ceremony being permitted in a registered building(c), but prohibited in the superintendent registrar's office(d).

In all foregoing respects the law and practice are uniform, whether the parties principally concerned be Roman Catholics, Presbyterians, or of any other religious denomination, except Quakers and Jews. The marriages of Quakers and Jews, having been excepted from the operation of the acts prior to 6 & 7 Will. 4, c. 85(e), have been subjected to special legislation(f). The same notice is required from them as from other non-conformists, and they must, like others, be married under the superintendent registrar's certificate or licence. But they are not restricted to marriage in registered buildings or in places within the *district in which the parties dwell; any place within the superin- [*536] tendent registrar's district, in which marriages can properly be solemnised according to their respective usages, may be named in the certificate or licence, and the presence at the marriage of their own registering officer in the case of Quakers, or of an officer certified in a particular manner to be the secretary of a Jewish synagogue, in the case of Jews, is accepted as sufficient to authenticate the contract, without the attendance of a civil registrar.

With respect to the marriages of minors, the law is substantially the same (though with some unimportant differences in its directory provisions), whether the marriage is intended to be solemnised by the established church or otherwise(g).

Lord Russell's Act (6 & 7 Will. 4, c. 85), be registered as a building for the solemnisation of marriages, upon the application of a proprietor, or trustee, accompanied by a certificate of at least twenty householders, that they have used such building for one year as their usual place of religious worship, and that they desire it to be registered; and any part of a building licensed and used for public religious worship as a Roman Catholic chapel only, is deemed, for this purpose a separate building.

(y) 8 & 4 Vict. c. 72.

(e) 19 & 20 Vict. c. 119, s. 11.

(a) 6 & 7 Will. 4, c. 85, ss. 20 & 21.

(b) 6 & 7 Will. 4, c. 85, ss. 20, 21.

(c) 6 & 7 Will. 4, c. 85, s. 20.

(d) 19 & 20 Vict. c. 119, s. 12.

(e) 26 Geo. 2, c. 38, s. 18; 4 Geo. 4, c. 76, s. 31.

(f) 6 & 7 Will. 4, c. 85, ss. 2, 89; 3 & 4 Vict. c. 72, s. 5; 19 & 20 Vict. c. 119, ss. 20—22.

(g) The civil law required the consent of the parent or tutor at all ages; unless the children were emancipated, or out of the parent's power (Dig. 28, 2, 2 & 18); and if such

*The consent of parents or guardians (subject to an appeal to the court of chancery in cases of unreasonable refusal(*h*)), is so far [*537] required by law, that the parent or guardian by publicly forbidding the banns(*i*), or the solemnisation, or by *caveat*(*k*), or by entry in the registrar's marriage notice book(*l*), may prevent the banns from proceeding, or the licence or certificate (as the case may be) from issuing, or the marriage from taking place; and the consequence of the marriage of a minor, without the proper consent, may be, that the court of chancery will deprive the offending party of any pecuniary benefit from the marriage(*m*). But it is not incumbent on any clergyman, surrogate, or superintendent registrar, to call for any proof of consent beyond the declarations of the parties, when a licence is applied for, or notice given to a registrar: and the marriage of a minor, if actually solemnised without the requisite consent, is valid in law(*n*). (146)

A *caveat*, or entry of prohibition, in the registry of the ordinary(*o*), or in a registrar's office(*p*), alleging any legal impediment to a marriage, stops the issue of the surrogate's licence, or of the registrar's certificate or licence, until the objection is disposed of in due course of law. Superintendent registrars are empowered to inquire into and decide upon the validity of such objections, subject to an appeal to the registrar-general(*q*): and a **caveat* entered in the registry of the ordinary, may be brought for adjudication before the judge(*r*), for whom the surrogate is deputy, or [*538] (in the absence and with the sanction of the judge) may be disposed of by the surrogate.

Effect of non-compliance with legal requisites.

The effect of non-compliance with the various legal requirements, as well in cases of marriage by the established church as in others, must, in the next place, be considered.

consent from the father was wanting, the marriage was null, and the children illegitimate (Inst. 1, 10, 12); but the consent of the mother or guardians, if unreasonably withheld, might be supplied by the judge, or the president of the province, and if the father was *non-compos*, a similar remedy was given (Inst. 1, 10, 1), but no such restriction was known here till it was thought proper to introduce somewhat of the same policy into our laws by stat. 26 Geo. 2, c. 83, which enacted, that all marriages celebrated by licence (for banns suppose notice) where either of the parties is under twenty-one (not being a widow or a widower, who are supposed emancipated), without the consent of the father, or, if he be not living, of the mother or guardian, should be absolutely void. A like provision was made as in the civil law, where the mother or guardian was *non compos*, beyond sea, or unreasonably dissatisfied, to dispense with such consent at the discretion of the lord chancellor: but no provision was made, in case the father should labour under any mental or other incapacity. The strictness required by this act was found so prejudicial, and so many cases involving apparent hardship occurred of marriages being declared null after many years of cohabitation, that the law was by stats. 3 Geo. 4, c. 75 and 4 Geo. 4, c. 76

relaxed, to this extent, that though consent is still required for the marriage of minors yet marriages taking place without such consent are valid. On this subject see Appendix to Report of the Commission on the Laws of Marriage, A. D. 1868, pp. 16—23, 84.

(*h*) 4 Geo. 4, c. 76, s. 17. See *Ex parte, I. G.* 3 Myl. & Cr. 471.

(*i*) 4 Geo. 4, c. 76, s. 8.

(*k*) 4 Geo. 4, c. 76, s. 11; 6 & 7 Will. 4, c. 85, s. 13. Any person vexatiously entering a *caveat* with the superintendent registrar on grounds found to be frivolous, is liable for the costs of the proceedings, and for damages to be recovered in a special action on the case by the person against whose marriage such *caveat* has been entered. 6 & 7 Will. 4, c. 85, s. 37; 7 Will. 4 & 1 Vict. c. 23, s. 5.

(*l*) 6 & 7 Will. 4, c. 85, s. 9.

(*m*) 4 Geo. 4, c. 76, s. 23; 6 & 7 Will. 4, c. 85, s. 43.

(*n*) 3 Geo. 4, c. 75, s. 2; 4 Geo. 4, c. 76, s. 23; 6 & 7 Will. 4, c. 85, s. 25; 19 & 20 Vict. c. 119, s. 17.

(*o*) 4 Geo. 4, c. 76, s. 11.

(*p*) 6 & 7 Will. 4, c. 85, s. 13.

(*q*) 6 & 7 Will. 4, c. 85, s. 13.

(*r*) 4 Geo. 4, c. 76, s. 11.

The false statement of any of those particulars, as to which affidavits or statutory declarations are needed, though punishable(s), or visited with forfeiture of pecuniary interests(t), does not vitiate a marriage. And although in the wilful celebration of a marriage by a clergyman of the established church, or a registrar, in contravention of the law is felony by statute(u), yet no evidence can be offered after a marriage, for the purpose of showing non-compliance with the provisions of the statutes as to residence(v).

No want of attestation, or other mere defect of form, will vitiate a marriage contracted in good faith. But it may be vitiated and rendered null in law

by the falsification, or even by a slight disguise, through the fraud of both parties, of a christian name or surname in the publication of banns(x), (though not in a licence(y)); and possibly also in a registrar's certificate(z). A marriage, also, according to the rites of the established church is by statute 4 Geo. 4, c. 76, s. 22, "null and void to all intents and purposes [*539] whatsoever," if the parties (i. e. both of *them) have knowingly and wilfully intermarried in any place other than a church or chapel in which banns may be lawfully published (unless by special licence), or have "knowingly and wilfully" intermarried "without due publication of banns, or licence from a person having authority to grant the same, first had and obtained," or have "knowingly and wilfully assented to or acquiesced in the solemnisation of such marriage by any person not being in holy orders." Further, a marriage purporting to be solemnised under the statute 6 & 7 Will. 4, c. 85, is by that act declared to be "null and void" if the parties shall "knowingly and wilfully" intermarry in any place other than the church, chapel, or registered building specified in the notice and certificate, or without due notice to the superintendent registrar, or without the superintendent registrar's certificate, duly issued, or without his licence, when necessary, or in the absence of a registrar or superintendent registrar, where his presence is necessary under the act. No publication of banns, common or special licence, or superintendent registrar's certificate or licence, is available as legal authority for the solemnisation of a marriage at any time more remote than three months from the date of the last publication of banns or of the issue of the licence or certificate(a).

A marriage cannot lawfully be contracted according to the peculiar usages of the Quakers, except between persons, both of whom are members of, or, (if not members,) "profess with and are of the persuasion of" the Society of Friends, nor according to the peculiar usages of the Jews, except between persons, both of whom are of the Jewish religion. These usages being referred to by the statutes as the rules of lawful solemnisation, difficult questions, perhaps even affecting the validity of marriages *bond fide* contracted, may be liable to arise, in cases in which it may be alleged that those usages have not been properly [*540] observed. Except, however, in these peculiar cases, of Quakers and Jews, no marriage in England is liable to be held void on any ground

(s) 6 & 7 Will. 4, c. 85, s. 38; 19 & 20 Vict. c. 119, s. 18.

(t) 4 Geo. 4, c. 76, s. 23; 6 & 7 Will. 4, c. 85, s. 43.

(u) 4 Geo. 4, c. 76, s. 21; 6 & 7 Will. 4, c. 85, s. 39.

(v) 4 Geo. 4, c. 76, s. 26; 6 & 7 Will. 4, c. 85, s. 25; 19 & 20 Vict. c. 119, s. 17.

(x) 4 Geo. 4, c. 76, ss. 7, 22; *Mather v. Ney*, 3 M. & S. 265; *R. v. Inhabitants of Tisbury*,

1 B. & Ad. 190; *Wells v. Wells and Cottam*, 3 Swa. & Tr. 364, 533.

(y) *Lane v. Goodwin*, 4 Q. B. 361; *Bevan v. McMahon*, 2 Swa. & Tr. 290.

(z) See *Holmes v. Simmons*, L. R. 1 P. & D. 523.

(a) 4 Geo. 4, c. 76, ss. 9, 19; 6 & 7 Will. 4, c. 85, s. 15; *Wiltshire v. Prince*, 3 Hag. Ecc. R. 332; *Tongue v. Allen*, 1 Moo. P. C. 90.

connected with the religious belief or persuasion of both or either of the parties thereto, in whatever form, by whatever person, or in whatever place it may have been solemnised.

It must be remembered that none of the marriage acts(*b*) here mentioned affect the royal family, whose marriages are regulated by the common law as modified by the Royal Marriage Act(*c*), nor to marriages taking place abroad(*d*); respecting which there has been some recent legislation.

II. We have next to consider the manner in which a marriage may be dissolved; and this is either by death, or divorce.(147) Before the year 1857,

(II.) How a marriage may be dissolved. when the Divorce Act was passed, divorce as well as marriage was within the cognisance of the ecclesiastical courts. There were

Divorce a vinculo matrimonii.

two kinds of divorce, the one total, the other partial; the one *a vinculo matrimonii*, the other, *a mens et thoro*. The total divorce, *a vinculo matrimonii*, was always for some one of the canonical causes of impediment before mentioned; and those existing before the marriage, as is always the case in consanguinity or affinity; not supervenient, or arising afterwards, as may be the case in corporal imbecility. For in a case of total divorce the marriage was declared null, as having been absolutely unlawful *ab initio*; and the parties were therefore separated *pro salute animarum*: for which reason, as was before observed, no divorce could be obtained, but during the life of the *parties(*e*). The issue of such marriage as was thus entirely dissolved, were bastards(*f*). [*541]

Divorce *a mens et thoro* was when the marriage had been just and lawful *ab initio*, and therefore the law was tender of dissolving it; but for some supervenient cause, it became improper or impossible for the parties to live together: as in case of cruelty, or adultery in either of the parties. For the canon law, which the common law followed in this case, deemed so high and with such mysterious reverence of the nuptial tie, that it

(b) 26 Geo. 2, c. 33, s. 17; 4 Geo. 4, c. 76, s. 30; 6 & 7 Will. 4, c. 85, s. 45.

(c) 12 Geo. 3, c. 11, ante p. 267.

(d) The laws relating to marriages in Scotland and Ireland differ in many respects from those which have force in England. The

marriage abroad of a person who is here under attainder for treason may be valid. *Kynnaid v. Leslie*, L. R. 1 C. P. 889.

(e) *Ante*, p. 525.

(f) *Co. Litt.* 235.

(147) Ordinarily, divorces are sought upon grounds, or for causes arising after marriage; but there are cases in which the cause may have existed before and at the time of the marriage, as in the case of incurable impotency. *J. G. v. H. G.*, 83 Md. 401; *Bascomb v. Bascomb*, 25 N. H. 267; *Keith v. Keith*, Wright, 518; *Ferris v. Ferris*, 8 Conn. 166. Impotency arising from idiocy is no cause for a divorce in Vermont. *Norton v. Norton*, 2 Aiken, 188; *Greenstreet v. Cumyngs*, 2 Phill. 10. See *Devanbagh v. Devanbagh*, 5 Paige, 554; 6 id. 175; *E. B. v. E. C. B.*, 28 Barb. 299; 8 Abb. Pr. 44; *Newell v. Newell*, 9 Paige, 25.

It may be stated as a general rule that adultery is a good ground for an absolute divorce in all the states of the Union except South Carolina. See *Hair v. Hair*, 10 Rich. Eq. 172. The statutes of the different states relating to the subject must necessarily differ in matters of detail, and can be learned by examining them. The decisions upon this branch of the law are very numerous, and a citation of them would serve no useful purpose in this place. To the general rule there may be one apparent exception; and in several cases it has been held that adultery committed by an insane wife did not furnish ground for a divorce. *Nichols v. Nichols*, 81 Vt. 828; *Broadstreet v. Broadstreet*, 7 Mass. 478; *Wray v. Wray*, 19 Ala. 523. The contrary was held in *Matchin v. Matchin*, 6 Penn. St. (6 Barr.) 883.

would not allow it to be unloosed for any cause whatsoever, that arose after the union was made. And this was said to be built on the divine revealed law; though that expressly assigns incontinence as a cause, and indeed the only cause, why a man may put away his wife and marry another(*g*).

But in England adultery was only a cause of separation from bed and board(*h*): for which the best reason that could be given was the supposition, that if divorces were allowed to depend upon a matter within the power of either of the parties, they would probably be extremely frequent; as was the case when divorces were allowed for canonical disabilities, on the mere confession of the parties(*i*). However, divorces *a vinculo matrimonii*, for adultery were for many years frequently granted by act of parliament:(148) but only upon strict proof of the adultery; and, in general, only after a sentence of divorce *a mensâ et thoro*, by the ecclesiastical court, and, (if the husband were the petitioner), after verdict against the adulterer in a trial at law(*k*).

From such a state of the law it practically resulted that divorces on what [*542] were deemed sufficient grounds, *though always obtainable by the rich, were denied for the most part to the poor.

This great injustice has been remedied by the establishment of the Court for Divorce and Matrimonial Causes, commonly called the Divorce Court(*l*), which now grants relief in two ways, viz.: by divorce, or dissolution of marriage, which corresponds to the old divorce *a vinculo matrimonii*, and by a judicial separation which corresponds to the divorce *a mensâ et thoro*.

Divorce or dissolution of marriage(*m*), which is a complete severance of the marriage tie, can be obtained by the husband on the ground of his wife's adultery.(149) It can be obtained by the wife on the grounds that

Divorce. since the celebration of the marriage, her husband has been guilty of incestuous adultery(*n*), or of bigamy with adultery, or of rape, or an unnatural crime, or of adultery coupled with such cruelty(*o*) as would formerly have entitled her to a divorce *a mensâ et thoro* or of adultery coupled with desertion, without reasonable excuse, for two years or upwards.

A judicial separation which has all the effects attendant on a divorce *a mensâ*

(*g*) Matt. xix. 9.

(*h*) Moor, 683.

(*i*) 2 Mod. 314.

(*k*) See the cases in Macqueen's Parl. Div. pp. 551—688.

(*l*) As to the jurisdiction and practice of this court, see vol. iii.

(*m*) 20 & 21 Vict. c. 85, s. 27. As to the effect of a decree of divorce by a foreign tribunal in the case of an English marriage between English subjects, see *Shaw v. Gould*, L. R. 3 H. L. 55.

(*n*) Incestuous adultery means adultery committed by the husband with a woman whom if his wife were dead he could not marry, by reason of her being within the prohibited degrees of consanguinity or affinity, 20 & 21 Vict. c. 85, s. 27.

(*o*) What conduct amounts to cruelty may be gathered from the following cases. *Evans v. Evans*, 1 Hagg. Con. Rep. 85; *Curtis v. Curtis*, 1 Swa. & Tr. 193; *Marsh v. Marsh*, *Id.* 312; *Milner v. Milner*, 31 L. J. P. M. & A. 159; *Hudson v. Hudson*, 3 Swa. & Tr. 314.

(148) Divorces have been granted by some of the state legislatures, though this has not been much practiced. And in some cases the state courts have denied the power of the legislature to grant divorces. *Brigham v. Miller*, 17 Ohio, 445; *Clark v. Clark*, 10 N. H. 380; *Ponder v. Graham*, 4 Flor. 23; *Bryson v. Bryson*, 17 Mo. 590.

In many of the state constitutions there is a clause prohibiting the legislature from granting divorces, and conferring the power upon the courts. And the application for divorces are now made to the courts under the statutes and decisions of the several states.

(149) See note 147.

et thoro under the former law(*p*) may be obtained by either party on the ground of adultery, or cruelty(*q*), or desertion without cause for two years or upwards(*r*). (150)

(*p*) 20 & 21 Vict. c. 85, s. 7.

(*r*) 20 & 21 Vict. c. 85, s. 16.

(*q*) See note (*o*), *supra*.

(150) The power of the courts to grant limited divorces, or separation from bed and board, is well settled in this country. The grounds which will authorize such a decree are, in many cases declared by statute, and they differ in the several states as to minor details. Cruel and inhuman treatment, and abandonment, are frequent grounds of complaint and of actions. The general rule is, that to constitute legal cruelty which will authorize a divorce or separation, there must be either actual violence committed, attended with danger to life, limb or health, or there must be a reasonable apprehension of such violence. *Shaw v. Shaw*, 17 Conn. 189; *Sharman v. Sharman*, 18 Tex. 521; *Mahone v. Mahone*, 19 Cal. 627; *Finley v. Finley*, 9 Dana (Ky.) 52; *Harman v. Harman*, 16 Ill. 85; *Beebe v. Beebe*, 10 Iowa, 183; *Doyle v. Doyle*, 36 Mo. 545; *Hughes v. Hughes*, 44 Ala. 698; *Cole v. Cole*, 23 Iowa, 433; *Cook v. Cook*, 3 Stockt. (N. J.) 195; *Richards v. Richards*, 37 Penn. St. 225.

Ordinarily, a single act of cruelty, unless it is a very aggravated one, will not authorize a divorce; and usually the acts must be persistent, unless from their nature it is to be presumed that they will be continued, *Ib*.

A statute which provides that it is ground of divorce if the husband has offered such indignities to his wife's person as to render her condition intolerable and life burdensome, does not require that such indignities should be such as to endanger her life. *May v. May*, 62 Penn. St. 206; see, also, *Davies v. Davies*, 55 Barb. 130; 37 How. Pr. 45; *Payne v. Payne*, 4 Hum. 500.

Where a husband made gross and unfounded charges of adultery against his wife, and attempted to induce a negro servant to criminate her in adultery with such servant, the court granted a divorce from bed and board. *Thomas v. Thomas*, 2 Cold. (Tenn.) 128.

If a husband whips his wife, or threatens or attempts to commit adultery, or if he curses and abuses her, or uses insulting and opprobrious language, he is guilty of cruel treatment which will authorize a divorce. *Gholston v. Gholston*, 31 Ga. 625. So where a husband was in the habit of using vile and abusive language towards his wife, causing her much mental suffering and fits of illness, threatening permanent injury to her health, it was held a sufficient ground for a divorce for cruelty. *Powelson v. Powelson*, 22 Cal. 358. Groundless charges of adulterous intercourse made by the husband against his wife is an act of gross cruelty. *Pinkard v. Pinkard*, 14 Tex. 356. So of studied vexations and deliberate insults and provocations. *Sheffield v. Sheffield*, 3 id. 79. Austerity of temper, sallies of passion or abusive language do not constitute such extreme and repeated cruelty as to authorize a divorce under the statute. *Turbitt v. Turbitt*, 21 Ill. 438. Mere indignities by a husband to the moral character or reputation of his wife, are not sufficient to authorize a divorce. *Cheatham v. Cheatham*, 10 Mo. 296. Vulgar, obscene, and harsh language, with epithets suited to deeply wound the feelings and excite the passions, but not accompanied with any act or menace indicating violence to the person, does not constitute such cruelty. *Shaw v. Shaw*, 17 Conn. 189.

A divorce will not be granted on the ground of extreme cruelty, where it appears that the party complaining willfully provoked the violence or misconduct complained of, unless such violence was extremely out of proportion to the provocation. *Reed v. Reed*, 4 Nev. 395; *David v. David*, 27 Ala. 222; *Skinner v. Skinner*, 5 Wis. 449; *Poor v. Poor*, 8 N. H. 307. See, *contra*, *Eidenmuller v. Eidenmuller*, 37 Cal. 364.

Where a wife treats her husband in such a manner as to render his "condition intolerable and his life burdensome," it is a ground of divorce under the Pennsylvania statutes. *Jones v. Jones*, 66 Penn. St. 494. So violent and outrageous conduct on the part of the wife toward the husband, rendering the proper discharge of the duties of married life impossible, is, in Maryland, sufficient ground for a divorce from bed and board. *Lynch v. Lynch*, 33 Md. 328; *Kenemer v. Kenemer*, 26 Ind. 330; *Beebe v. Beebe*, 10 Iowa, 183; *Gholston v. Gholston*, 31 Ga. 625; *McNamara v. McNamara*, 2 Hilt. (N. Y. C. P.) 547; 8 Abb. 18; *Perry v. Perry*, 2 Paige, 601; *White v. White*, 1 S. & T. 591; 6 Jur. N. S. 28; 1 L. T. N. S. 197; *Pritchard v.*

It is enacted that a sentence of divorce shall in no case *be granted [*543] if the petitioner has been accessory to, or connived at, or condoned the adultery of the other party, or if the petition has been presented in collu-

Pritchard, 3 S. & T. 523; 10 Jur. N. S. 880; 10 L. T. N. S. 789; *Forth v. Forth*, 15 W. R. 1091; 16 L. T. N. S. 574; 36 L. J. Mat. Cas. 122.

Personal abuse or indignities offered by a wife to her husband will not justify him in turning her out of doors; he must show such cruel or barbarous treatment as render his condition intolerable and life burdensome, or endanger his life; such as would entitle him to a divorce. *Gordon v. Gordon*, 48 Penn. St. 226. A single act of drunkenness and indecency of a wife is not such an indignity as will render the condition of the husband intolerable. *Kempf v. Kempf*, 34 Mo. 211.

Desertion or abandonment by either husband or wife is one of the grounds for a divorce. But, to constitute this offense, the desertion or abandonment must be intentional, or willful and malicious, with an intent to renounce and disregard the marriage relation. The length of time which is required to justify a divorce is not uniform in the several states. What acts constitute desertion will be found reported in numerous cases, of which but a few can be here given by way of illustration of the general rule.

Abandonment must be the deliberate act of the party complained against, and done with the intent that the marriage should no longer exist; but when the abandonment of the conjugal relation is mutual, and equally deliberate and final on both sides, no divorce *a vinculo* can be granted to either party. *Lynch v. Lynch*, 33 Md. 328.

It is ground for a divorce where a husband has intentionally, and against his wife's consent, for five consecutive years, abandoned all matrimonial intercourse and companionship with her, and denied her the protection of his home, even though he has during that time regularly contributed toward supporting the wife and children. *Magrath v. Magrath*, 103 Mass. 577.

A husband is not justified in deserting his wife because she refuses him marital intercourse. *Reid v. Reid*, 21 N. J. Eq. 331.

Refusal of sexual intercourse for five years consecutively, although not justified by considerations of health, is not "desertion." *Southwick v. Southwick*, 97 Mass. 827.

A wife who willfully and maliciously declines or refuses to accompany her husband to a new house, and without just or reasonable cause therefor, is guilty of desertion. *Angier v. Angier*, 7 Phil. (Penn.) 805; *Cutler v. Cutler*, 2 Brews. (Penn.) 511; see *Walker v. Leighton*, 81 N. H. 111, 116; *Hardenburgh v. Hardenburgh*, 14 Cal. 654.

But the husband must show that the wife unreasonably refused to remove from one state to another, at his place of residence; and if the fatigues and hardships of such a journey are very great, he must show that she was able to endure them, or a divorce will be refused. *Gleason v. Gleason*, 4 Wis. 64, 66. A wife who, in good faith, refuses to live with her husband in a particular locality, "near his relations," which he persisted in doing, will not be considered guilty of desertion if she believes she could not live happily there, as the desertion would not in that case be willful. *Powell v. Powell*, 29 Vt. 148, 150. So the refusal of a wife to remove with her husband to a foreign country to reside, is not a willful desertion. *Bishop v. Bishop*, 80 Penn. St. 412.

To constitute desertion on the part of the wife, she must absent herself from her husband of her own accord, without his consent and against his will. *Moores v. Moores*, 16 N. J. Eq. (1 C. E. Green) 275.

It is no ground for desertion or for a divorce by the wife that the husband's marital intercourse with her is very frequent, if she has no peculiar debility or physical infirmity, and there is no violence or compulsion on the part of the husband. *Moores v. Moores*, 16 N. J. Eq. (1 C. E. Green) 275; *Shaw v. Shaw*, 17 Conn. 189.

A divorce will not be decreed upon proof that the husband went away and lived apart from his wife. A mere separation cannot be considered a desertion within the meaning of the statute. *Cook v. Cook*, 18 N. J. Eq. (2 Beas.) 268.

A failure by a husband to supply his wife with such necessities and comforts as are within his reach, and compelling her by cruelty to quit him, are as much an abandonment as actual desertion on his part. *Levering v. Levering*, 16 Md. 213.

sion with either respondent(s). It is also entirely in the discretion of the court whether it will pronounce a decree or not(t), if the petitioner during the marriage has been guilty of adultery, or unreasonable delay in presenting the petition, or cruelty to the other party to the marriage, or of having deserted or wilfully separated himself or herself from the other party before the adultery complained of, and without reasonable excuse, or of such wilful neglect or misconduct as has conduced to the adultery.

III. Having thus shown how a marriage may be made, or dissolved, we come lastly to speak of the legal consequences of such making, or dissolution.

(III.) Legal consequences of marriage and divorce. And first, as to the consequences of marriage:— By marriage, the husband and wife become one person in law(u):(151) that is, the very being or legal existence of the woman is in many

(e) 20 & 21 Vict. c. 85, 81.

(u) Co. Litt. 112.

(t) *Ibid.*

(151) In the United States the common-law disability of a married woman to make contracts very generally prevails where no statute has changed the rule. *Whitworth v. Carter*, 43 Miss. 61; *O'Daily v. Morris*, 81 Ind. 111; *Smith v. Allen*, 1 Lans. 101; *Bauer v. Bauer*, 40 Mo. 61; *Pond v. Carpenter*, 12 Minn. 430; *Jones v. Crosthwaite*, 17 Iowa, 898; *Shannon v. Canney*, 44 N. H. 592; *Glover v. Alcott*, 11 Mich. 470; *Ayer v. Warren*, 47 Me. 217; *Griffith v. Clark*, 18 Md. 457; *Nunally v. White*, 8 Metc. (Ky.) 584; *Luning v. Brady*, 10 Cal. 265.

Where a wife has a separate estate, she has power to make contracts in relation to that, which a court of equity will enforce in a proper case, without the aid of any statute for that purpose. *Yale v. Dederer*, 18 N. Y. (4 Smith) 265; *Pemberton v. Johnson*, 46 Mo. 342; *Cheever v. Wilson*, 9 Wall. 108; *Lindley v. Cross*, 81 Ind. 106; *Hackett v. Metcalf*, 6 Bush (Ky.) 352; *Ballin v. Dillaye*, 37 N. Y. (10 Tiff.) 35; *Harrison v. Stewart*, 18 N. J. Eq. (3 C. E. Green) 451; *Penn v. Whitehead*, 17 Gratt. (Va.) 503; *Dallas v. Heard*, 82 Ga. 604; *Beals v. Cobb*, 51 Me. 848; *Tracy v. Booth*, 37 Vt. 78; *Todd v. Lee*, 16 Wis. 480; *Miller v. Newton*, 23 Cal. 554.

In several of the states of the Union, statutes have been enacted for the protection of the rights of married women. And the general character of these statutes is to give to a married woman all the rights of property which she might have if unmarried, with some slight exceptions to the general rule. Wherever such statutes exist, the courts have given full effect to them by securing the wife's rights to her property, and by enforcing her contracts made in relation thereto. It is generally held that such statutes do not enlarge the general powers of the wife as to all contracts, but only as to such as affect her property or estate. The practical effect of this change in the law has been to enable married women to make many contracts which courts of law will enforce, when such a rule did not formerly exist. The cases and the illustrations of these principles are very numerous, and but few of them can be noticed in this place.

The remedy against a married woman, in equity, to charge her separate estate for her contracts, is superseded by the statutory provision authorizing a judgment against her personally. *Ainsley v. Mead*, 3 Lans. 116. She may make bargains, carry on any trade or business, and perform labor and services on her own separate account, and for her own exclusive benefit, the same as though she were unmarried; and the earnings and profits belong to her exclusively, and are her sole and separate estate. She may also sue and be sued upon any and all bargains, obligations and liabilities made or incurred in her business, the same as though she were sole. And an action is brought, prosecuted and enforced against her in the same manner that it would be if she were unmarried. *Foster v. Conger*, 61 Barb. 145; S. C., 42 How. Pr. 176. She may bind her separate estate, by contract, so as to charge it with a mechanic's lien. *Trucker v. Gest*, 46 Mo. 339. She may enter into an agreement to submit to arbitration, and to abide by the award, a question of damages for the flowage of her lands. *Duren v. Getchell*, 55 Me. 241; *Palmer v. Davis*, 28 N. Y. (1 Tiff.)

respects suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and cover, she performs every thing and is therefore called in our law-French a *feme-covert*,

242. So she is liable on a promissory note given for the price of neat cattle, bought by her authority for the use of a farm of which she is seized to her sole and separate use. *Batchelder v. Sargent*, 47. N. H. 262. Under the statute of Iowa she is liable on her covenant of warranty in a deed of her own land. *Richmond v. Tibbles*, 26 Iowa, 474. So in Massachusetts (*Basford v. Pearson*, 7 Allen [Mass.] 504), and New York (*Sigel v. Johns*, 58 Barb. 620). If she purchases furniture in her own name for the purpose of using it in a boarding-house which she keeps, and takes all the profits, she will be personally liable to pay the price, even though her husband lives with her, if he has nothing to do with the management of the house, or the profits. *Tilman v. Shackleton*, 15 Mich. 447; *Parker v. Simonds*, 1 Allen (Mass.) 258. So she is liable on her contract for the purchase of a mowing machine to be used on her farm. *McCormick v. Holbrook*, 23 Iowa, 487. Or to any attorney for services rendered at her request in reducing to her possession her separate estate. *Leonard v. Rogan*, 20 Wis. 540. If she carries on business on her sole account, she can give a valid note for goods purchased for that purpose. *Barton v. Beer*, 35 Barb. 78; 21 How. Pr. 309.

The tendency of legislation, and of the adjudications of the courts, is to extend the rights and powers of married women beyond those given by the common law. Yet the courts enforce the common-law rights of the husband where no statute interferes to declare a different rule. Ordinarily, the cases hold that the husband is entitled to the personal services of the wife, and to the earnings accruing from them; and that, too, notwithstanding the statutes relating to married women, unless it is earned in a business carried on upon her sole and separate account. *McCluskey v. Provident Inst.*, 108 Mass. 300; *National Bank of Metropolis v. Sprague*, 20 N. J. Eq. (5 C. E. Green) 13; *Gould v. Curlton*, 55 Me. 511; *Baxter v. Prichett*, 27 Ind. 490; *Bear v. Hays*, 36 Ill. 280; *Hoffman v. Toner*, 49 Penn. St. 231; *Connors v. Connors*, 4 Wis. 112; *Woodbeck v. Havens*, 42 Barb. 68.

The statutes of some of the states are broad enough to give the wife the earnings of her personal services in all cases, whether earned in a separate business carried on by her or not, and they give her all the rights she would have in that respect if unmarried, and her husband's creditors cannot reach them or their avails. *Marshall v. Marshall*, 3 Bush. (Ky.) 415; *Hoyt v. White*, 46 N. H. 45; *Oglesby v. Hall*, 30 Ga. 386; *Whiting v. Beckwith*, 81 Conn. 596; *Abbey v. Deyo*, 44 N. Y. (5 Hand) 343.

In relation to the wife's earnings arising from her personal services, it may be said that the general rule in this country is that they belong to the husband, and may be taken for his debts, unless some statute gives them to the wife to the exclusion of her husband or his creditors.

The common-law rights of the husband are very generally established and enforced in this country. And where an injury is inflicted upon the husband by one who knowingly assists the wife in a violation of her duty, as where a druggist secretly sells the wife, from day to day, large quantities of laudanum to be used by her as a beverage, and which is so used, to her great injury, and without the husband's knowledge, but with the knowledge of the druggist that she was greatly injured by its use, such druggist will be liable to an action by the husband. *Hoard v. Peck*, 56 Barb. 202.

Where a third person, with wicked intent, and by means of false insinuations against the husband, and by other insidious wiles, so prejudices and poisons the wife's mind against the husband, and so far alienates her affections from him as to induce her to seek a divorce, and to refuse to recognize or receive the husband as such, or to live with him as his wife, an action will lie by the husband against such third person. *Heermance v. James*, 47 Barb. 120; 32 How. Pr. 142.

But a wife has a right to invoke and receive aid, shelter and protection against the cruelty and oppression of her husband; and a stranger may lawfully render such aid, shelter and protection, upon an application and statement of the wife which shows its necessity, and when such stranger acts in good faith. *Barnes v. Allen*, 1 Keyes (N. Y.) 390.

The common law does not permit husband or wife to be a witness for or against the other in civil actions. *Macondray v. Wardle*, 26 Barb. 612; *Hicks v. Bradner*, 5 Trans. App. 239; 35 How. Pr. 118; *Blake v. Lord*, 82 Mass. 387; *Kelly v. Drew*, 12 Allen (Mass.) 307; *Car-*

fœmina viro co-operta; is said to be covert-baron, or under the protection and influence of her husband, her baron, or lord; and her condition during her marriage is called her coverture. Upon this principle of an union of person in husband and wife, depend almost all the legal rights, duties, and disabilities, that either of them acquire by the marriage. For this reason, according to our common law, a man cannot grant any thing to his wife, or enter into covenant

penter v. Moore, 43 Vt. 392; *Phares v. Barbour*, 49 Ill. 370; *Blair v. Patterson*, 47 N. H. 523; *Kyle v. Frost*, 29 Ind. 389; *Mountain v. Fisher*, 22 Wis. 93; *Marshman v. Conklin*, 3 N. J. Eq. (2 H. W. Green) 289; *Leach v. Fowler's Devises*, 22 Ark. 143; *McKeen v. Frost*, 46 Me 389; *McDuffie v. Greenway*, 24 Tex. 625; *Bird v. Houston*, 10 Ohio St. 418.

In some of the states, under statutes relating to the competency of witnesses, the wife or husband may sometimes be witnesses for or against each other; but it is generally held, that statutes which merely declare that interest shall not disqualify, do not remove the common-law disabilities of husband and wife, which are founded upon principles of public policy. Some of the cases which hold that the wife or husband may be a witness for or against the other, are the following: The husband is a competent witness for his wife to prove what disposition he has made of money belonging to her separate estate. *Robison v. Robison*, 44 Ala. 227. So in an action of slander against husband and wife for words spoken by her, they may be witnesses in their own behalf. *Mousler v. Harding*, 33 Ind. 176. And in like case they may be witnesses for each other. *Marah v. Potter*, 30 Barb. 506. In New York, under statute 1867, ch. 887, in civil actions or proceedings, a husband or wife is competent and compellable to give evidence for or against each other, the same as other witnesses, except in actions founded on adultery, or in actions for criminal conversation, or as to confidential communications between them. *Southwick v. Southwick*, 49 N. Y. (4 Slick.) 510. But, before this statute, neither could be a witness in an action between them for a divorce on the ground of adultery. *Risenburgh v. Risenburgh*, 47 Barb. 419.

So in an action for damages for criminal conversation by the defendant with the plaintiff's wife, the wife could not be a witness against her husband. *Hicks v. Bradner*, 5 Trans. App. 289; 85 How. Pr. 118.

After a dissolution of the marriage by a divorce, or by death, either party may be admitted as a witness, unless as to confidential communications made during marriage. *Crook v. Henry*, 25 Wis. 569; *Rea v. Tucker*, 51 Ill. 110; *Ryan v. Fallensbee*, 47 N. H. 100; *Storms v. Storms*, 3 Bush. (Ky.) 77; *Wooley v. Turner*, 13 Ind. 253; *Stober v. McCarter*, 4 Ohio St. 513; *Smith v. Potter*, 27 Vt. 304; *Stein v. Weidman*, 21 Mo. 294; *Gaskill v. King*, 13 Ired. 211; *Jackson v. Barron*, 37 N. H. 494; *Cornell v. Vanartsdallen*, 4 Barr (Penn.) 304; *Ratcliff v. Wales*, 1 Hill (N. Y.) 63; *Dickerman v. Graves*, 6 Cush. (Mass.) 308.

While the general rule is very clearly settled, there are a few cases which seem opposed. After a divorce, a woman is still incompetent to testify against her former husband, in a matter between him and a third party. *Kimbrough v. Mitchell*, 1 Head (Tenn.) 539; *Wadams v. Humphrey*, 22 Ill. 661; *Cook v. Grange*, 18 Ohio, 526; *Barnes v. Camack*, 1 Barb. 392.

But the fact that a man and a woman have lived in illicit cohabitation, does not render the one incompetent as a witness for or against the other. *Flanagin v. State*, 25 Ark. 92; *Dennis v. Crittenden*, 43 N. Y. (3 Hand) 542; *State v. Tachanatah*, 64 N. C. 514.

On a trial for bigamy, the second wife is a competent witness. *Finnay v. State*, 3 Head (Tenn.) 544; *State v. Patterson*, 2 Ired. 346.

In criminal cases neither the husband nor the wife can be a witness for or against the other, unless it is for some personal injury or violence done or threatened by one to the other. Upon an indictment for an assault and battery, or other criminal offense against the person by either of them upon the other, the injured party is a competent witness. *State v. Hussey*, Busbee (N. C.) 123. See Stat. of No. Car. 1856, ch. 23; *Rex v. Jagger*, 1 East. P. C. 455; *Reg. v. Pource*, 9 C. & P. 667; *Rex v. Asire*, 1 Stra. 633.

So on an indictment against a husband for an assault and battery on his wife. She is a competent witness for him to disprove the charge. *People v. Fitzpatrick*, 5 Park. Cr. Rep. (N. Y.) 26; *State v. Neill*, 6 Ala. 685.

with her(v), for the grant would be to suppose her separate existence:(152) and to covenant with her, would be only to covenant with himself: and therefore it [*544] is also generally true, that compacts made *between husband and wife, when single, are voided by the intermarriage(x). A man may, however, covenant with others as trustees for his wife, and a conveyance may be made to trustees for the benefit of his wife, as hereafter explained(y).(153) A

(v) *Ib.*

(x) *Post*, vol. iii. p. 17.

(y) *Post*, vol. ii.

(152) The rule stated in the text has been very generally followed by the courts in the several states. And it is held that, at law, conveyances of land directly by and between husband and wife, without the intervention of a trustee, is invalid. *Winans v. Peebles*, 83 N. Y. (5 Tiff.) 428; *White v. Wager*, 25 N. Y. (11 Smith) 328; *Martin v. Martin*, 1 Me. (1 Greenl.) 894; *Doe d. Abbott v. Hurd*, 7 Blackf. (Ind.) 510; *Bryan v. Bradley*, 16 Conn. 482.

But such a deed, though void at law, may be sustained and enforced in equity. *Hunt v. Johnson*, 44 N. Y. (5 Hand) 27; *Wallingford v. Allen*, 10 Pet. 583; *Putnam v. Bicknell*, 18 Wis. 383; *Maraman v. Maraman*, 4 Metc. (Ky.) 87.

(153) While contracts made by a man and a woman before marriage are generally void, as stated in the text, there may be a valid contract between them which the subsequent marriage will not invalidate. Contracts made in contemplation of marriage, by the parties thereto, are sustained and enforced unless they are illegal, or against public policy, or fraudulent and unjust. The first element in an ante-nuptial contract is that each of the parties shall act in entire good faith toward the other. *Kline's Estate*, 64 Penn. St. 122. Any designed and material concealment ought to avoid an ante-nuptial contract at the will of the party who has been injured. *Kline v. Kline*, 57 Penn. St. 120. A widow possessing real and personal estate, and entering into a marriage engagement, two days before her marriage, and without the knowledge of her intended, executed a trust-deed to her brother of half of her property, to make payments as therein specified; but this deed was set aside as a fraud upon the marriage contract, and void. *Duncan's Appeal*, 43 Penn. St. 67. So where a widowed daughter resided with her father, and was habitually under his control, at his request signed a deed giving away her property to her child by a former marriage, although done against her wish, and but two days before her marriage, the deed was set aside as inoperative against the husband, although he had notice of the deed before the marriage. *Poston v. Gillespie*, 5 Jones' Eq. (N. C.) 258. But to make such a disposition of property invalid, as against the husband's marital rights, it must be done pending a treaty, and in contemplation of marriage, and without the knowledge of the husband. *Cheshire v. Payne*, 16 B. Monr. (Ky.) 618. The last two cases, it will be seen, are directly opposed on the question of knowledge by the husband, but agreed as to the invalidity of a conveyance without his knowledge. See, also, *Linker v. Smith*, 4 Wash. C. C. 224, which holds a secret conveyance void. But a husband who, before the marriage, has got his intended wife with child, and thereby practically put it out of her power to insist upon a proper settlement, cannot object to a reasonable deed of trust of her property, although executed by her without his knowledge. *Anonymous*, 84 Ala. 430.

A voluntary settlement, by a woman in contemplation of marriage, of her property in trust for her exclusive benefit during her life, notwithstanding the marriage, will not be set aside, after the marriage, on the mere ground that the trustee was her legal adviser, even though she is competent to manage the property, and desires to regain its possession. *Falk v. Turner*, 101 Mass. 494.

An oral ante-nuptial agreement, proved by satisfactory parol evidence, and confirmed by the continued recognition of the parties, is binding upon them, and all who claim as volunteers under them. *Southerland v. Southerland*, 5 Bush (Ky.) 591. A written ante-nuptial contract, providing that neither party during marriage, or after the death of one of them, should claim any interest in the property of the deceased, will be enforced; and when the husband dies first, the widow cannot set aside the agreement, on the ground of want of consideration; for, either the mutual promises of marriage, or the stipulations as to property are sufficient. *Naill v. Maurer*, 25 Md. 533; *Tarbell v. Tarbell*, 10 Allen (Mass.) 278.

woman indeed may act as agent(s) for her husband, for that implies no separa-

(s) *Offley v. Clay*, 2 M. & Gr. 172.

The construction of such contracts is such as is given to other agreements. And an ante-nuptial contract should be liberally construed, so as to carry into effect the intention of the parties. *Ardis v. Printup*, 33 Ga. 648. Under such a contract a wife conveyed a certain sum of money to the husband who agreed that if she did not leave any will, and he survived her, he would pay the money "to any child or children which she may leave, and in event of leaving more than one child, to distribute said sum of money equally among all, share and share alike." There was no issue of this marriage, but the wife had a child of a former marriage, who was held to be entitled to the money under the agreement. *Michael v. Moroy*, 26 Md. 239. A settlement which provides for the conveyance to trustees of all property "to which she might thereafter become entitled," will be construed to be an agreement to convey only such property as may be acquired during marriage. *Steinberger's Trustees v. Potter*, 8 Green (N. J.), 452. A settlement by which the husband surrenders to the wife the "full and free disposal of her property," she to "have and hold the sole discretion, guidance thereof," authorizes her during coverture to dispose of it absolutely by will. *Porcher v. Daniel*, 12 Rich. Eq. (S. C.) 349. An ante-nuptial agreement may vest the equitable title to personal property in the wife, while the legal title vests by the marriage in the husband. *Smith v. Chapell*, 31 Conn. 589. And a contract entered into between husband and wife before marriage, although void at law, will be recognized and enforced in equity. *Tiedale v. Jones*, 38 Barb. 523. Under such a settlement, the wife's right to dispose of the property which is the subject of the contract, is limited to the manner designated in the deed. *Hoyle v. Smith*, 1 Head (Tenn.), 90. General language in a deed of settlement, inconsistent and in conflict with the purposes of the deed, as declared therein, will be qualified and restrained by the recitals of the deed. *Williams v. Claiborne*, 1 Sm. & Marsh. Ch. 355.

Where a marriage settlement is made in the state in which the parties reside at the time, it is to be construed by the laws of that state, even though the parties should subsequently remove to another state. *McLeod v. Board*, 30 Tex. 238; *Lafitte v. Lawton*, 25 Ga. 305. See *Fuss v. Fuss*, 24 Wis. 256. A conveyance by a husband to the use of his wife, in the execution of an agreement to invest the proceeds of her separate estate, which she has advanced to him as a loan, and not as a gift, will be good as against creditors. *Latimer v. Glenn*, 2 Bush (Ky.), 535; *Hall v. Light*, 2 Duval (Ky.), 358. An oral agreement to marry, and to pay the then existing debts of the proposed husband, in consideration that he will convey to the proposed wife certain premises owned by him, will, if fully performed by the wife, be valid and binding, in equity, on the husband; and a conveyance to her by him of such premises as agreed, is upon a good and sufficient consideration; and it cannot be impeached by any one who became a creditor of the husband subsequent to the agreement. *Dygert v. Remerschnider*, 32 N. Y. (5 Tiff.) 629.

An ante-nuptial agreement which provides that the wife shall have a good and sufficient maintenance during life, does not require her, after her husband's death, to reside with his executors or relations, but she is entitled to be supported wherever she reasonably chooses to live, according to the style in which she lived during his life. *Loomis v. Loomis*, 35 Barb. 624.

Where, by the terms of the agreement, the intended wife agrees to accept a prudent maintenance out of a husband's estate, in lieu of dower, this is valid, and the support intended will be in kind and not in money. *Law v. Smith*, 2 R. I. 244. A court of equity will, after the husband's death, enforce specifically such agreements for the maintenance of the widow. *Culver v. Culver*, 8 B. Monr. 128. So a contract made in contemplation of the marriage of the parties, respecting the property of either, to be performed after marriage, may be enforced in equity, against the husband's representatives, after his death. *Müller v. Goodwin*, 8 Gray, 543.

A settlement of an estate which gives a widow and her daughters a support during the widow's life and then a remainder to the daughter, and this is followed by the marriage of the widow, whose husband takes possession of her estate so settled, and, as guardian, also took other property of the daughter, the husband will be required to support the daughter

tion from, but is rather a representation of, her lord.(154) And a husband may also bequeath anything to his wife by will; for that cannot take effect till the coverture is determined by his death(a).

The husband is generally bound by contracts of his wife, his assent to them being ordinarily presumed from cohabitation, though this presumption is capable of being rebutted; and as a husband ought to provide his wife with necessities, he is generally obliged to pay debts which she has been compelled to incur in providing them for herself; but it is otherwise with regard to things which are not necessities, and for such the husband is not liable unless they have been supplied by his authority.(155) The presumption of authority

(a) Co. Litt. 112.

out of the estate so settled, and not out of the daughter's independent property. *Cartledge v. Cutliff*, 29 Ga. 758.

The construction and the enforcement of these contracts, during the life-time of the parties, frequently furnish questions for the courts. And as such agreements are peculiarly liable to misapprehension and misrepresentation, the courts will not enforce them unless they are entirely satisfied that such agreements were made. *Montgomery v. Henderson*, 8 Jones' Eq. (N. C.) 118. An ante-nuptial agreement, that the wife shall have a certain sum of money if she survives her husband, is not testamentary, and may be enforced against the administrator of the husband. *Vogel v. Vogel*, 22 Mo. 161.

(154) A wife may act as the agent of her husband; and if he permits her so to act in any particular business, he adopts, and is bound by, her acts and admissions in reference to that business, and they may be given in evidence against him. *Riley v. Suydam*, 4 Barb 222; *Edgerton v. Thomas*, 9 N. Y. (5 Seld.) 40; *Gates v. Brown*, id. 205. Whether the wife is authorized to act as his agent is a question of fact. *Ib.* A subsequent ratification of the wife's previous unauthorized acts, as agent of the husband, will render such acts valid. *Pike v. Baker*, 53 Ill. 183.

So a husband may act as the agent of his wife. *Owen v. Cawley*, 36 N. Y. (9 Tiff.) 800; *Fowler v. Seaman*, 40 N. Y. (1 Hand) 592. And the question of agency is one of fact. *Ib.*

When the husband employs his wife to act as his agent in the transaction of any business, he is bound by her acts, within the scope of such employment, even though it subjects the husband to a penalty. *Marselis v. Seaman*, 21 Barb. 319; *Hasbrouck v. Weaver*, 10 Johns. 247. So where a man is sued for a penalty for selling liquor without a license, and his defense is that he acted as the agent of his wife, who owned the tavern, he must also show that she had a license to sell, or the defense will not be sustained. *Board of Com'rs of Excise v. Dougherty*, 55 Barb. 332. And if a wife sells liquor without a license, and receives pay for it, in the presence and by the direction and connivance of her husband, he may be convicted of the penalty given for selling without license, if neither he nor his wife have taken out a license. The facts that she owns and keeps the store in which the sale was made, that the husband has no interest in it, and that he himself does not sell the liquor, do not excuse him. *Mulvey v. State*, 43 Ala. 316. See, also, *Commonwealth v. Tryon*, 99 Mass. 442.

(155) The liability of a husband for the acts of his wife, as an agent in making contracts, is the same as in any other case of agency in which authority is expressly given. But there are acts of the wife for which the husband is liable, owing to the relationship of husband and wife, and such acts are said to be authorized by an implied authority. If a husband refuses or neglects to provide the wife with necessities such as her situation requires, she may procure them on the credit of her husband, and the law will sanction the act. But the person who supplies the articles, after having been forbidden to do so, is bound to show that the articles were needed, and that the husband neglected or refused to furnish them. *Woodward v. Barnes*, 43 Vt. 330; *Kellor v. Phillips*, 39 N. Y. (12 Tiff.) 351.

Where the husband turns his wife out of doors, or his cruelty is such as to compel her to leave, she will have authority to procure board and other necessities, for which he will be liable. *Reynolds v. Sweetser*, 15 Gray, 78; *Hultz v. Gibbs*, 66 Penn. St. 360.

from the husband does not, however, arise when the husband and wife are living apart from each other, and in such case the husband is usually not liable if he allows his wife a sufficient allowance and takes care that it be paid, though in the absence of any such allowance he is generally liable, except in the case of her elopement and living with another man (b). (156)

(b) As to the extent of a husband's liability 631; *Seaton v. Benedict*, 5 Bing. 28; *Jolly v. Rees*, 15 C. B. N. S. 638; *Wilson v. Ford*, L. R. 8 Ex. 63; *Bazeley v. Forder*, L. R. 8 Q. B. 559. See also *Needham v. Bremner*, L. R. 1 i Sid. 109; *Montague v. Benedict*, 3 B. & C. C. P. 588.

So where a husband introduces a woman of profligate habits into his house, and permits her to remain there as an inmate, the wife will be justified in withdrawing from his protection, and he will be bound to provide her with necessaries. *Descollies v. Kadmus*, 8 Clarke (Iowa), 51; *Sykes v. Halstead*, 1 Sandf. 483.

If a wife, without reasonable or just cause, and in violation of her duty, deserts her husband and refuses to live with him, she cannot bind him to pay for necessaries furnished to her by a person who knows that they are living separate and apart. *Brown v. Mudgett*, 40 Vt. 68; *Collins v. Mitchell*, 5 Harr. (Del.) 369; *Pool v. Everton*, 5 Jones (N. C.), 241; *Brown v. Patton*, 8 Humph. (Tenn.) 135; *Burlen v. Shannon*, 14 Gray, 433; *Rice v. Durkee*, 25 Ill. 503.

And the rule is the same, even though the person who furnished the necessaries did not know of such desertion at the time of making the sale. *Sturtevant v. Starin*, 19 Wis. 268; *Morgan v. Hughes*, 20 Tex. 141; *McCutchen v. McGahay*, 11 Johns. 281.

Where a married woman leaves her husband's house with his consent, he is liable for the necessary expenses of her subsequent support and funeral, although at the time he gave her a third person's note, saying, "You will need something, but I have not got any money." *Corley v. Green*, 12 Allen (Mass.), 104. And if the husband's cruelty and neglect compels the wife to leave him, he is liable to a person who provides a burial for her remains, at a reasonable expense, and no notice is necessary in order to charge him. *Cunningham v. Reardon*, 98 Mass. 538.

But a husband is not liable for money deposited with his wife, or loaned to her, unless the deposit was made at his request, or unless it is proved that she acted as his authorized agent in taking it. *Gilbert v. Plant*, 18 Ind. 308. So where a person lends money to a wife knowing that it is to be used for her own private purposes, and he, at the wife's request, conceals the loan from her husband, he cannot maintain an action against the husband for its recovery. *Franklin v. Foster*, 20 Mich. 75.

So a husband is not liable for goods sold to his wife upon her separate credit as a *feme covert* trader, where he has never assumed to pay for such goods. *Weisker v. Lowenthal*, 81 Md. 413.

The common-law liability of a husband civilly for the torts of his wife prevails very generally in this country, unless some statute has changed the rule. Where a married woman claims, as her separate property, a lien upon goods in her possession, belonging to a third person, and she refuses to deliver them, on demand, to such third person, her husband is not liable for her act, although she had in fact no lien upon the goods, and her refusal to deliver them amounted to a conversion. *Peak v. Lemon*, 1 Lans. 295.

When a tort is committed by the wife, in the presence of her husband, he will generally be liable for her acts. *Ball v. Bennett*, 21 Ind. 427; *Brazil v. Moran*, 18 Minn. 236.

Where a husband delivers property to a bailee, with instructions not to deliver it to any person without his written order, if the bailee delivers the property to the bailor's wife, he will be liable for the property, because the wrongful act of the wife in obtaining the property will not constitute any defense to the husband's action. *Kovring v. Munly*, 49 N. Y. (4 Sick.) 192. For if an action could be maintained against husband and wife for the wife's tort, this would be no defense to his action against the bailee. *Ib.*

(156) There may be a valid agreement between husband and wife for a separation, which the courts will sanction. *Dutton v. Dutton*, 30 Ind. 452; *Griffin v. Banks*, 37 N. Y. (10 Tiff.) 621; *Chapman v. Gray*, 8 Ga. 341; *Calkins v. Long*, 23 Barb. 97; *Hutton v. Dewey*, 3 Penn-

As regards property possessed by the wife whilst sole, it must here suffice to say, that all personalty of a corporeal nature, such as goods or cash, then [*545] belonging to the *wife vests in the husband by the marriage, and that all such property given to or acquired by the wife after marriage also vests in the husband. But choses in action belonging to the wife before marriage do not on marriage vest in the husband, unless he does some act to reduce them into possession during the coverture, and even during coverture the husband may permit the wife to make a contract, in an action on which he may join with her during her life though he may disaffirm her interest and sue on the contract as made with himself alone. If he does permit the wife to make such a contract and does not reduce it into possession during the coverture it survives to the wife(c).(157)

Again, if the wife be indebted before marriage, the husband is bound afterwards to pay the debt; for he has adopted her and her circumstances together(d); but, in respect of such antecedent indebtedness he must be sued jointly with her — not separately(e); and if she die before payment the husband is free from every such claim, unless she leaves property to which he administers(f).(158) If the wife be injured in her person or her property, she can bring no action for redress without her husband's concurrence, and must bring it in his name as well as her own(g): neither can she be sued without making her husband a defendant(h). There is indeed one case of rare occurrence where the wife can

- (c) *Fleet v. Perrins*, L. R. 8 Q. B. 536, 541. The husband can also sue for the loss of his wife's services, which he has sustained in consequence of an injury inflicted on her, and for the medical and surgical expenses he has incurred in procuring requisite attendance for her. *Post*, vol. iii. p. 150; *Hemstead v. Phoenix Gas Co.*, 8 H. & C. 745.
 (d) 8 Mod. 186. See *Haydon v. Miller*, 2 Roll. 53.
 (e) *Mitchinson v. Hewson*, 7 T. R. 348.
 (f) *Heard v. Stamford*, 3 P. Wms. 409; Com. Dig. *Baron & Feme*, E. 3.
 (g) Salk. 119; 1 Roll. Abr. 347.
 (h) 1 Leon. 312; 1 Sid. 120.

St. 100; *Miller v. Miller*, 16 Ohio St. 527; *Wells v. Stout*, 9 Cal. 439. In most of the cases the agreement to live separately was made after a separation had actually taken place; though in others the agreement related to a present separation, which was to continue in future.

Where such an agreement is held valid by the courts, and provision is made for the payment of a specified sum for the wife's support, if the husband makes the payments according to the terms of his agreement, the wife cannot create any debts against him for her support. *Culkins v. Long*, 22 Barb. 97; *Baker v. Barney*, 8 Johns. 72.

(157) To defeat the wife's title by survivorship, the husband must reduce her property to possession as husband. *Crawford v. Brady*, 35 Ga. 184.

Where a promissory note or other evidence of debt is made payable to husband and wife, and he dies, the wife, as survivor, will be entitled to the proceeds, unless the interests of creditors are thereby affected. *Johnson v. Lusk*, 6 Cold. (Tenn.) 118.

At common law, a husband is entitled to the personal property and choses in action of his wife, and they are vested in him at her death, whether reduced to possession or not, in virtue of his marital right, and not of his right to administration. *Ryder v. Hulce*, 24 N. Y. (10 Smith) 372; *Ransom v. Nichols*, 22 N. Y. (8 Smith) 110; *Barnes v. Underwood*, 47 N. Y. (2 Sick.) 351.

(158) The liability of a husband for the debts of the wife which were contracted before the marriage is a joint one, and it terminates on her death, unless enforced during coverture by a judgment in a joint action against both. *Cole v. Shurtleff*, 41 Vt. 311; *Jones v. Walkup*, 5 Sneed (Tenn.). 185; *Day v. Messick*, 1 Houston (Del.), 328; *Chaplin v. Moore*, 7 Monr. (Ky). 179; *Thaeton v. Houseal*, 2 McCord's Ch. (S. C.), 480; *Randolph v. Simpson*, 2 Halst. (N. J.) 346; *Neutz v. Reuter*, 1 Watts (Penn.), 220; *Howes v. Bigelow*, 13 Mass. 384.

sue and be sued as a *feme sole*, viz., where the legal existence of the husband is considered as extinguished or suspended, that is to say when *he is dead [*546] in law(i), for then the husband being thus disabled to sue for or defend the wife, it would be unreasonable, if she had no remedy or could make no defence at all. In criminal prosecutions, however, the wife might always have been indicted and punished separately(k): for marriage is only a civil union.

According to the civil law husband and wife were considered as two distinct persons; and might have separate estates, contracts, or debts, and sustain separate injuries(l); and, therefore, in our ecclesiastical courts, as formerly constituted, the procedure of which was in a great measure founded on, and regulated by the civil law, a woman might sue and be sued without her husband(m); and in courts of equity the husband and wife are, for many purposes, regarded as distinct persons: *ex. gr.* the wife may have a separate estate under the doctrine of trusts; and may bind the same by her separate contracts; and she may sue and be sued in respect of such contracts or in relation to such estate.(159)

Moreover, though our common law in general considers man and wife as one person, yet, there are some instances in which the wife is separately considered; as inferior to the husband and acting by his compulsion. She cannot by will devise property to her husband, unless under a power of appointment or other special circumstances: the original reason for which appears to have been that at the time of making the will she was supposed to have been under his coercion(n). And in some felonies and other inferior crimes, committed by the wife, through constraint of her husband, the law excuses her; but this extends not to treason or murder or some other offences(o).

The husband also (by the old law) might give his wife moderate correction(p).(160) For as he was to answer for her *misbehaviour, the [*546] law thought it reasonable to intrust him with this power of restraining her, by domestic chastisement, with the same moderation that a man is allowed to correct his apprentices or children. But this power of correction was confined within reasonable bounds(q), and the husband was prohibited from using any violence to his wife *aliter quam ad virum, ex causâ regiminis et castigationis uxoris suæ, licite et rationabiliter pertinet*(r). The civil law gave the husband the same, or a larger authority over his wife: allowing him for some misdemeanors, *flagellis et fustibus acriter verberare uxorem*; for others, only

(i) Co. Litt. 183.

(k) 1 Hawk. P. C. bk. 1, c. 1, s. 13.

(l) Cod. 4, 12, 1.

(m) 2 Roll. Abr. 298.

(n) Co. Litt. 112.

(o) Post, vol. iv.

(p) Crompt. Just. Peace, 28, 136; 1 Hawk. P. C. bk. 1, c. 28, Surety of the Peace, s. 23.

(q) Moor. 874.

(r) F. N. B. 80.

(159) See notes 151, 152, 156.

(160) A husband cannot be convicted of a battery on his wife unless he inflicts a permanent injury on her person, or uses such excessive violence or cruelty as indicates malignity or vindictiveness; and it makes no difference that the husband and wife are living separate by agreement. *State v. Black*, 1 Winst. (N. C.) 206.

A husband has no right to beat his wife, or to inflict corporal punishment upon her; but he may defend himself against her, and may restrain her from acts of violence toward himself or toward others. *People v. Winters*, 2 Park. Cr. Cas. 10. And when a husband is indicted for an assault and battery on his wife, he may show, in mitigation of the fine, that, at the time of the assault, he was immediately provoked to its commission by her bad behavior and misconduct. *Robbins v. State*, 20 Ala. 86.

modicam castigationem adhibere(s). But with us, in the reign of Charles II., this power of correction began to be doubted(*t*): and a wife may now have security of the peace against her husband(*u*); or, a husband against his wife(*x*). Yet there can be no question respecting the common law right of a husband to restrain his wife of her personal liberty, with a view to prevent her going into society of which he disapproves, or otherwise disobeying his rightful authority; such right must not, however, be exercised unnecessarily or with undue severity; and the moment that the wife, by returning to her conjugal duties, makes restraint of her person unnecessary, such restraint becomes unlawful(*y*).

Secondly we have to consider the effect of the dissolution of marriage, which can only take place in two ways, *viz.*, by death or divorce: the effect of the death of either party, with regard to the wife's right of dower, and the husband's tenancy by the curtesy of real estate, and their respective claims to personal estate under the statute of *distributions, will be treated of in our Second Volume. It is only necessary here to mention that, whereas the husband of a woman indebted whilst sole, is freed from her creditor's claims after her death(*z*), the wife surviving her husband becomes again liable to them.

The remaining questions are as to the effect of a divorce, or a judicial separation:—

The separation effected by a divorce is so complete that if the divorced persons again cohabited their union would be adulterous, and their children would be illegitimate, but there seems nothing to prevent divorced persons being re-married if they choose; of course if the marriage be pronounced void on the ground of consanguinity, or otherwise, the effect is the same as if it had never taken place. Further, in a case of dissolution of marriage on the ground of the misconduct of either party the court in its discretion may allot alimony, and may make arrangements with regard to subsisting settlements.

A judicial separation has the same effect(*a*) as had the divorce *a mens et thoro* formerly granted by the ecclesiastical courts, and is, as that term implied, merely a legal severance from bed and board, leaving the matrimonial tie unloosed; consequently the parties may return to cohabitation at any time when they may mutually choose to do so. As far as property is concerned, the right of suing and being sued in court, a wife, after a sentence of judicial separation, stands in the position of a feme sole, and the court has powers of allotting alimony and making arrangements with regard to property.

The right to the custody of children in the cases of divorce or judicial separation will be treated of in the next chapter.

(*n*) Nov. 117, c. 14.

(*t*) *Lord Leigh's Case*, 3 Keb. 488.

(*u*) 2 Lev. 128.

(*x*) Stra. 1207.

(*y*) *Per Coleridge, J. In re Cochran*, 8 Dowl. P. C. 631; *R. v. Lister*, Stra. 478.

(*z*) *Ante*, p. 545.

(*a*) 20 & 21 Vict. c. 85, s. 7.

*CHAPTER XVI.

[*549]

PARENT AND CHILD.

THE next relation to be noticed is immediately derived from the preceding, being that between parent and child.

Parent and child. Children are of two sorts; legitimate and illegitimate; each of which we shall consider; and first, of legitimate children.

I. A legitimate child is one born in lawful wedlock, or within a competent time afterwards.(161) "*Pater est quem nuptiæ demonstrant*," is the rule of the civil law(a); and this holds with the civilians, whether the nuptials happened before, or after, the birth of the child. With us in England, however, the rule is narrowed, for the nuptials must be precedent to the birth; of which more will be said when we come to consider the case of bastardy. At present let us inquire into: 1. The legal duties of parents to their legitimate children. 2. The power of parents over their children. 3. The duties of such children to their parents.

1. The duties of parents to legitimate children principally consist in three particulars; their maintenance, their protection, and their education.

1. Duties of parents to their children. The duty of parents to provide for the maintenance of their children, depends on a principle of natural law; it is an obligation, says Puffendorf(b), laid on them not only by nature herself, but by their own act, in bringing them into the world: for they would be in the highest degree *injurious to their issue, if they only gave their children life, and afterwards let them perish. By begetting children, therefore, the [*550] parents have entered into a voluntary obligation, to endeavour, as far as in them lies, that the life which they have bestowed shall be supported and preserved. Thus children have morally a perfect right of receiving maintenance from their parents. And Montesquieu(c) justly observes upon this head: that the establishment of marriage in all civilized states is built on this natural obligation of the father to provide for his children: for marriage ascertains and makes known the person who is bound to fulfil such obligation: whereas, in promiscuous and illicit conjunctions, the father is unknown; and the mother finds a thousand obstacles in her way;—shame, remorse, the constraint of her sex, and the rigour of laws;—that stifle her inclinations to perform this duty; and besides, she usually wants ability.

The municipal laws of well-regulated states have taken care to enforce this

(a) Dig. 2, 4, 5.

(c) Sp. L. bk. 23, c. 2.

(b) L. of N. l. 4, c. 11.

(161) The common law does not regard any as lawful children but those born in the bonds of matrimony, and begotten by the lawful father upon the lawful mother. No matter how clear, strong and satisfactory the evidence may be to show that a particular individual is the father of a child born of an unmarried woman, the common law will not recognize him as such father by giving him the rights, or subjecting him to the responsibilities, of a parent. Nor will it recognize any right of the infant to inherit the property of such father. In a subsequent note the presumptions as to legitimacy will be stated. See note 171.

duty: though Providence has done it more effectually than any laws, by generally implanting in the breast of parents a natural affection, which not even the deformity of person or mind, not even the wickedness, ingratitude, and rebellion of children can totally suppress or extinguish.

The civil law(*d*) obliged the parent to provide maintenance for his child: and said, if he refused, "*judex de ed re cognoscet*." Nay, it carried this matter so far, that it would not suffer a parent at his death totally to disinherit his child, without expressly giving his reason for so doing; and there were fourteen such reasons reckoned up(*e*), which might justify such disinherison. If the parent alleged no reason, or a bad, or a false one, the child might set the will aside, *tanquam testamentum inofficiosum*, a testament contrary to the natural duty of the parent. And it is remarkable under what colour the children were [* 551] *to move for relief in such a case; by suggesting that the parent had lost the use of his reason; when he made the inofficious testament. For this, as Puffendorf remarks(*f*), was not to bring into dispute the testator's power of disinheriting his own offspring; but to examine the motives upon which he did it: and, if they were found defective in reason, then to set them aside. This, however, was surely going too far; every man has, or ought to have, by the laws of society, a power over his own property: and, as Grotius very well distinguishes(*g*), though children may have a natural right to a necessary maintenance; yet to anything more they can have no other right than that which is given them by the favour of their parents, or the positive constitutions of the municipal law.

Let us next see what provision our own laws have made for this natural duty. It has by some been thought that there is a legal obligation imposed on every man to provide for his children; but the common law of England(*h*) seems never to have afforded any means of enforcing such duty if it existed(*i*). (162)

(*d*) Dig. 25, 3, 5.

(*e*) Nov. 115.

(*f*) L. 4, c. 11, s. 7.

(*g*) De Jur. Bel. et. Pac. l. 2, c. 7, s. 4, n. 8.

(*h*) It is now settled that this is a moral obligation merely, not enforceable at law; *Mortimore v. Wright*, 6 M. & W. 432. Nevertheless if anybody supplies an infant with necessaries fit for his station, very slight evidence of the father's assent to such supply will usually suffice to make him liable to pay for them under an implied contract. See *Law v. Willin*, 6 A. & E. 718.

(*i*) *Cooper v. Martin*, 4 East, 84. It seems, however, to have been an indictable offence to refuse or neglect to provide sufficient food, bedding, &c., and so to injure the health of

any infant of tender years, servant, apprentice, or child, unable to provide for itself, whom the party was obliged by duty or contract to provide for. See *R. v. Friend*, R. & Ry. C. C. 20; *R. v. Ridley*, 2 Camp. 650; and it is now provided by 31 & 32 Vict. c. 122, s. 37, that "if any parent shall wilfully neglect to provide adequate food, clothing, medical aid, or lodging, for his child, being in his custody, under the age of fourteen years, whereby the health of such child shall have been, or shall be likely to be seriously injured, he shall be guilty of an offence punishable on summary conviction," and shall be liable to six months' imprisonment.

See further as to this subject, *post*, vol. iv.

(162) The law recognizes and enforces the duty of a father to provide for his legitimate children. There has been much discussion in relation to the question whether the father's liability rests on a moral obligation and a corresponding legal liability, or whether it is founded upon an agency, express or implied. But, however that question may be settled, the courts have usually found some principle of law upon which to fix a father's liability in a proper case. There are some general rules which influence or govern the decisions of the courts, as, that goods which are not necessaries, if supplied to an infant, cannot be charged to, or payment for enforced against the father, unless his authority is proved; that where the articles are necessaries the father's authority will be presumed, unless he supplies them himself, or was ready to do so; that where an infant lives with the father, or under his control, his judgment as to what are necessaries will be so far respected that he will be held

Such principle has, however, been recognised, and such duty has been enforced by various statutes beginning as long ago as the reign of queen Elizabeth, and it is now enacted that the father, mother, grandfather, and grandmother of

liable only for things furnished to the infant to relieve him from absolute want. But where the infant does not live with the father, but has voluntarily left him, the authority of the father must be strictly proved, unless, perhaps, in cases of absolute necessity; and that where the infant has been deserted by the father, or driven away from him, either by command or by cruel treatment, then the infant carries with him the credit and authority of the father for necessities. See 1 Pars. on Cont. 305.

Where a divorce has been granted, and the custody of the infant children is given to a third person, and the father agrees that certain property shall be conveyed to the children, which is done, but he refuses to give up the possession of the property, or to use the profits for their support, the fact that the children are in the custody of such third person will not affect the father's liability to support the children to the extent of such property. *McCarthy v. Hinman*, 35 Conn. 538. The father's liability to support his infant children, who are unable to support themselves, and are members of his family, rests upon principles analogous to those of the liability to support a wife. *Cromwell v. Benjamin*, 41 Barb. 558. A father is bound to support his legitimate minor children, so long as he has credit or property to do so without disposing of articles which must be immediately replaced to enable himself and family to live together. *Litchfield v. Londonderry*, 39 N. H. 247. But where an infant is residing at the house of another person, with the parents' consent, and is there taken with the small-pox, and is taken by the health officers to a pest house, and detained there as a patient, the town cannot maintain an action against the father for the infant's support while so detained. *Town of Farmington v. Jones*, 36 N. H. 271. Where infants are taken from the custody of a father, by a court of chancery, and they have no property of their own, the father is bound to support them, and the amount to be paid will be determined by the ability of the father, which may be determined by a referee, or by the court. *Couls v. Couls*, 8 Gilm. 435.

But a husband is not bound to support the bastard children of his wife which were born before the marriage. *Minden v. Cox*, 7 Johns. 235. Nor is he bound to support the illegitimate offspring of his children. *Hillsboro v. Deering*, 4 N. H. 86. Nor is a father bound to support his adult widowed daughter or her infant offspring. *Haynes' Adm'r v. Waggoner*, 25 Md. 174.

Although a father is ordinarily bound to maintain his infant children, at his own expense, yet there are cases in which the court will order their support out of property belonging to such children. A father whose poverty and bodily infirmities have rendered him unable to support his infant daughter, has a right to apply to a court of equity to have an allowance decreed to be paid by a trustee out of the infant's estate for her support. *Watts v. Steele*, 19 Ala. 691; *Godard v. Wagner*, 2 Strobb. Eq. 1; *Daves v. Howard*, 4 Mass. 97, 99. See *Carter v. Rolland*, 11 Hunph. (Tenn.) 833; *Matter of Kane*, 2 Barb. 375. So a mother is entitled to an allowance for the maintenance of her children out of the income of their property, especially where her own fortune is inadequate. *Osborne v. Van Horne*, 2 Fla. 360; *Whipple v. Dow*, 2 Mass. 415; *Daves v. Howard*, 4 id. 97, 99; *Matter of Ryder*, 11 Paige, 185.

Where the articles furnished to an infant are not necessities, the father will not be liable for them, unless it is shown that they were procured by his authority. It will not be presumed, in the absence of evidence to the contrary, that kid gloves, cologne, fiddle-strings, bridles and spurs, walking-canes, powder-flasks, and caps, a silk cravat, and a silk and linen coat, are such articles as will bind a parent upon any implied or express contract to pay for as necessities furnished to his minor children. *Lefls v. Sugg*, 15 Ark. 187. Nor is a father bound to pay for kid gloves or gold pencils, even though proper for his station in life, unless it appears that the child was then destitute of such necessities. *Brown v. Deloach*, 28 Ga. 486.

The liability of a father to pay for articles purchased by his infant child is most frequently placed upon the ground of an express or an implied agency. If an infant child purchases articles upon the father's credit, and he subsequently pays the bill without objection, he will be liable for a bill of similar things purchased of the same person. A father who

every poor, blind, lame, and impotent person, or other poor person not able to [*552] work, *shall, if of sufficient ability(*k*), at their own charges, relieve and maintain such poor person in such manner, and at such rate as shall be adjudged by the quarter sessions(*l*), or by two or more justices in petty sessions(*m*), and if such sum be not duly paid, it may be recovered (together with a penalty of twenty shillings a month for not paying it) by distress or imprisonment(*n*). The provisions of this statute have long been held to extend only

(*k*) This fact must be set forth in the order. *R. v. Dunn*, 1 Bott, 372.

(*l*) 43 Eliz. c. 2, s. 6.

(*m*) 59 Geo. 3, c. 12, s. 26.

(*n*) 4 & 5 Will. 4, c. 76, s. 78. Though the father is primarily liable to support his child,

it has been held that the grandfather may be called upon to do so during the life of the father, and it is not necessary to state the inability of the father on the face of the justices' order. *R. v. Cornish*, 2 B. & Ad. 498.

authorizes a merchant or his clerks to let his minor daughter have such articles as she may want from the store, thereby makes her his agent to contract, and he will be bound by her acts, although she purchases things not necessary for her comfort. *Harper v. Lemon*, 38 Ga. 227. So a father who permits an infant son to purchase goods on credit, and then pays the bills without objection, will give an implied authority to sell to the infant other goods of like kind and amount. *Wilkes v. McClung*, 32 Ga. 507; *Plotts v. Rosebury*, 4 Dutch. (N. J.) 146; *Henry v. Betts*, 1 Hilt. (N. Y. C. P.) 156; *McKensie v. Stevens*, 19 Ala. 691.

The misconduct of the wife does not affect the liability of the father to support his child, and if he permits the child to live with her, he will constitute her his agent to contract for the child's necessities, and will be liable to those who furnish them upon his credit. *Gill v. Read*, 5 R. I. 843.

That a stranger cannot volunteer to furnish an infant with necessities, and then enforce payment for them against the father, who did not give any authority, express or implied, for such act, is maintained by several cases. *Raymond v. Loyl*, 10 Barb. 483; *Hunt v. Thompson*, 3 Scam. 180; *Owen v. White*, 5 Port. (Ala.) 435; *Varney v. Young*, 11 Vt. 258; *Gordon v. Potter*, 17 id. 350.

But other cases are quite as positive that a father who drives his infant child from home, or who refuses or neglects to furnish it with the necessities of life, thereby omits to discharge a legal and moral duty, which another person may so far perform as to furnish such necessities to the infant, and compel the father to pay for them. *Stanton v. Wilson*, 3 Day (Conn.), 37; *Van Valkinburgh v. Watson*, 13 Johns. 480; *Tomkins v. Tomkins*, 3 Stockt. (N. J.) 512; *Poock v. Miller*, 1 Hilt. (N. Y. C. P.) 108; *Townsend v. Burnham*, 33 N. H. 270; *Owen v. White*, 5 Port. (Ala.) 435; *Pidgin v. Crane*, 8 N. H. 350. See also *Johnson v. Gibson*, 4 E. D. Smith (N. P. C. P.), 231. But in such cases the party furnishing the articles must show that they are necessities, and that the father neglected or refused to furnish them, or there can be no recovery against him. *Ib*.

No promise to pay for necessities will be implied where an infant has left his home against the parent's wishes or to avoid proper parental restraint. *Raymond v. Loyl*, 10 Barb. 483; *Weeks v. Merrow*, 40 Me. 151. And where the infant leaves against the wishes, but with the consent of the father, under circumstances that show that the infant is his own master, the father will not be liable for necessities furnished to such minor. *Johnson v. Gibson*, 4 E. D. Smith (N. Y. C. P.), 231.

Where husband and wife are divorced for the acts of the husband, and the court awards the custody of the children to the mother, she may provide for them as a part of her family, and he will be liable for the expenses thus incurred. *Stanton v. Willson*, 3 Day, 37; *Plaster v. Plaster*, 47 Ill. 290; *Bazeley v. Forder*, L. R. 3 Q. B. 559. But see *Finch v. Finch*, 22 Conn. 411. Payment of an infant's bills, made after notice to the dealer not to trust him, and when, at the time of payment, the father gives a new notice not to trust the infant, will not bind the father to pay debts afterward contracted by the son. *Wilkes v. McClung*, 29 Ga. 371. Where one trades with an infant, and gives credit to him alone, with a knowledge of all the facts in the case, he cannot sustain an action against the father for the necessities so delivered. *Gordon v. Potter*, 17 Vt. 848.

The legal liability of the parent ceases when the infant arrives at full age. *Mills v. Wyman*, 3 Pick. 207; *Wood v. Gills*, Core, 449.

to blood relations, and therefore no one was bound under it to support those who were connected with him by affinity only(*o*); but now, by statute 4 & 5 Will. 4, c. 76, s. 57, a man marrying a woman who has children at the time of such marriage, is compelled to support them till they respectively attain the age of sixteen, or until the death of the mother, and this liability is irrespective of the fact of their being legitimate or illegitimate.

No person is bound to provide a maintenance for his issue, unless such children are impotent and unable to work(*p*), either through infancy, disease, or accident; *and then is only obliged to find them necessaries, the requisite amount thereof being determined by the justices. For the policy of our laws, [*553] which are ever watchful to promote industry, did not mean to compel a father to maintain his idle and lazy children in ease and indolence, and thought it unjust to oblige the parent against his will to provide them with superfluities, and other indulgences of fortune; imagining they might trust to the impulse of nature if the children were deserving of such favours. There were two exceptions to this rule when religious bigotry was very strong, it being enacted by stat. 11 Will. 3, c. 4, that if any popish parent should, in order to induce him to change his religion, refuse to allow a protestant child a fitting maintenance, according to his fortune, the lord-chancellor might, by order of the court, compel him to do what was just and reasonable; and very shortly afterwards a similar provision was made with respect to Jews, by 1 Anne, stat. 1, c. 24, and both these enactments remained in force till A. D. 1846, having been repealed by the 9 & 10 Vict. c. 59.

Our law has made no provision to prevent the disinheriting of children by will: leaving every man's property in his own disposal, upon a principle of liberty in this, as well as other actions; though among persons of rank or fortune, a competence is generally provided for younger children, and the bulk of the estate settled upon the eldest. The heir, also, is a favourite of our courts of justice, and cannot be disinherited by dubious or ambiguous words; there being required the utmost certainty of the testator's intentions to take away his right(*q*).

From the duty of maintenance we may easily pass to that of protection, which is also a natural duty, but rather permitted than enjoined by any municipal laws: nature, in this respect, working so strongly as to need rather a check than a spur. A parent may, by our laws, *maintain and uphold his children in their law-suits without being guilty of the legal crime of maintain- [*554] ing quarrels(*r*). A parent may also justify an assault and battery in defence of the person of his child(*s*). Such indulgence does the law show to the frailty of human nature, and the workings of parental affection.

The last duty of parents to their legitimate children is that of giving them an education suitable to their station in life; a duty pointed out by reason, and

(*o*) *R. v. Munday*, 1 Str. 190; *R. v. Benoler*, 2 Lord Raym. 1454; *Tubb v. Harrison*, 4 T. R. 118.

(*p*) This must be stated in the order of maintenance (*R. v. Gully*, Vin. Abr. tit. Poor C. 6), which must also state that the person to be relieved is poor, or likely to be chargeable to the parish. *Inhabitants of St. Andrew's Undershaf v. Breda*, 1 Lord Raym. 699. See also *R. v. Litton*, Set. & Rem. 85.

(*q*) *Fitch v. Weber*, 6 Hare, 145; *Maugham v. Mason*, 1 V. & B. 410.

(*r*) 2 Inst. 564.

(*s*) 1 Hawk. P. C. bk. i. c. 28, s. 28. So by the laws of Alfred, c. 42, a man could justify an assault in defence of his kinsman, or of the chastity of his daughter. Anc. L. and Inst. Eng. p. 40.

manifestly of the greatest importance.(163) For, as Puffendorff well observes(*t*), it is not easy to imagine or allow, that a parent has conferred any considerable benefit upon his child by bringing him into the world, if he afterwards entirely neglects his culture and education, and suffers him to grow up like a mere beast, to lead a life useless to others, and shameful to himself. Our municipal laws do not, however, constrain parents to bestow proper education upon their children. Perhaps they think it punishment enough to leave the parent, who neglects the instruction of his family, to labour under those griefs and inconveniences, which his family, so uninstructed, will be sure to bring upon him; and they leave the rich to their own option, whether they will bring up their children to be ornaments or disgraces to their family(*u*). Nevertheless, the legislature has made from time to time certain provisions for the improvement and education of the poor.

[*555] *It is true that through a dread of interfering with individual liberty, education has not as yet been made universally compulsory; but institutions have been established for those who most require them, in the shape of industrial or reformatory schools, for those who have fallen, or are likely to fall, into crime(*x*), and of educational establishments for pauper children(*y*), who are thus not permitted to grow up in entire ignorance(*z*), and lastly, enactments have been made for regulating factories and mills, by which it is provided that children employed therein shall be bound to attend a school, superintended by a competent teacher, for a specified number of hours in every week(*a*).

2. The power of parents over their children is given them, partly to enable a parent more effectually to perform his duty, and partly as a recompense for his care and trouble in the faithful discharge of it.(164) And upon 2. Power of parents over their children. this score the municipal laws of some nations have given a much

(*t*) L. of N. b. 6, c. 2, s. 12.

(*u*) There were severe restrictions imposed by statute to prevent parents having their children educated in Roman Catholic colleges or seminaries here or abroad. 1 Jac. 1, c. 4, s. 6; 3 Jac. 1, c. 5, s. 11; 3 Car. 1, c. 8; 11 Will. 3, c. 4. These disabilities have, however, one by one been removed, and it is now established that children may be educated in the Roman Catholic religion, if such be the wish of their parents or guardians. *Talbot v. Earl of Shrewsbury*, 4 M. & C. 672; *Reg. v. Clarke*, 7 E. & B. 186.

(*x*) 24 & 25 Vict. c. 113; 25 & 26 Vict. c. 10.

The father or stepfather of children in these institutions may be compelled to contribute to their support, any sum not exceeding five shillings per week.

(*y*) 18 & 19 Vict. c. 34; 25 & 26 Vict. c. 48.

(*z*) By 31 & 32 Vict. c. 122, ss. 16, 17, 22, provision is made for the religious instruction of these children in the creed of their parents.

(*a*) See particularly stats. 10 & 11 Vict. c. 70; 30 & 31 Vict. c. 146, ss. 14—18.

(163) Among the necessities required by infants may be reckoned a reasonable education, and for this the father is liable. *Plaster v. Plaster*, 47 Ill. 290; *Hines v. Mullins*, 25 Ga. 696; *Hause v. Roehrschied*, 6 Ind. 67; *Thompson v. Dorsey*, 4 Md. Ch. Decis. 149; *Raymond v. Loyl*, 10 Barb. 489; *Middlebury College v. Chandler*, 16 Vt. 633.

(164) The duty of a parent to maintain infant children is compensated by the right of the parent to the infant's services during his minority. *Janness v. Emerson*, 15 N. H. 486; *Conover v. Cooper*, 3 Barb. 115; *Godfrey v. Hays*, 6 Ala. 501; *The Etna*, Ware, 462; *Shute v. Dorr*, 5 Wend. 204; *Benson v. Remington*, 2 Mass. 113; *Morse v. Welton*, 6 Conn. 547. But, as the right of the parent to the infant's services is founded upon the corresponding duty of the parent to support the child, a neglect or an inability to discharge this duty will forfeit the right to the infant's services. *Ib.* So the parent may emancipate the child, or consent that its earnings may be paid to it; and such payment will then be valid. *Ib.*

larger authority to the parents than others. The ancient Roman laws gave the father a power of life and death over his children; upon this principle, that he who gave had also the power of taking away(b). But the rigour of these

(b) Dig. 28, 2, 11; Cod. 8, 47, 10.

As to the payment of wages by the parent, or for the board or support of a child who remains with the parent after attaining full age, see note 127. The rule as to adopted children is the same as that relating to natural children, upon the question of wages or board. *Luney v. Vantyne*, 40 Vt. 501. A parent by adoption, sanctioned by the court, has the same right as a natural parent to the custody of the child, as against a guardian. *Ross v. Sneed*, 25 Ga. 612. The title to clothing and jewelry, furnished by a father for the use of his infant daughter, remains in him; and, in case of its loss by a common carrier, he is the proper party to sue for its value. *Prentice v. Decker*, 49 Barb. 21; *Parmelee v. Smith*, 21 Ill. 620. A father, as the natural guardian of his infant children, may preserve and take care of their property; but he cannot, as natural guardian, sell it and bind the infants by such sale. *Griffings v. Hopkins*, Walker (Miss.), 49; *Wilson v. Wright*, Dudley (Ga.), 102; *Isaacs v. Boyd*, 5 Port. 388; *McCarty v. Rountree*, 19 Mo. 345; *Evans v. Peares*, 15 Gratt. (Va.) 518; *Alston v. Alston*, 34 Ala. 15; *Judson v. Sierra*, 22 Tex. 365. If the parent desires to take charge of the infant's property, or to dispose of it, his proper course is to qualify as guardian, by giving the proper bond. *Id.*

A parent may resume property given to an infant child, without the consent of the child. *Crane v. Kroger*, 23 Ill. 74.

The right of the parent to the infant's services gives him a right of action against a person who deprives him of them, either by enticing him away and employing him, or by doing him an injury which prevents or unfits him from the performance of such services. A father may recover damages, not only for the loss of service down to the time of the trial, but also for the prospective value of the services of his son, aged eight years, who was injured by an act of negligence. *Drew v. Sixth Avenue R. R. Co.*, 26 N. Y. (12 Smith) 49; *O'Mara v. Hudson River R. R. Co.*, 88 N. Y. (11 Tiff.) 445; *Rogers v. Smith*, 17 Ind. 323; *Kennard v. Burton*, 25 Me. 39; *Wilt v. Vickers*, 8 Watts, 227.

Where an infant child, who is too young to render service, is injured by a third person in such a manner as to give the infant a right of action against him for negligence, the father may recover against him for the trouble and expense he is put to in caring for the child. *Dennis v. Clark*, 2 Cush. 347. See *Durden v. Bennett*, 7 Ala. N. S. 169; *Arnold v. Norton*, 25 Conn. 92; *Kennard v. Burton*, 25 Me. 39.

A father may maintain an action for the seduction of his infant daughter, where the slightest acts of service are shown. *Pence v. Dosien*, 7 Bush (Ky.), 183; *Ingerson v. Miller*, 47 Barb. 47.

The action is founded upon the relation of master and servant, not that of parent and child, and pregnancy need not follow to maintain the action; for, if the defendant communicates to the daughter a venereal disease, which renders her sick and unfit to labor, this is sufficient. *White v. Nellis*, 31 N. Y. (4 Tiff.) 405.

Although the daughter is over twenty-one, at the time of her seduction, but the relation of master and servant between her and her father actually exists, he may maintain the action, although at the time of the seduction she was temporarily absent. *Lipe v. Eisenlord*, 32 N. Y. (5 Tiff.) 229.

But if the daughter is over twenty-one, and no acts of service are shown, and she was not a member of her father's family at the time of the seduction, he cannot maintain an action. *Patterson v. Thompson*, 24 Ark. 55.

But, slight acts of service are sufficient. *Badgley v. Decker*, 44 Barb. 577.

After the daughter is twenty-one, the father may maintain an action for the seduction of his daughter while she was an infant. *Stevenson v. Belknap*, 6 Clarke (Iowa), 97.

An action lies by a parent for the unlawful abduction of his infant child. *Steele v. Thacher*, Ware, 91; *Maritz v. Garnhart*, 7 Watts (Penn.), 802, 803; *Mages v. Holland*, 3 Dutch. (N. J.) 86.

But no action lies by the father against a person who procured the marriage of his infant

laws was softened by subsequent constitutions; so that(c) we find a father banished by the emperor Hadrian for killing his son, though he had committed a very heinous crime, upon this maxim, that "*patria potestas in pietate debet, non in atrocitate, consistere.*" - But still they maintained to the last a very large and absolute *authority: for a son could not acquire any property of [*556] his own during the life of his father; but all his acquisitions belonged to the father, or at least the profits of them for his life(d).

The power of a parent by our English laws is much more moderate; but still sufficient to keep the child in order and obedience. He may lawfully correct his child, being under age, in a reasonable manner(e); this being for the benefit of his education.(165) The consent or concurrence of the parent to the mar-

(c) Dig. 48, 9, 5.
(d) Inst. 2, 9, 1.

(e) 1 Hawk. P. C. bk. 1, c. 28; Surety of the Peace, s. 23.

daughter with another person. *Goodwin v. Thompson*, 2 Greene (Iowa), 329; *Hewey v. Maseley*, 7 Gray, 479; *Jones v. Tevis*, 4 Litt. (Ky.) 25. Contra, *Hills v. Hobert*, 2 Root, 48.

A father may emancipate his infant children, and, if he does so, they are entitled to and may receive or recover the value of their services from those for whom they were rendered on request. *Rush v. Vought*, 55 Penn. St. 437; *Fairhurst v. Lewis*, 23 Ark. 435. A minor daughter is emancipated by her marriage, with the consent of her father; and such consent may be implied from circumstances. *Bucksport v. Rockland*, 56 Me. 22. But a minor son is not emancipated by a marriage, without the consent and contrary to the directions of his father. *White v. Henry*, 24 Me. 531. A father who consents that his infant son may enlist in the service of the government, and who promises that he may have the money earned in such service, will be bound by his word, and will be compelled to refund such money if placed in his keeping by the son. *Ayer v. Ayer*, 41 Vt. 302. Whether the father relinquished his claim is a question of fact. *Ayer v. Ayer*, 41 Vt. 302; *Baker v. Baker*, id. 55.

An emancipation of a minor child by a parol agreement, and without consideration, is revocable until acted upon. *Abbott v. Converse*, 4 Allen (Mass.), 530. See *Everett v. Sherfey*, 1 Clarke (Iowa), 356; *Ream v. Watkins*, 27 Mo. 516.

A conditional emancipation, by which the father is to receive a certain sum annually from the infant's earnings, and he is to have the care of his son and the control of his affairs, and to see that he gets his wages from those who employ him, is not such an emancipation as will prevent the father from suing for the infant's wages or earnings. *Mason v. Hutchins*, 32 Vt. 780.

(165) Although a parent is authorized to inflict a reasonable punishment upon his child, he cannot lawfully exceed such bounds and inflict a cruel or excessive punishment; and if he does so he is himself criminally punishable. *Johnson v. State*, 2 Humph. (Tenn.) 233. While a parent is said to exercise a judicial authority in such a case, he is still liable in a clear case of excess; and what constitutes such an excess is a question of fact for a jury. *Johnson v. State*, 2 Humph. (Tenn.) 233.

Where a father imprisoned his blind, helpless boy in a cold, damp cellar, without fire, during several days in midwinter, and giving as an excuse that the boy was covered with vermin, and had been anointed by the father with kerosene, this was held to be a needless cruelty, which subjected the father to indictment and punishment. *Fletcher v. People*, 52 Ill. 395.

When the child is employed as an agent by the parent, he will be liable for his acts in the same manner that he would for the acts of any other agent. But for the unauthorized and willful tortious acts of the infant he is not responsible. A father is not liable for the act of his minor daughter, who willfully sets his dog upon a neighbor's hog, which is thereby bitten and killed. *Tyft v. Tyft*, 4 Denio, 175.

Nor is he liable for an assault committed by his minor son. *Baker v. Haldeman*, 24 Mo. 219. Nor is he liable for the willful trespasses and torts of his infant children, when he neither assents to nor ratifies them. *Paul v. Hummel*, 43 Mo. 119.

But an action will lie for an injury committed by his team, when driven by a son with

riage of his child under age is also, as we have seen(*f*), directed by our law to be obtained. Under ordinary circumstances a father is the guardian of his children, and entitled to the custody of them, so that if they be taken from him when under age, a *habeas corpus* lies for their restitution, and at any rate till the age of sixteen they cannot leave him against his will, whether they desire to do so or not(*g*). (166) And the unlawful abduction of a daughter under the age specified is a misdemeanor(*h*). The father is entitled to the custody of his children as against other persons till they attain the age of twenty-one; but they will not be obliged to return to him against their will, if they be of an age to exercise a choice, and this age seems to be sixteen(*i*). This paternal power applies to the father only, and not to the mother, who has none during her husband's life(*k*); (167) indeed, until recently the mother might be

- (*f*) *Ante*, pp. 536, 537.
 (*g*) *Reg. v. Howes*, 8 E. & E. 332. See also
Reg. v. Clarke, 7 E. & B. 186.
 (*h*) 24 & 25 Vict. c. 100, s. 55.
 (*i*) *Reg. v. Howes*, 8 E. & E. 332.
 (*k*) But after his death she is entitled to

the custody of the children, unless a testamentary or other guardian has been appointed, and in the absence of such appointment, her consent to their marriage is available under the marriage acts.

whom he was riding at the time. *Strohl v. Levan*, 89 Penn. St. 177. Or when using the team in his employment. *Wait v. Wait*, 30 N. Y. (3 Tiff.) 78; *Lashbrook v. Patten*, 1 Duval (Ky.), 316.

Without proof of authority from the father, a son has no more right than a stranger to lend his father's goods. *Johnson v. Stone*, 40 N. H. 197. But, under ordinary circumstances, a young lady living at her father's house may give permission to her friend to drive her out in her father's carriage, and the friend will not be liable for the result of an accident to the horses not arising from negligence on his part. *Bennett v. Gillette*, 8 Minn. 428.

(166) In this country the general rule is well settled that the father is entitled to the custody and control of his infant children, to the exclusion of all others, if he is a suitable person. *Taylor v. Jeter*, 33 Ga. 195; *Johnson v. Terry*, 34 Conn. 259; *State v. Baird*, 2 Green (N. J.), 194; *State v. Banks*, 25 Ind. 495; *State v. Richardson*, 40 N. H. 272; *People v. Olmstead*, 27 Barb. 9; *People v. Mercein*, 3 Hill, 399; *State v. Paine*, 4 Humph. 523. But this superior right of the father is subject to the control of the courts in some cases; and when the father has abused or forfeited the right by cruelty or misconduct toward his children, or he is of such a character, or has been guilty of such conduct, that their welfare, either physical or moral, requires that they shall be removed from him, the court may interfere for the benefit of the children, and give the custody to some other proper person. *Ib*.

Where husband and wife are living apart, and especially where the husband is not in fault, he will be entitled to the custody of the children. *People v. Olmstead*, 27 Barb. 9; *People v. Mercein*, 3 Hill, 399; *People v. ———*, 19 Wend. 16; *People v. Chegaray*, 18 id. 637; *People v. Humphreys*, 24 Barb. 521; *People v. Brooks*, 35 id. 85.

Upon a divorce granted in favor of the wife, the custody of children of tender years will be awarded to the mother, when it appears that she is well educated, amiable, and virtuous, and it is shown that the father is habitually rude, profane, vulgar, obscene, insulting to the females of his household, with a tendency to drunkenness. *Goodrich v. Goodrich*, 44 Ala. 670; *McBride v. McBride*, 1 Bush (Ky.), 15; *Gardenhire v. Hinds*, 1 Head (Tenn.), 402.

Where a child is unlawfully detained from him, his remedy is by *habeas corpus*, as no action at law can be maintained for that purpose. *Douling v. Todd*, 26 Mo. 267.

(167) Generally, upon the father's death, the mother, as the natural guardian, is entitled to the earnings of her children during their minority. *Campbell v. Campbell*, 3 Stockt. (N. J.) 268; *Ohio, etc., R. R. Co. v. Tindall*, 13 Ind. 366; *Cain v. Devitt*, 8 Clarke (Iowa), 116; *Simpson v. Buck*, 5 Lans. 337.

excluded by the father from all access to her children; and though the husband thus acted avowedly for extortion or intimidation, the court would not relax the rule(l). And even the court of chancery *refused to interfere with [*557] the legal right of the father to absolute dominion over his infant children, being wards of court, unless upon distinct proof that he was of immoral and irreligious principles, and that his children were likely to be corrupted by him(m). But now, by 2 & 3 Vict. c. 54, a mother (unless an adulteress), may by petition to the court of chancery(n), obtain an order for access to her infant children, at such times and subject to such regulations as the court shall think proper; and if such infant or infants shall be within the age of seven years, she may obtain an order that they be delivered to and remain in her custody until attaining such age, subject to such regulations as aforesaid, and by the divorce acts, the court is allowed to make arrangements for the custody of children, *pendente lite*, and afterwards, for their permanent custody and maintenance(o).

This power of a father over the person of his child ceases at the age of twenty-one, when he is supposed to have arrived at years of discretion, unless the father, by consenting to his child's marriage previously to attaining that age, has impliedly emancipated him. And this authority of the father may continue even after his death, for he may by his will appoint a guardian to his children. He may also, during his lifetime, delegate part of his parental authority to the tutor or schoolmaster of his child, who is then *in loco parentis*, and has such a portion of the power of the parent committed to his charge, viz. that of

(l) *R. v. Greenhill*, 4 A. & E. 624.

(m) *Wellesley v. Duke of Beaufort*, 3 Russ.

(n) *Re Taylor*, 10 Sim. 291.

1; *Ball v. Ball*, 2 Sim. 35.

(o) 20 & 21 Vict. c. 85, s. 35; 22 & 23 Vict. c. 61, s. 4.

Upon the death of the father, the mother, all other things being equal, has the preferable claim of being intrusted with the custody of her children. *People v. Wilcox*, 22 Barb. 178; S. C. affirmed, 14 N. Y. (4 Kern.) 575.

And in case of the death of the father, it is the duty of the mother to exercise proper authority over her children. *Osborn v. Allen*, 2 Dutch. (N. J.) 388

Where the father is dead, and the children are living with the mother and her second husband, the children will not be removed from her care and custody, even though the morals of such husband are exceptionable, and he is given to profanity in the presence of the family, where there is no danger that they will be abused, and they are well fed and clothed, and sent to school without charge by the stepfather. *Striplin v. Ware*, 36 Ala. 87.

After the father's death the mother has a right to change the domicile of the child during its infancy, if it has no guardian, and where there is no fraudulent intent in doing so. *Carlisle v. Tuttle*, 80 Ala. 613.

After the death of the father the mother is entitled to the earnings of her infant children, and she may maintain an action for the seduction of her infant daughter. *Gray v. Durland*, 50 Barb. 100, 211; *Damon v. Moore*, 5 Lans. 454.

So where a daughter remains in the service of her mother after arriving at the age of twenty-one years, the mother may maintain an action for the seduction of such daughter and servant. *Badgley v. Decker*, 44 Barb. 577. See *Vassel v. Cole*, 10 Mo. 634. But where the infant daughter was seduced during the life-time of her father, and where the child was not born until after his death, the mother cannot maintain the action. *Heinrichs v. Kerchner*, 35 Mo. 378; *Vassel v. Cole*, 10 id. 634; *Logan v. Murray*, 6 Serg. & Rawle, 175.

But where a widow bound her infant daughter an apprentice, who was afterward seduced, and the indenture then canceled, and the infant returned to the mother's, where she was supported, and delivered of her child, the mother was held entitled to recover. *Sargent v. Denniston*, 5 Cow. 106.

restraint and correction, as may be necessary to answer the purposes for which he is employed(168).

3. The duties of children to their parents arise from a principle of natural justice and gratitude. For to those who gave us existence, we naturally owe subjection and obedience during our minority, and honour and reverence ever after: they, who protected the weakness of our *infancy, are entitled to our protection in the infirmity of their age; [*558] they, who by sustenance and education have enabled their offspring to prosper, ought in return to be supported by that offspring in case they stand in need of assistance. Upon this principle proceed all the duties of children to their parents which are enjoined by positive laws. And the Athenian laws(*p*) carried this principle most strictly into practice; obliging children to provide for their father, when fallen into poverty; with an exception in the case of spurious children, of those whose chastity had been prostituted by consent of the father, and of those whom he had not put in any way of gaining a livelihood. The legislature, says Montesquieu(*q*), considered, that in the first case the father, being uncertain, had rendered the natural obligation precarious; that in the second case, he had sullied the life he had given, and done his children the greatest of injuries, in depriving them of their reputation; and that in the third case he had rendered their life (so far as in him lay) an insupportable burthen, by furnishing them with no means of subsistence.

Our laws agree with those of Athens with regard to the first only of these particulars, the case of spurious issue. In the other cases the law does not hold the tie of nature to be dissolved by any misbehaviour of the parent; and therefore a child is equally justifiable in defending the person of a bad parent as a good one; and is compellable, if of sufficient ability, to maintain a parent in distress and unable to work, whatever his conduct may have been(*r*).(169)

(*p*) Potter's Antiq. bk. 4, c. 15.

(*q*) Sp. L. bk. 26, c. 5.

(*r*) Stat. 43 Eliz. c. 2.

This liability may also be enforced under 4 & 5 Will. 4, c. 76, s. 78.

(168) A schoolmaster has the legal power or authority to enforce obedience to his rules, and to use the rod when necessary, but he cannot chastise wantonly and without just cause; and his chastisement must be proportionate to the offense of the pupil, and within the bounds of moderation; for if it be excessive, or without cause, he will be guilty of an assault and battery. *Anderson v. State*, 3 Head (Tenn.), 455; *Commonwealth v. Randall*, 4 Gray (Mass.), 86; *Cooper v. McJunkin*, 4 Ind. 290; *State v. Pendergrass*, 2 Dev. & Bat. 365. The legal presumption will be that the punishment was proper; and to warrant a conviction, that presumption must be rebutted by showing that the punishment was excessive or without any proper cause. *Anderson v. State*, 3 Head (Tenn.), 455. And whether the punishment was excessive or without just cause, is a question of fact for the jury. *Commonwealth v. Randall*, 4 Gray (Mass.), 86.

(169) At common law a child is not bound to support its parents, but, where one son, at the request of his brothers, furnishes support to a parent, they will be liable upon an implied promise to pay *Sone v. Sone*, 32 Conn. 142. Although a parent is bound to support his child until he arrives at majority, the obligation of the child to support the father rests entirely upon the statute. *Edwards v. Davis*, 16 Johns. 281; *Dawson v. Dawson*, 12 Iowa, 512. And to charge a son with necessities furnished to his parent, an express request from the son must be proved. *Lebanon v. Griffin*, 45 N. H. 558. But the law does not imply any promise on the part of a mother to pay for board and necessities furnished to her while living with her child. *Lynn v. Lynn*, 29 Penn. St. 369. There are statutes in many of the states providing for the support of poor relatives, and the statutes and decisions of such states will furnish such information as may be desired, in reference to any particular state.

II. We are next to consider the case of illegitimate children, or bastards; [*559] with regard to whom let us inquire, *1, Who is a bastard. 2. The legal duties of the parents towards a bastard child. 3. The rights (II.) Illegitimate children. and incapacities attending such bastard child.

1. A bastard, by our English law, is one who is not only begotten, but born, out of lawful matrimony. The civil and canon laws do not allow a child to remain a bastard, if the parents afterwards intermarry(s): and 1. Who is a bastard. herein they differ most materially from our own law; which, though not so strict as to require that the child shall be begotten, yet makes it an indispensable condition, to make it legitimate, that it shall be born, after lawful wedlock(t).(170) And our English law seems superior in this respect to the Roman, if we consider the principal end and design of the contract of marriage taken in a civil light; abstractedly from any religious view. The main end and design of marriage in a state being to ascertain and fix upon some certain person, to whom the care, the protection, the maintenance, and the education of the children should belong: this end is undoubtedly better answered by legitimating all issue born after wedlock, than by legitimating all issue of the same parties even born before wedlock, provided wedlock afterwards ensues; (1.) Because of the uncertainty there may be in proving that the issue was begotten by the same man; whereas by confining the proof to the birth, and not to the begetting, our law has rendered it certain what child is to be deemed legitimate, and who is to take care of the child. (2.) Because by the Roman law a child may be allowed to remain a bastard, or be made legitimate, at the option of the father and mother by a marriage *ex post facto*; thereby opening a door to frauds and partialities which by our law are prevented. (3.) Because, by that law a man may remain a bastard till forty years of age, and then become [*560] legitimate by the subsequent marriage *of his parents; whereby the main end of marriage, the protection of infants, is frustrated. (4.) Because this rule of the Roman law admits of no limitations as to time or as to the number of bastards so to be legitimated; but a dozen of them may, twenty years after their birth, by the subsequent marriage of their parents, be admitted to the privileges of legitimate children. This is plainly a discouragement to the matrimonial state; to which one main inducement is usually not only the desire of having children, but also the desire of procreating lawful heirs.

(e) Inst. 1, 10, 18; Decret. Greg. l. 4, t. 17, *postmodum nati in matrimonio sunt legitimi*.
c. 1. Yr. bk. 45 Edw. 3, pl. 45, p. 28.

(t) *Sic nota, procreati ante matrimonium et*

(170) In a subsequent note, No. 171, the rule as to the presumption of legitimacy will be considered. In Kentucky an actual marriage and a subsequent recognition will legitimize a child born before the marriage. *Dannelli v. Dannelli's Adm'r*, 4 Bush (Ky.), 51. So in Massachusetts, *Monson v. Palmer*, 8 Allen (Mass.), 551; and in Texas, *Carroll v. Carroll*, 20 Tex. 781.

At common law the putative father is not liable for the support of his infant bastard child; and the only remedy is that given by the statute. *Birdsall v. Edgerton*, 25 Wend. 619; *Moncrief v. Ely*, 19 id. 406; *People v. Mitchell*, 44 Barb. 245; *Marlett v. Wilson*, 30 Ind. 240.

The right to the custody and control of an infant bastard child is exclusively in the mother; and if the putative father takes it from her, the courts will restore it to the mother, upon an application, by *habeas corpus*. *Robalina v. Armstrong*, 15 Barb. 247; *People v. Mitchell*, 44 id. 245, 249; *Hudson v. Hills*, 8 N. H. 417; *Commonwealth v. Fee*, 6 Serg. & Rawle, 255. But if the child is abused, the court will interfere and direct the child to be placed elsewhere. *People v. Landt*, 2 Johns. 875.

Whereas our constitutions guard against this indecency, and at the same time give sufficient allowance to the frailties of human nature. For, if a child be begotten while the parents are single, and they will endeavour to make an early reparation for the offence, by marrying within a few months after, our law will not bastardise the child, if it be born, though not begotten in lawful wedlock; for this is an incident that can happen but once, since all future children of the same parents will be lawfully and honourably begotten. Upon reasons like these we may suppose the peers to have acted at the parliament of Merton(u), when they refused to enact that children born before marriage should be esteemed legitimate.

From what has been said, it appears that all children born before matrimony are bastards by our law: and so it is of all children born so long after the death of the husband, that by the usual course of gestation, they could not be begotten by him. But this being a matter of some uncertainty, our law is not exact as to a few days, and has not authoritatively established any fixed period for gestation, but the legitimacy or illegitimacy of a posthumous child is in each particular case a question for the jury(x). This uncertainty, however, gave rise to a peculiar proceeding at common law, where a widow was suspected to feign herself with child, in order to produce a *suppositional heir to the estate. In this case the heir presumptive or a devisee over on failure [*561] of issue(y), may have a writ *de ventre inspiciendo*, to examine whether she be with child or not(z); and, if she be, to keep her under proper restraint, till delivered; which is entirely conformable to the practice of the civil law(a); but if the widow be upon due examination found not pregnant, the presumptive heir shall be admitted to the inheritance, though liable to lose it again, on the birth of a child within due time from the death of the husband(b). But if a man dies, and his widow soon after marries again, and a child is born within such a time, as that by the course of nature it might have been the child of either husband; in this case he was once said to be more than ordinarily legitimate; for he might, when he arrived at years of discretion, choose which of the fathers he pleased(c). But this doctrine, if ever recognized, was too absurd to last, and it was afterwards held to be a question for the jury to determine, according to the evidence, which husband was most likely to be the father(d). To prevent this, among other inconveniences, the civil law ordained that no widow should marry *infra annum luctus*(e), and we find it established under the Saxon and Danish governments, that she should not marry within twelve months after her husband's death(f).

As bastards may be born before the coverture or marriage state is begun, or after it is determined, so also children born during wedlock may in some circumstances be bastards. As if the husband be out of the kingdom of England (or, as the law somewhat loosely phrases it, *extra quatuor maria*), so that no access to his wife, within a competent period before birth of the child, can be *presumed, her issue may be adjudged to be a bastard(g). But, generally during the coverture, access of the husband is presumed, unless [*562]

(u) Stat. 20 Hen. 3, c. 9.
(z) See *The Gardner Peerage Case*, rep. by Le Marchant.
(y) *Ex parte Wallop*, 4 Bro. C. C. 90; see also *Ex parte Ayscough*, 2 P. Wms. 591.
(e) Co. Litt. 8; Bract. 1. 2, c. 32.
(a) Dig. 25, tit. 4, per tot.

(b) Britton, c. 66, p. 166.
(c) Co. Litt. 8.
(d) Co. Litt. by Harg. 128 b, n. 1.
(e) Cod. 5, 9, 2.
(f) Leg. Ethelr. V. c. 21; Leg. Canut. c. 74; Anc. L. and Inst. Eng. pp. 181, 178.
(g) Co. Litt. 244.

the contrary be shown. This was formerly held such a negative as could only be proved by showing him to be elsewhere, the general rule being *præsumitur pro legitimatione*; (171) but the old doctrine of the *quatuor maria* was long since exploded (h), and the child will now be considered illegitimate if he be born under such circumstances as make it impossible that his mother's husband could have begotten him, whether this impossibility arise from non-access, physical infirmity, or other cause (i); but the presumption of legitimacy still holds to this extent, that if the husband have any opportunity of sexual access during the natural period of gestation, the child will be considered legitimate, though there may be the strongest reason for supposing it the offspring of an adulterer, the question for a jury in such a case always being, not whether the husband be the father, but whether he could have been such (k).

[*563] In the case of a judicial separation (which has the effect *of a divorce *a mensâ et thoro* under the old law) if the wife afterwards has children they are bastards; for the law will presume the husband and wife to have lived apart conformably to the sentence of separation, unless access be proved: but in a voluntary separation by agreement, the law will suppose access, unless the negative be shown (l). Also after a decree of nullity of marriage, which is now pronounced on grounds that would have justified a divorce in the spiritual court *a vinculo matrimonii*, the issue born during the coverture are bastards (m), because such divorce is decreed upon some cause, that rendered the marriage unlawful and null from the beginning, and issue born after either a

(h) *Pendrell v. Pendrell*, Str. 925.

(i) In *R. v. Luffe*, 8 East, 198, it was laid down that where the evidence establishes a "natural impossibility" that the husband could be the father, the child is a bastard; the court remarking that the case where the child is born so recently after the marriage of the parents, that it could not have been begotten in wedlock rests on its own peculiar grounds, such a child being legitimated by the recognition of the husband.

In *Morris v. Davies*, 3 C. & P. 218, 427, it was held, that although access of the husband will be presumed; yet to rebut this presumption, it is not essential to show a physical impossibility of access either by absence of the husband *extra quatuor maria*, or any other circumstance; presumption of inter-

course may be repelled by proof of the extreme youth of the husband (Co. Litt. 244.) or by facts which prove to the satisfaction of the jury, that no opportunity for sexual intercourse between the husband and wife existed, within the possible limits of the epoch of conception; see also *The Gardner Peerage Case*, reported by Le Marchant; *The Banbury Peerage Case*, 1 Sim. & Stu. 153; Sir Harris Nicholas on Adulterine Bastardy; *Head v. Head*, 1 T. & R. 188; *Bury v. Philpot*, 2 M. & K. 349.

(k) *Head v. Head*, 1 T. & R. 188. See, also, *Morris v. Davies*, 3 C. & P. 215.

(l) Salk. 123; *Sidney v. Sidney*, 8 P. Wms. 276.

(m) Co. Litt. 235.

(171) A child born during the coverture of its mother is presumed to be legitimate; but this presumption may be rebutted by evidence that such access did not take place, between the husband and the wife, as, by the laws of nature, is necessary, in order for the man to be, in fact, the father of the child. *State v. Shumpert*, 1 S. C. 85.

A child is, in law, legitimate, although born in a week or a day after marriage. *Rhyne v. Hoffman*, 6 Jones' Eq. (N. C.) 835; *State v. Heman*, 18 Ired. 502; *Mills v. Sprague*, 13 Iowa, 198; *Phillips v. Allen*, 2 Allen (Mass.), 453; *Page v. Dennison*, 1 Grant's Cas. (Penn.) 877.

The presumption of legitimacy of the child of a married woman can only be rebutted by evidence which proves beyond all reasonable doubt that her husband could not have been the father. *Phillips v. Allen*, 2 Allen (Mass.), 453; *Page v. Dennison*, 1 Grant's Cas. (Penn.) 877; *Patterson v. Gaines*, 6 How. (U. S.) 550.

The presumption cannot be rebutted by proof of the wife's adultery while cohabiting with her husband. *Hemmenway v. Lowner*, 1 Allen (Mass.), 209. But proof that the husband was in the army, and absent from his wife from January, 1864, until June, 1865, and that the child was born in November, 1865, is sufficient to establish its illegitimacy. *Dean v. State*, 29 Ind. 438.

divorce or a sentence of nullity, are of course bastards, as their father and mother are to all intents and purposes unmarried.

2. Let us next consider the duties of parents to their bastard children by our law; of which the principal is that of maintenance.(172) For though bastards are not looked upon as children for any civil purposes, yet the ties of nature, of which maintenance is one, are not so easily dissolved: and they hold indeed for some other purposes; as, for instance, a man cannot marry his bastard sister or daughter(*n*). The civil law, therefore, when it denied maintenance to bastards begotten under certain atrocious circumstances(*o*), was neither consonant to nature nor reason; however profligate and wicked the parents might justly have been esteemed.

The method in which the English law provides maintenance for bastards is as follows. Prior to or within twelve months(*p*) after the birth of an illegitimate child, the mother, who is primarily liable to support it(*q*), may, if unable to do so, summon the putative father before the *justices in petty sessions(*r*), who may, on being satisfied of the paternity, if her evidence [*564] be corroborated in some important particulars, order him to pay a certain sum for the support of the child(*s*), till it attains the age of thirteen years, should it live so long, or till its mother marries, whereupon her husband will be liable to support the child(*t*).

We proceed next to the rights and incapacities which appertain to a bastard. The rights are very few, being only such as he can acquire; for he can inherit 2. Rights and nothing(*u*), being looked upon as the son of nobody, *nullius* incapacities of bastards. *filius*(*x*).(173) Yet a bastard may gain a surname by reputation(*y*), though he has none by inheritance, being entitled neither to that of his

- (*n*) *Hains v. Jessell*, Lord Raym. 68.
- (*o*) Nov. 89, c. 15.
- (*p*) Or later if the father has paid money for its maintenance; 7 & 8 Vict. c. 101, s. 2.
- (*q*) 7 & 8 Vict. c. 101, s. 6.
- (*r*) Subject to an appeal by the father to the quarter sessions.
- (*s*) 7 & 8 Vict. c. 101; 8 & 9 Vict. c. 10.
- (*t*) *Ante*, p. 552.
- (*u*) In *Doe v. Vardill*, 5 B. & C. 438; 6

- Bing. N. C. 385; 6 Bligh. N. S. 479; 9 *Id.* 83;
- 2 Cl. & Fin. 582; 7 Cl. & Fin. 895; it was decided, that even where a bastard, by the subsequent marriage of his parents, becomes legitimate according to the law of Scotland, in which country he was born, he is nevertheless incapable of inheriting lands in England.
- (*x*) Fort de Laud. Leg. Ang. c. 40.
- (*y*) Co. Litt. 3 b.

(172) See note 170.

(173) The common-law principle, that a bastard cannot inherit property, has been very generally adopted by our courts, where no statute provides a different rule. *Doe v. Bates*, 6 Blackf. 533; *Cooley v. Dewey*, 4 Pick. 98; *Barwick v. Miller*, 4 Dessaus. 434; *Stover v. Boswell*, 8 Dana, 233.

A bastard cannot inherit from a legitimate half-brother, born of the same mother. *Woodward v. Duncan*, 1 Coldw. (Tenn.) 562; *Fluithan v. Haldor*, 1 Dev. Eq. 345.

Where a statute provides that an illegitimate child may inherit property left by the mother, it will be entitled to its proportion equally with a legitimate child. *Opdyke's Appeal*, 49 Penn. St. 373; *Alexander v. Alexander*, 31 Ala. 241; *Heath v. White*, 5 Conn. 228; *Stover v. Boswell*, 8 Dana, 233.

A child, "fully" legitimated by a statute procured by the act of the putative father, will take under a bequest in his will to "children." *Shelton v. Wright*, 25 Ga. 636.

A mother of an illegitimate son subsequently had children born in lawful wedlock. The child died intestate, leaving no children nor issue of children; and the children of the deceased mother were held to be entitled to inherit his property equally, whether his father was alive or dead. *Ellis v. Hatfield*, 20 Ind. 101. See *Lewis v. Eustler*, 4 Ohio St. 354; *Doe v. Bates*, 6 Blackf. 533.

father or his mother. It was formerly held that he could only have a birth settlement, but as we have already seen, he is now entitled to that of his mother until he attains the age of sixteen(*z*).

The incapacity of a bastard consists indeed principally in this, that he cannot be heir to any one, neither can he have heirs, but of his own body; for being *nullius filius*, he is of kin to nobody, and has no ancestor from whom any inheritable blood can be derived. A bastard was also formerly held, in strictness, incapable of holy orders; and when that was dispensed with, he was still long considered disqualified to hold any dignity in the church(*a*); but this doctrine seems now altogether obsolete; and in most other respects there is no distinction between a bastard and another man(*b*). And really any other distinction than *that of not inheriting, which civil policy renders necessary, would, with regard to the innocent offspring of his parents' crime, be unjust, and cruel: though the civil law, so noted for its equitable decisions, made bastards in some cases incapable even of a gift from their parents(*c*). A bastard may, lastly, be made legitimate, and capable of inheriting by the transcendant power of an act of parliament, and not otherwise(*d*); as was done in the case of John of Gaunt's bastard children, by a statute of Richard II.

[*566]

* CHAPTER XVII.

CORPORATIONS, ETC.

WE have hitherto considered persons in their natural capacities, and have treated of their rights and duties. But, as many personal rights die altogether with the person; and, as the necessary forms of investing a series of individuals, one after another, with the same identical rights would be very inconvenient, if not impracticable; it has been found necessary, when it is for the advantage of the public to have particular rights kept on foot and continued, to constitute certain abstract bodies or artificial persons, who may maintain a perpetual succession, and enjoy a kind of legal immortality.

These artificial persons are called bodies politic, bodies corporate (*corpora corporata*), or corporations; of which there is a great variety subsisting, for the Corporations; advancement of religion, of learning, and of commerce; in order their purposes and advantages. to preserve entire and forever rights and immunities, which

(*a*) *Ante*, p. 437.

(*a*) Fortesc. c. 40; 5 Rep. 58,

(*b*) The custody of a young illegitimate child is in the mother at any rate as against

the supposed father. *R. v. Mosley*, 5 East, 224; *R. v. Hopkins*, 7 East, 579.

(*c*) Cod. 6, 57, 5.

(*d*) 4 Inst. 36.

Illegitimate children do not inherit from legitimate children of the same mother (*Bacon v. McBride*, 32 Vt. 585); nor from bastard brothers. *Allen v. Ramsey*, 1 Metc. (Ky.) 635; *Bent v. St. Vrain*, 30 Mo. 268. Contra, *Brown v. Dye*, 2 Root, 280.

A child born out of wedlock, and legitimated by the laws of another state, is not thereby rendered capable of inheriting land in Pennsylvania. *Smith v. Derr*, 34 Penn. St. 126.

There are so many statutory provisions of the different states, relating to the right of bastards to inherit property, that it is impossible to lay down any general rule which is in force in every state; though, where no statute exists, the common-law rule has been very generally observed.

if, they were granted only to those individuals of which the body corporate is composed, would upon their death be utterly lost and extinct. To show the advantages of these incorporations, let us consider the case of a college in one of our universities, founded *ad studendum et orandum*, for the encouragement and support of religion and learning. If this were a mere voluntary assembly, the individuals which compose it might indeed read, pray, study, and perform scholastic exercises together so long as they could agree to do so: but they could neither frame, nor receive any laws or rules for their conduct; none at least, *which would have any binding force, for want of a coercive [*567] power to create a sufficient obligation. Neither could they be capable of retaining any privileges or immunities: for if such privileges should be attacked, no one individual of all this unconnected assembly could have the right, even if he had the ability, to defend them. And, when they were dispersed by death or otherwise, they could not transfer these advantages to another set of students, as unconnected as themselves. So also with regard to holding estates or other property, if land be granted for the purposes of religion or learning to twenty individuals not incorporated, there is no legal way of continuing the property to any other persons for the same purposes, but by endless conveyances from one to the other, as often as the hands are changed. But when they are consolidated and united into a corporation, they and their successors are then considered as one person in law: as one person they have one will, which is usually collected from the sense of the majority of the individuals: this one will may establish rules and orders for the regulation of the whole, which make a sort of municipal law of this little republic; or rules and statutes may be prescribed to it at its creation, which are then in the place of natural laws; the privileges and immunities, the estates and possessions of the corporation, when once vested in them, will be for ever vested without any new conveyance(a); for all the individual members that have existed from the foundation to the present time, or that shall hereafter exist, are but one person in law, a person that never dies; in like manner as the river Thames is still the same river, though the parts which compose it are changing every instant.

These political constitutions are ancient; they were known to the Romans(b), and in the civil law(c), and * called *universitates*, as forming one whole out of many individuals; or *collegia*, from being gathered [*568] together. Origin of corporations. they were adopted also by the canon law, for the maintenance of ecclesiastical discipline; and from them our spiritual corporations are derived. But our laws have considerably refined and improved upon the invention, particularly with regard to sole corporations, consisting of one person only, of which the Roman lawyers had no notion; thus we read "*Neratius Priscus tres facere existimat collegium(d)*." Though they held, that if a corporation originally consisting of three persons, were reduced to one, "*si universitas ad unum redit*," it might still subsist as a corporation "*et stet nomen universitatis*"(e).

Before we proceed to treat of the several incidents of corporations, as regarded by the laws of England, it will be convenient to divide them into four classes,

(a) Subject, of course to the statutes of mortmain.

(b) Plutarch says they were introduced by Numa.

(c) Dig. l. 8, t. 4, *per tot*.

(d) Dig. 50, 16, 85; Colquhoun's Civil Law, ss. 863, 885.

(e) Dig. 8, 4, 7; Colquhoun's Civil Law, s. 885.

viz.:—I. Corporations existing at common law, irrespective of statute, and exclusive of; II. Municipal corporations; III. Railway companies, canal companies, gas companies, and other companies which require special parliamentary powers; and IV. Joint-stock companies, formed under the Joint-Stock Companies' Acts (*f*).

I. Under our first head we propose then to treat of corporations not falling within either of the other three titles above mentioned. We shall find them

(I.) Corporations capable of various subdivisions, the respective qualities whereof at common law will be considered.

One division of corporations is into aggregate and sole. A corporation aggregate consists of many persons united together into one society, and is kept up by a perpetual succession of members, so as to continue for ever; of which kind are the mayor and commonalty of a city, the

[*569] * head and fellows of a college, the dean and chapter of a cathedral church.(174) A corporation sole consists of one person only and his

Sole. successors, who are incorporated by law, in order to give them some legal capacities and advantages, particularly that of perpetuity, which in their natural persons they would not have had.(175) In this sense the king is a sole corporation(*g*); so is a bishop or an archdeacon; so sometimes is a dean(*h*) distinct from his chapter; and so is a rector or vicar. And the necessity, or at least use, of this institution will be very apparent, if we consider the case of a

(*f*) 25 & 26 Vict. c. 89; 30 & 31 Vict. c. 131. (*h*) Grant on Corporations, 581, 588–590.

(*g*) See Co. Litt. 43.

(174) "A corporation aggregate is a collection of individuals united in one body, under such a grant of privileges as secures a succession of members without changing the identity of the body, and constitutes the members for the time being one artificial person, or legal being, capable of transacting some kind of business like a natural person." Bronson, J., *People v. Assessors of Watertown*, 1 Hill, 620.

"A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of the law, it possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created. Among the most important are immortality, and, if the expression may be allowed, individuality, properties by which a perpetual succession of many persons are considered as the same, and may act as a single individual. They enable a corporation to manage its own affairs, and to hold property without the perplexing intricacies, the hazardous and endless necessity of perpetual conveyances, for the purpose of transmitting it from hand to hand. It is chiefly for these purposes of clothing bodies of men in succession, with these qualities and capacities, that corporations were invented and are in use." Marshall, C. J., *Trustees of Dartmouth College v. Woodward*, 4 Wheat. 636.

An English joint-stock company, having the powers incident to a corporation, will be treated as a corporation in this country, although English acts of parliament declare that such companies are not corporations. *Liverpool Insurance Co. v. Massachusetts*, 10 Wall. 566.

(175) In Massachusetts a minister seized of the parsonage lands, in the right of the parish, is a sole corporation for this purpose, and holds the lands to himself and his successors. *Brunswick v. Dunning*, 7 Mass. 447; *Weston v. Hunt*, 2 id. 501; *Overseers, etc. v. Sears*, 22 Pick. 125. In New York a supervisor of a town is a quasi sole corporation, and when he has taken a collector's bond, under the statute, his successor in office must sue on the bond in his own name. *Jansen v. Ostrander*, 1 Cow. 670; see *Levy Court v. Coroner*, 8 Wall. 501. The capacity of a sole corporation to take property is confined to real estate. *Terrett v. Taylor*, 9 Cranch, 43.

parson of a church. At the original endowment of parish churches, the freehold of the church, the churchyard, the parsonage-house, the glebe, and the tithes of the parish were vested in the then parson by the bounty of the donor, as a temporal recompense to him for his spiritual care of the inhabitants, and with the intention that the same emoluments should ever afterwards continue as a recompense for the same care. But how was this to be effected? The freehold was vested in the parson; and if we suppose it vested in his natural capacity, on his death it might descend to his heir, and might be liable to his debts and incumbrances; or, at best, the heir might be compellable, at some trouble and expense, to convey it to the succeeding incumbent. The law therefore wisely ordained, that the parson, *quatenus* parson shall never die, any more than the king: by making him and his successors a corporation(*i*). By which means the original rights of the parsonage are preserved entire: for the present incumbent, and his predecessors who lived a century ago, are in law one and the same person; and what was given to the one was given to the other also; though in order to preserve entire the original rights of a parsonage, as against the acts of a parson, the legislature has found it necessary to restrain * his exercise of the right of alienation by various enactments(*k*). [**570*]

Another division of corporations, either sole or aggregate, is into ecclesiastical and lay. Ecclesiastical corporations are those where not only the members

Ecclesiastical. that compose it are entirely spiritual persons, but where the object of the institution is spiritual(*l*): such as bishops; certain deans, all archdeacons, parsons, and vicars, who are sole corporations; deans and chapters at present, and formerly prior and convent, abbot and monks, and the like, bodies aggregate. These are erected for the furtherance of religion, and perpetuating the rights of the church(*m*). (176) Lay corporations are of two sorts,

Lay which are civil. civil and eleemosynary. The civil are such as are erected for various temporal purposes. The king, for instance, is made a corporation to prevent in general the possibility of an *interregnum*, or vacancy of the throne, and to preserve the possessions of the crown entire; for immediately upon the demise of one king, his successor is, as we have formerly seen(*n*), in full possession of the regal rights and dignity. A lay corporation may be erected for the good government of a town or particular district, as a mayor and commonalty, bailiff and burgesses, or the like; some lay corporations have been instituted for the advancement and regulation of manufactures and commerce; as the civic companies(*o*) of London, and other towns: and some for the *better carrying on of divers special purposes; as churchwardens, who [**571*] are incorporated for the preservation of the goods of the parish(*p*);

(*i*) *Ante*, p. 484.

(*k*) Cripps, L. Church and Clergy, 5th ed. pp. 268 *et seq.*

(*l*) It is not their being composed of spiritual persons, but their having been founded for spiritual purposes, which makes such corporations ecclesiastical: Kyd, on Corp. vol. 1, p. 23.

(*m*) The Ecclesiastical Commissioners, appointed by 6 & 7 Will. 4, c. 77, to regulate ecclesiastical revenues, and for other purposes, are made a corporation by the act ap-

pointing them. See Cripps, L. Church and Clergy, 5th ed. pp. 49 *et seq.*

(*n*) *Ante*, p. 298.

(*o*) As to the distinction (which seems very slight) between a corporation and an incorporated trading company, i.e., an association or fraternity, established by charter mediately or immediately, between persons exercising a certain trade or mystery within a certain locality; see the cases cited, Kyd, on Corp. vol. 1, pp. 46-49.

(*p*) *Ante*, p. 477; Keil. 32; *A.-G. v. Ruper*, 2 P. Wms. 125.

(176) See note 120, where the subject of religious corporations has been sufficiently noticed.

the college of physicians and college of surgeons in London, for the improvement of the medical science; the royal society for the advancement of natural knowledge; and the society of antiquaries for promoting the study of antiquities. And among these the general corporate bodies of the universities of Oxford and Cambridge must be ranked: for it is clear they are not purely spiritual or ecclesiastical corporations—not having been established for spiritual purposes, and being composed of more laymen than clergy(*q*): neither are they eleemosynary foundations, though stipends are annexed to particular functionaries and professors, any more than other corporations where the acting officers have standing salaries; for these are rewards *pro operâ et labore*, not charitable donations only, since every stipend is preceded by service and duty; they seem therefore to be civil corporations. An eleemosynary corporation is such as has been constituted for the perpetual distribution of the free alms, or bounty of its founder, to such persons as he may have directed. Of this kind are hospitals for the maintenance of the poor, sick, and impotent: and colleges both in our ancient universities, and out(*r*) of them: which colleges were founded for two purposes; (1) For the promotion of education and learning by proper regulations and ordinances. (2) For imparting assistance to the members of those bodies, in [*572] order to enable them to prosecute their studies with *greater ease and assiduity. And all these eleemosynary corporations are, strictly speaking, lay and not ecclesiastical, even though composed of ecclesiastical persons(*s*), and although they may in some things partake of the nature, privileges and restrictions of ecclesiastical bodies.(177)

Having thus mentioned several species of corporations included within the present division of our subject, we proceed to consider: 1. How such corpora-

(*q*) "Whatever may have been the notion in former times," said Lord Mansfield, "it is most certain now, that the corporations of universities are lay corporations." *R. v. Vice-Chancellor of Cambridge*, 3 Burr. 1656.

(*r*) Such as at Manchester, Eton, Winchester, &c.

(*s*) *Phillips v. Bury*, 1 Lord Raym. 6.

(177) In regard to incorporated colleges there are some well-settled rules, among which are these: that they belong to the class of private corporations as opposed to municipal, or such as are owned entirely by the state; that they are strictly eleemosynary, contributing to our higher wants, and generally furnishing to the comparatively poor, opportunities otherwise beyond their reach; that private contributions for the endowment of institutions of learning, on the faith of a charter, constitute a contract between the contributors and others interested and the state; that the contribution is a sufficient consideration for the franchise given by the charter, the whole constituting a valid and binding agreement not to be impaired by the state nor avoided by the corporation; that the trustees named in the charter, and those chosen as their successors according to its terms, are not only trustees of the fund, but also take the place of the founder of the charity as its lawful visitors and overseers, their trust implying an obligation to govern according to the statutes of the founder, as embodied in the charter; that in fulfilling this obligation they can be controlled as other trustees, the only duty of the courts being to see that the trust is faithfully executed; and that any statute making a substantial change in the charter, as by the addition of new trustees, or by a material change in the manner of choosing them, in the mode of expending the funds, or in the objects of the charity, impairs the obligation of the contract, and is forbidden by the constitution of the United States. *State v. Adams*, 44 Mo. 570; *Dartmouth College v. Woodward*, 4 Wheat. (U. S.) 518; *Vincennes University v. Indiana*, 14 How. (U. S.) 268; *Terrett v. Taylor*, 9 Cranch, 43.

A change in the constitution of a state cannot release the state from contracts made under a constitution which permitted them to be made. *Dodge v. Woolsey*, 18 How. (U. S.) 331.

tions may be created. 2. What are their powers, capacities, and incapacities. 3. How corporations are visited. And, 4. How they may be dissolved.

1. Corporations, by the civil law, seem to have been created by the mere act, and voluntary association of their members: provided such convention was not contrary to law, for then it was *illicitum collegium*(*t*). It does

1. How created. not appear that the sovereign's consent was necessary to be actually given to the foundation of them; it was merely required that the original founders of these voluntary and friendly societies (for they were little more than such) should not establish any meetings in opposition to the laws of the state.

But with us in England, the sovereign's consent, either impliedly or expressly given, is necessary to the erection of any corporation such as now treated of(*u*). (178) The consent of the crown is implied in the

By king's consent. case of a corporation existing by force of the common law, to which former *kings are supposed to have given their concurrence. [*573] Of this sort are the monarch, bishops (exclusive of those recently con-

(*t*) Dig. 47, 22, 1. *Neque societatem, neque collegium, neque hujusmodi corpus passim omnibus habere conceditur; nam et legibus, et senatus consultis, et principalibus constitutionibus ea res coercetur.* Dig. 3, 4, 1.

(*u*) Cities and towns were first erected into corporate communities on the continent, and

endowed with many valuable privileges, about the eleventh century: (Roberts. Charles V. i. 30), to which the consent of the feudal sovereign was absolutely necessary, as many of his prerogatives and revenues were thereby considerably diminished.

(178) In the United States, corporations are generally created by the state legislatures. The power of the United States government has been noticed. See note 91. In the United States, corporations may exist by prescription, which presupposes an authorized and legitimate creation. *Robie v. Sedgwick*, 35 Barb. 819; *Dillingham v. Snow*, 7 Mass. 547; *Stockbridge v. West Stockbridge*, 12 id. 400; *Hagerstown Turnpike Co. v. Cruger*, 5 Harr. & Johns. 122; *Greene v. Dennis*, 6 Conn. 802.

Public corporations are such as are created by the government for political purposes, as counties, towns, cities and villages; they are vested with subordinate legislative powers, to be exercised for local purposes connected with the public good; and such powers are subject to the control of the legislature of the state. *Mills v. Williams*, 11 Ired. 558; *Tyneman v. Belvidere & Delaware R. R. Co.*, 2 Dutch. (N. J.) 148. A board of school commissioners for a particular county, created by special statute, authorized to devise a system of public instruction, to establish schools, and to raise money for their support, is a public corporation. *School Commissioners v. Putnam*, 44 Ala. 566. A corporation is private, as distinguished from a public corporation, unless the whole interest belongs to the government, or it is vested with political or municipal power. *Rundle v. Delaware & Raritan Canal*, 1 Wall. 275. A canal company is a private corporation; it is not a public corporation because it may be useful for the public benefit. *Ib.*; *Ten Eyck v. Delaware & Raritan Canal*, 8 Harr. 200.

An incorporated academy is a private corporation, although it may derive a part of its support from the government. *Cleveland v. Stewart*, 3 Kelly, 283. Private corporations are such as are created for building and operating steamships, steamboats, railroads, roads, bridges, telegraphs, banks, insurance, and numerous others of the same general nature.

A railroad is a private corporation. *Alabama & Tennessee R. R. Co. v. Kidd*, 29 Ala. 221. Formerly there were many corporations created by the state legislatures by special enactment in each case. But the rule has been greatly changed in that respect. In many of the states the constitutions provide that corporations shall not be created by special legislation, but must be done under general laws enacted for that purpose. Any exceptions to this general rule need not be noticed here. It may be stated as a general rule that, in this country, corporations are the creatures of statutes, either special or general. These statutes provide for the creation, organization, duration, powers, duties, rights and obligations which are incident to the corporation when created and in existence. And, where general statutes

stituted by statute), rectors, wardens of a parochial church, and some others; who by common law have ever been held (as far as our books can show us) to have been corporations *virtute officii*: and this incorporation is so inseparably

exist upon the subject, the organization of a corporation depends upon the acts of those individuals who are engaged in its formation. In all such enterprises it is essential to the validity of the proceedings that they are strictly in accordance with the statute authorizing them. Where a state constitution prohibits the creation of corporations except by general laws, the mere recognition of a corporate body, as an existing body, in acts of the legislature, cannot operate to give such organization validity. *Oroville, etc., R. R. Co. v. Plumas County*, 87 Cal. 854.

Although a state has power, by its constitution, to create corporations by special legislation, yet if the acts for the incorporation of a company are not completed until a new constitution is in force which prohibits such legislation, the corporation will not be valid if founded on such special act. *State v. Dawson*, 16 Ind. 40; *Gillespie v. Fort Wayne, etc., R. R. Co.*, 18 id. 243. Where an act of incorporation is passed before such a constitution takes effect, but it is not accepted nor the incorporation perfected until thereafter, a bill in equity will not lie to set aside conveyances of land made for the purchase of stock, after that time, if such lands have been conveyed by the corporation to innocent third parties. *Brown v. Phillips*, 16 Iowa, 210; *Snyder v. Studebaker*, 19 Ind. 463. And, although a constitution prohibits such special incorporations, yet the act may operate as a legislative license for the acts authorized. *Brent v. State*, 43 Ala. 297.

Where corporations are organized under and by virtue of general statutes, the parties engaged in the organization must observe and follow the mode prescribed by the statutes. An illegally organized corporation has no valid existence. *Commonwealth v. France*, 3 Brews. (Penn.) 148.

If a corporation, so called, has no legal existence, because it has no legal organization, it is to be treated as a partnership. *Hill v. Beach*, 1 Beasley (N. J.), 81; *Wells v. Gates*, 18 Barb. 554.

The articles of incorporation, of a corporation organized under general statutes, must specify the objects of such corporation. *West v. Bullskin Prairie Ditching Co.*, 32 Ind. 188; *O'Reiley v. Kankakee Valley Draining Co.*, id. 169.

Where such general statutes declare that, when the certificate of the formation of the company shall have been filed as required by such statutes, the subscribers and their successors shall be a corporation, the filing of such certificate in the offices, and in substantially the manner prescribed, is essential to constitute the corporation. *Childs v. Smith*, 55 Barb. 45, 53; S. C., 38 How. Pr. 828; *Baker v. Adm'r of Backus*, 32 Ill. 79; *Field v. Cooks*, 16 La. An. 153; *Tarbell v. Page*, 24 Ill. 406.

But no one but the state can raise the question, as that cannot be done collaterally. *Ib.*

A corporation will be estopped from setting up, in defense of an action against it, that the certificate of its incorporation is false. *Dooley v. Cheshire Glass Co.*, 15 Gray, 494.

So a stockholder, when sued to enforce his individual liability, will not be permitted to allege defects in the proceedings to organize the corporation. *Eaton v. Aspinwall*, 19 N. Y. (5 Smith) 119.

Where the statute requires the certificate of incorporation to state the names of the city, or town and county in which the principal place of business is to be located, it will not be a compliance to state that the operations of the corporation are to be carried on in a specified county in the state. *Harrie v. McGregor*, 29 Cal. 124.

When the provisions of such general statutes have been complied with, the incorporators and their associates become a body corporate, and its existence does not depend upon the election of, or the right to elect, directors. *Ashtabula, etc., R. R. Co. v. Smith*, 15 Ohio St. 328.

No particular form of words is required to form a corporation. *Commonwealth v. Westchester R. R. Co.*, 3 Grant (Penn.), 200.

A strict literal compliance with the requirements of the statute is not essential, and the proceedings will not be held invalid for slight defects or omissions. *Spring Valley Water-works v. San Francisco*, 23 Cal. 434; *West v. Cranfordville and Alamo Turnpike Co.*, 19 Ind. 242; *Mokelumne, etc., Co. v. Woodbury*, 14 Cal. 424; *Tarbell v. Page*, 24 Ill. 46; *West Win-*

annexed to their respective offices, that we cannot frame a complete legal idea of any of these persons, unless we have at the same time the idea of a corporation, capable of transmitting rights to its successors. Another method of impli-

sted Savings Bank, etc., v. Ford, 27 Conn. 282; *Eakright v. Logansport, etc., R. R. Co.*, 18 Ind. 404.

The act of incorporation, and evidence tending to show that the company had gone into operation, and showing acts of user of the powers conferred, is *prima facie* proof of its legal existence as a corporation. *Merchants' Bank v. Harrison*, 39 Mo. 433; *Memphis, etc., Plank Road Co. v. Rives*, 21 Ark. 802; *Leonardsville Bank v. Willard*, 25 N. Y. (11 Smith) 574; *Wilmington, etc., R. R. Co. v. Thompson*, 7 Jones' Law (N. C.), 387; *President, Trustees, etc., v. Thompson*, 20 Ill. 197; *Came v. Brigham*, 39 Me. 35; *Eastern Plank Road Co. v. Vaughan*, 20 Barb. 155; 14 N. Y. (4 Kern.) 546. Where corporations are organized under general statutes, a duly certified copy of the articles of association, which have been properly filed, with proof that the corporation has gone into operation, and of acts of user under the articles, is sufficient to prove the existence of the corporation. *Ib.*

The construction of a charter, or of articles of association under a statute, is to be similar to that of other written instruments, but strictly as against the corporation. *Rice v. Minnesota & North Western R. R. Co.*, 1 Black (U. S.), 358; *State v. Noyes*, 47 Me. 189; *Bank of Pennsylvania v. Commonwealth*, 19 Penn. St. 144; *Justices, etc., v. Griffin & West Point Plank Road Co.*, 9 Ga. 213; *Perrine v. Chesapeake & Delaware Canal Co.*, 9 How. (U. S.) 172; *Providence Bank v. Billings*, 4 Pet. 514; *Bradley v. N. Y. & N. H. R. R. Co.*, 21 Conn. 306; *Reed v. Toledo*, 18 Ohio, 161.

Under a statute providing for the incorporation of benevolent, charitable, literary, scientific, missionary or mission or other Sabbath schools, the secretary of state is not required to file a certificate for the organization of a corporation not authorized by the statute. *People v. Nelson*, 46 N. Y. (1 Sick.) 447.

Expressions in an act of incorporation must be construed in subordination to the declared purposes of the act, and in accordance with all its provisions. *Bennett's Appeal*, 65 Penn. St. 242.

Mere general words in a charter do not authorize the corporation to do acts which are prohibited by the general public law of the state; for such words will be construed in subordination to the general law. *State v. Krebs*, 64 N. C. 604; *Babcock v. New Jersey Stock Yard Co.*, 20 N. J. Eq. (5 C. E. Green) 296; *Jersey City v. Morris Canal Co.*, 1 Beasley (N. J.), 547.

A clause in the charter of a private corporation declaring it to be a public act will cause a supplement to the act to be construed as a public act. *Stephens, etc., Transp. Co. v. Central R. R. Co.*, 33 N. J. L. (4 Vroom) 229.

A state is not included in the term "corporation," as used in the internal revenue acts of congress. *Georgia v. Atkins*, 35 Ga. 815.

A corporation is the creature of the law, and derives its powers from the act of incorporation; but it is not limited to the exercise of powers specifically granted, and it possesses all such powers as are either necessarily incident to those specified, or are essential to the purposes and objects of its corporate existence. *Le Coteulx v. City of Buffalo*, 33 N. Y. (6 Tiff.) 333; *Baltimore v. Baltimore, etc., R. R. Co.*, 21 Md. 50; *Western Bank v. Tallman*, 17 Wis. 530; *Perkins v. Portland, etc., R. R. Co.*, 47 Me. 578; *Burtis v. Buffalo, etc., R. R. Co.*, 24 N. Y. (10 Smith) 269; *Downing v. Mount Washington, etc., Co.*, 40 N. H. 230.

But the powers of all corporations are limited by the grants in their charters, and cannot be extended beyond them. *Ib.*; *Petersburg v. Metzker*, 21 Ill. 205; *Madison, etc., Co. v. Watertown, etc., Co.*, 7 Wis. 59; *City Council of Montgomery v. Plank Road Co.*, 31 Ala. 76; *Smith v. Merse*, 2 Cal. 524.

The power of counties, towns or municipal corporations to issue bonds in aid of railroad corporations, when authorized by statute to issue them, is settled in many cases. *Gelpcke v. City of Dubuque*, 1 Wall. (U. S.) 175; *Ex parte Selma, etc., R. R. Co.*, 45 Ala. 696, 724; *Gibson v. Mason*, 5 Nev. 283; *Lee County v. Rogers*, 7 Wall. (U. S.) 181; *Beloit v. Morgan*, id. 619; *Supervisors of Mercer County v. Hubbard*, 45 Ill. 139; *Campbell v. Kenosha*, 5 Wall. (U. S.) 184; *Armstrong v. Brinton*, 47 Penn. St. 367; *Seybert v. Pittsburg*, 1 Wall. (U. S.) 272; *Commonwealth v. Perkins*, 43 Penn. St. 400; *Curtis v. Butler*, 24 How. (U. S.) 435. The

cation, whereby the crown's consent is presumed, is in the case of a corporation by prescription, such as the city of London; and many other corporations(x) have existed as such, time whereof the memory of man runneth not to the contrary, and therefore are looked upon in law to be

(x) 2 Inst. 330. The two universities claim they were incorporated anew, and their anto be corporations by prescription (see *R. v. Chancellor of Cambridge*, 1 Stra. 557), though 29.

power has also been denied. See *Hansen v. Hannon*, 27 Iowa, 28; 1 Am. Rep. 215; *Whiting v. Sheboygan Railway Co.*, 25 Wis. 167; 3 Am. Rep. 310; *People v. Township Board of Salem*, 20 Mich. 452; 3 Am. Rep. 400, and see also article in 8 Albany Law Jour. 195. But towns, etc., cannot be compelled by statute to subscribe for stock, or to give bonds in exchange for stock in aid of such roads without the consent of such towns, etc. *People ex rel. Dunkirk, etc., Railroad Co. v. Batcheller*, 8 Albany Law Jour. 120.

Defects in the charter, or in the mode of incorporation, may be cured by subsequent legislation for that express purpose, or by acts of legislation recognizing the validity of the corporation. *Kanawha Coal Co. v. Kanawha, etc., Coal Co.*, 7 Blatchf. 391; *Goodrich v. Reynolds*, 31 Ill. 490; *Black River, etc., R. R. Co. v. Barnard*, 3 Barb. 258; *Danbury & Norwalk R. R. Co. v. Wilson*, 22 Conn. 435; *White v. Ross*, 15 Abb. Pr. 66; *Illinois, etc., R. R. Co. v. Cook*, 29 Ill. 237.

Until a charter passed by special act has been duly accepted, there will be no valid corporation; nor will the incorporators named in it be bound by it before such acceptance, either expressly, or by acts done under such charter. *State v. Dawson*, 16 Ind. 40; *Illinois River R. R. Co. v. Zimmer*, 20 Ill. 654; *Haslett v. Wotherspoon*, 1 Strobh. Eq. 209; *Goddard v. Pratt*, 16 Pick. 412; *Ellis v. Marshall*, 2 Mass. 269; *Lincoln & Ken. Bank v. Richardson*, 1 Greenl. 79; *Bailey v. Mayor, etc., of N.Y.*, 3 Hill, 531; *Talledaga Ins. Co. v. Sanders*, 43 Ala. 115.

Where an act amendatory of a charter contains no provision requiring a formal acceptance of it, acceptance may be implied from corporate acts. *Bangor, etc., R. R. Co. v. Smith*, 47 Me. 34; *Smead v. Indianapolis, etc., R. R. Co.*, 11 Ind. 104; *Taylor v. Neuberger*, 2 Jones' Eq. (N. C.) 141; *Blandford v. Gibles*, 2 Cush. 39; *Commonwealth v. Cullen*, 13 Penn. St. 133; *Goodin v. Evans*, 18 Ohio St. 150.

Where a corporation is organized under a general law, no acceptance of the charter is required. *Spring Valley Water Works v. San Francisco*, 22 Cal. 434.

A statute which grants a new franchise to an existing corporation, upon specified conditions, is inoperative until accepted. *Lynn v. Orange, etc., R. R. Co.*, 32 Md. 18.

A corporation having organized under a charter containing a disadvantageous provision will be estopped from denying its validity. *Durye v. Horicon, etc., Co.*, 22 Wis. 417.

Every corporation must be regarded as having some place of organization, existence and business. A corporation established under the laws of one state has its domicile there exclusively, although the offices of its treasurer and general superintendent are in another state, and a part of its business transacted there. *Baltimore, etc., R. R. Co. v. Glenn*, 28 Md. 287; *Fish v. Rock Island, Chicago & Pacific R. R. Co.*, 53 Barb. 472; 3 Abb. N. S. 453; *Camden, etc., Co. v. Swede Iron Co.*, 3 Vroom (N. J.), 15; *Talmadge v. North American Coal, etc., Co.*, 3 Head (Tenn.), 337; *Union Branch R. R. Co. v. East Tennessee and Georgia R. R. Co.*, 14 Ga. 327; *Day v. Newark India Rubber Manuf. Co.*, 1 Blatchf. 628; *Merrick v. Van Santvoord*, 34 N. Y. (7 Tiff.) 208.

A corporation formed in California, for mining purposes, may hold land in Nevada. *Whitman, etc., Mining Co. v. Baker*, 3 Nev. 386. See *State v. Boston, etc., R. R. Co.*, 25 Vt. 433; *Lumbard v. Aldrich*, 8 N. H. 31.

A steamboat company, incorporated in one state, may take a lease of an office in another state. *Steamboat Co. v. McCutcheon*, 13 Penn. St. 13.

A corporation organized in one state does not become a corporation of another state, merely by being authorized by the latter state to hold lands, and lease property, and transact business there. *State v. Delaware, etc., R. R. Co.*, 1 Vroom (N. J.), 473.

Corporations created in one state may transact business in another state, if not inconsistent with the laws and policy of the latter, nor in violation of its charter. *Connecticut, etc., Ins. Co. v. Cross*, 18 Wis. 109; *Bard v. Poole*, 12 N. Y. (2 Kern.) 495.

They may loan money and take securities, and enforce them in another state. *New York*

well created. For though the members thereof can show no legal charter of incorporation, yet in cases of such high antiquity, the law presumes there once was one; and that by the various accidents which length of time may produce,

Dry Dock v. Hicks, 5 McLean, 111; *Farmers' Loan and Trust Co. of N. Y. v. McKinney*, 6 McLean, 1; *American Ins. Co. v. Owen*, 15 Gray, 491. But where a corporation of one state exercises its corporate franchises in another state, it is only done by the comity of the latter. *Liverpool Ins. Co. v. Massachusetts*, 10 Wall. 566.

The failure to describe in a charter the place of business of the corporation "as the principal place of business," is a technical omission and does not avoid the charter. *In re Spring Valley, etc., Works*, 17 Cal. 132.

A corporation cannot exist under charters from two separate states; in contemplation of law, each charter creates a legal entity to be recognized within its own state, though the same corporators may compose both entities. *Ohio, etc., R. R. Co. v. Wheeler*, 1 Black (U. S.), 286. But if incorporated in that manner, it may sue or be sued as an inhabitant of that state where its principal place of business is situated, and its records kept. *Culbertson v. Wabash Navigation Co.*, 4 McLean, 544. See *Minot v. Philadelphia, etc., R. R. Co.*, 2 Abb. (U. S.) 323. And a valid corporation may be created by the concurrent action of two or more states. *Bishop v. Brainard*, 28 Conn. 289; *Commonwealth v. Pillsbury, etc., R. R. Co.*, 58 Penn. St. 26.

A corporation is regarded as a citizen of the state where it was created, for the purpose of suing or being sued in the United States courts, or for the removal of a cause from the state courts to the courts of the United States. *Hatch v. Chicago, etc., R. R. Co.*, 6 Blatchf. 105; *Stevens v. Phoenix Ins. Co.*, 41 N. Y. (2 Hand) 149; *Marshall v. Baltimore & Ohio R. R. Co.*, 16 How. (U. S.) 314; *Covington Bridge Co. v. Shepherd*, 20 id. 227, 232.

But a corporation aggregate is not considered as a citizen, or entitled to the privileges of one, for any other purpose. *Tatem v. Wright*, 3 Zab. 66. A corporation is not a "citizen" within the meaning of the United States constitution, which declares that "the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states." *Paul v. Virginia*, 8 Wall. (U. S.) 169; *Liverpool Ins. Co. v. Massachusetts*, 10 id. 566.

It is the creation of local law, and has no absolute right of recognition in another state, which may permit them to act upon such terms as they choose to prescribe, *Ib.*

The right to question the validity of the charter or organization of a corporation belongs exclusively to the state, and such validity cannot be questioned collaterally. *Cochran v. Arnold*, 58 Penn. St. 399; *Tisdale v. Miononk*, 46 Ill. 9; *Chamberlain v. Painesville, etc., R. R. Co.*, 15 Ohio St. 325; *Taggart v. Western, etc., R. R. Co.*, 24 Md. 563; *Bank of Missouri v. Snelling*, 35 Mo. 190; *Goodrich v. Reynolds*, 31 Ill. 490; *Mokelumne, etc., Co. v. Woodbury*, 14 Cal. 424; *Wright v. Shelby R. R. Co.*, 16 B. Monr. 4; *Union Branch R. R. Co. v. East Tenn. & Ga. R. R. Co.*, 14 Ga. 327; *Rondell v. Fay*, 32 Cal. 354.

Where there are no rights involved under the act of incorporation, and such incorporation is specified in a contract as the event upon which a sum of money is to become due, the question of incorporation may be raised for the purpose of determining whether the money is due; and in such litigation the regularity and validity of the incorporation may be contested. *Childs v. Smith*, 55 Barb. 45; 88 How. Pr. 328; S. C. reversed on other grounds, 46 N. Y. (1 Sick.) 34.

It is a general rule that a party who contracts with a corporation, or what purports to be such, will afterward be estopped from questioning the existence or the validity of such corporation. *McBroom v. Lebanon*, 31 Ind. 268; *Camp v. Byrne*, 41 Mo. 525; *Smith v. Davis*, 2 Duval (Ky.), 17; *Cochran v. Arnold*, 58 Penn. St. 399; *Franz v. Teutonia Building Association*, 24 Md. 259; *Wood v. Coosa, etc., R. R. Co.*, 32 Ga. 273; *Hyatt v. Whipple*, 37 Barb. 595; *Eppes v. Mississippi R. R. Co.*, 35 Ala. 33; *Tarbell v. Page*, 24 Ill. 46.

So, on the other hand, it is a general rule that an alleged corporation which enters into a contract as a corporation, will not be permitted to deny the existence or the validity of the corporation, nor its power to make such contract. *Callender v. Hudson, etc., R. R. Co.*, 11 Ohio St. 516; *Carey v. Cincinnati, etc., R. R. Co.*, 5 Clarke (Iowa), 357.

But it has been held that a corporation may avail itself of its want of authority to make the contract sought to be enforced against it, though it has received and enjoyed the consideration on which it was made. *Albert v. Savings Bank of Baltimore*, 1 Md. Ch. Dec. 407; *Abbott v. Balt. & Rapp. Steam Packet Co.*, id. 542.

the charter has been lost or destroyed. The royal consent is expressly given, either by act of parliament or by charter. By act of parliament, of which the royal assent is a necessary ingredient, corporations may undoubtedly be created(y); but it is observable, that (till of late years)

(y) 1 Roll. Abr. 512.

Two or more corporations may be consolidated, and form a new corporation. *Blatchford v. Ross*, 54 Barb. 42; 37 How. Pr. 110; 5 Abb. (N. S.) Pr. 434; *McVicker v. Ross*, 55 Barb. 247; *Commonwealth v. Atlantic, etc., R. R. Co.*, 53 Penn. St. 9; *State v. Bailey*, 16 Ind. 46. But the rights of the old stockholders who do not enter into the new corporation must be provided for and protected. *Ib.*

Where two corporations are merged in a new one, by authority of law, the new company stands in the place of the old companies, and may enforce their rights and is subject to their liabilities. *Miller v. Lancaster*, 5 Cold. (Tenn.) 514; *Indianapolis, etc., R. R. Co. v. Jones*, 29 Ind. 465; *Baltimore, etc., R. R. Co. v. Musselman*, 2 Grant's Cas. (Penn.) 348; *McOray v. Junction R. R. Co.*, 9 Ind. 358.

Subscriptions for shares of stock are founded upon a sufficient consideration in the right to such shares, and an action will lie for the recovery of the amount subscribed. *Merrimac Mining Co. v. Levy*, 54 Penn. St. 227; *Richmondville Seminary v. McDonald*, 34 N. Y. (7 Tiff.) 379; *Smith v. Davis*, 2 Duval (Ky.), 17; *East Tennessee & Va. R. R. Co. v. Gammon*, 5 Sneed (Tenn.), 567.

Conditional subscriptions have been held to be binding upon the corporation, and unless the conditions are complied with or performed, no action lies upon the subscription. *Nashville, etc., R. R. Co. v. Jones*, 2 Cold. (Tenn.) 574; *Chase v. Sycamore, etc., R. R. Co.*, 38 Ill. 215; *Beloit, etc., R. R. Co. v. Palmer*, 19 Wis. 574; *Pittsburg, etc., R. R. Co. v. Stewart*, 41 Penn. St. 54; *Burrows v. Smith*, 10 N. Y. (6 Seld.) 550; *Martin v. Pensacola, etc., R. R. Co.*, 8 Fla. 370; *Rives v. Plank Road Co.*, 30 Ala. 92; *Oldtown, etc., R. R. Co. v. Veasey*, 39 Me. 571; *Junction R. R. Co. v. Reeve*, 15 Ind. 236.

But upon the performance of the condition the subscription becomes absolute, and may be enforced. *Chamberlain v. Painesville, etc., R. R. Co.*, 15 Ohio St. 225; *Smith v. Allison*, 23 Ind. 386; *Miller v. Pittsburg, etc., R. R. Co.*, 40 Penn. St. 237; *North Missouri, etc., R. R. Co. v. Miller*, 31 Mo. 19; *Spartanburg, etc., R. R. Co. v. De Graffenreid*, 12 Rich. Law (S. C.), 675.

So a party may waive the condition. *Parks v. Evansville, etc., R. R. Co.*, 23 Ind. 567; *Evansville, etc., R. R. Co. v. Dunn*, 17 id. 603. See *Parker v. Thomas*, 19 Ind. 213.

Conditional subscriptions have been held to be entirely void. *Fort Edward, etc., Plank Road Co. v. Payne*, 15 N. Y. (1 Smith) 583; *Butternuts, etc., Turnp. Co. v. North*, 1 Hill, 518. The cases on this question may perhaps be harmonized, if the conditional subscription before organization is held void, while those made after that time are valid.

Conditional subscriptions have also been held to be of no effect, and the subscription was enforced as though it had been absolute or unconditional. *Bedford, etc., R. R. Co. v. Bowser*, 48 Penn. St. 29; *Bacington v. Pittsburg, etc., R. R. Co.*, 34 id. 358. If made before the corporation is organized. *Pittsburg, etc., R. R. Co. v. Stewart*, 41 id. 54. Where the payment of a specified percentage at the time of the subscription is required by law or the articles of association, but there is no payment made at that time, a subsequent payment of the full amount will render the subscription binding. *Black River, etc., R. R. Co. v. Clarke*, 25 N. Y. (11 Smith) 208; *Barrington v. Mississippi Central R. R. Co.*, 32 Miss. 370; *Klein v. Alton, etc., R. R. Co.*, 13 Ill. 514.

So if the payment is made by a stranger and his act is ratified by the subscriber. *Mississippi, etc., R. R. Co. v. Harris*, 36 Miss. 17.

So if he acts as a member in the meetings of the company, and in the regulation of its affairs, he will be bound. *Heywood, etc., Plank Road Co. v. Beyan*, 6 Jones' Law (N. C.), 82. See *Piscataqua Ferry Co. v. Jones*, 39 N. H. 491.

But where the charter provided that no subscription should be received and allowed without the payment of a specified sum on each share at the time of subscription, it was held that a subscription without such payment did not invest the subscriber with any of the privileges of a corporator, nor render him liable as a subscriber, stockholder or otherwise.

most of those statutes, which are usually cited as having created corporations, either confirm such as have been before created by the crown; as in the case of the college of physicians erected by charter 10 Henry 8(z), which char-

(s) *Dr. Bonham's Case*, 8 Rep. 114.

Wood v. Coosa, etc., R. R. Co., 32 Ga. 273; *Fiser v. Mississippi, etc., R. R. Co.*, 33 Miss. 359. See *Blair v. Rutherford*, 81 Tex. 465.

A subscriber will be bound by the recitals contained in the instrument subscribed by him. *Black River, etc., R. R. Co. v. Clarke*, 25 N. Y. (11 Smith) 208.

They are supposed to know the provisions of the charter. *Wright v. Shelby R. R. Co.*, 16 B. Monr. (Ky.) 4.

Where a subscription is obtained by a fraud practiced upon the subscriber, he may set up such fraud as a defense to an action upon the subscription. *Oustar v. Titusville Gas, etc., Co.*, 63 Penn. St. 381; *Wert v. Crausfordville, etc., Co.*, 19 Ind. 242; *Waldo v. Chicago, etc., R. R. Co.*, 14 Wis. 575; *Cunningham v. Edgefield, etc., R. R. Co.*, 2 Head (Tenn.), 23.

But statements made by agents engaged in obtaining subscriptions are not binding upon the corporation, and will not affect the liability upon the written subscription. *Bish v. Bradford*, 17 Ind. 490; *Brownlee v. Ohio, etc., R. R. Co.*, 19 id. 213; *Ogilvie v. Knox Ins. Co.*, 22 How. (U. S.) 380; *Martin v. Pensacola, etc., R. R. Co.*, 8 Fla. 370; *Walker v. Mobile, etc., R. R. Co.*, 34 Miss. 245; *Buffalo & New York City R. R. Co. v. Dudley*, 14 N. Y. (4 Kern.) 336.

A subscription cannot be withdrawn, especially when other parties may have been induced to sign upon the faith of it. *Johnson v. Wabash, etc., R. R. Co.*, 16 Ind. 389; *Lake Ontario R. R. Co. v. Mason*, 16 N. Y. (2 Smith) 451.

Money paid in furtherance of the objects of the incorporation, and in completing the organization, may be recovered of the subscribers. *Griswold v. Peoria University*, 26 Ill. 41.

Where the charter or articles of association provide for it, there may be a forfeiture of the shares subscribed for, upon the non-payment of the sums due. *Small v. Herkimer Manuf., etc., Co.*, 2 N. Y. (2 Comst.) 330; *Mills v. Stewart*, 41 N. Y. (2 Hand) 384.

If the stock is declared forfeited by the company, no action will lie afterward for the subscription. *Ib.*

But forfeiture of the stock is merely a cumulative remedy, and the corporation may enforce it, or may omit to do so, and collect the subscription by action at its election. *Piscataqua Ferry Co. v. Jones*, 39 N. H. 491; *City Hotel v. Dickinson*, 6 Gray, 586; *Buffalo & New York City R. R. Co. v. Dudley*, 14 N. Y. (4 Kern.) 336; *Barbee v. Plank Road Co.*, 6 Fla. 262; *Railroad Co. v. Rodriguez*, 10 Rich. Law (S. C.), 278; *Hightown v. Thornton*, 8 Ga. 486.

As a subscription is a valid liability, the money to be paid may lawfully be secured by giving a mortgage or other security. *Battershall v. Davis*, 31 Barb. 323.

The liability for stock must be in writing, as an oral promise is invalid, and is not a subscription. *Pittsburg, etc., R. R. Co. v. Gazzam*, 32 Penn. St. 340.

Agreements or subscriptions for stock may be valid, though made before the incorporation of the company, but in contemplation of it. *Johnson v. Ewing, etc., University*, 35 Ill. 518; *Lake Ontario R. R. Co. v. Mason*, 16 N. Y. (2 Smith) 451; *Gleaves v. Turnpike Co.*, 1 Sneed (Tenn.), 491; *Penobscot R. R. Co. v. Dummer*, 40 Me. 172.

Where the charter or the articles of association provide for calls before payments are payable, a proper call and notice are conditions precedent to a right of recovery upon the subscription. *Alabama, etc., R. R. Co. v. Rowley*, 9 Fla. 508; *Heaston v. Cincinnati, etc., R. R. Co.*, 16 Ind. 275; *Mississippi, etc., R. R. Co. v. Gastor*, 20 Ark. 455.

Otherwise, where the charter does not require notice. *Wilson v. Wills Valley R. R. Co.*, 33 Ga. 466; *Eppes v. Mississippi, etc., R. R. Co.*, 35 Ala. 33.

A subscription for shares of stock of an incorporated company makes the subscriber a stockholder therein, even though he fails to pay the subsequent calls, or though no certificates of stock were issued to him. *Schoeffer v. Missouri Ins. Co.*, 46 Mo. 248.

Where the statute authorizes directors to require "payments from subscribers to the capital stock of the sums subscribed by them, at such time, and in such proportions, and on such conditions as they shall see fit," the directors are invested with a full discretionary power as to the time and manner of payment; and they may require the whole subscrip-

ter was afterwards confirmed in parliament(a); or, they permit the crown to [*574] erect a *corporation *in futuro* with certain powers: as was originally the case with the bank of England(b). So that the immediate creative act was usually performed by the sovereign alone, in virtue of the royal prerogative(c).

Corporations which exist otherwise than by common law, by prescription, and by act of parliament, were for the most part created by the king's letters patent, or charter of incorporation. The royal creation may be performed By patent or charter. by any words expressing incorporation. Nay, it has been held, that if the sovereign grants to a set of men to have *gildam mercatoriam*, a mercantile meeting or assembly(d), this is alone sufficient to incorporate and establish them for ever(e).

The crown (it is said) may grant to a subject the power of erecting a corporation(f), though the contrary was formerly held(g); that is, the sovereign may permit the subject to name the persons and powers of the corporation at his pleasure; but it is really the king who erects, Or the king may delegate the power.

(a) 14 & 15 Hen. 8, c. 5.

(b) Stat. 5 & 6 Will. & M. c. 20.

(c) *Ante*, p. 326.

(d) *Gild* signified among the Saxons a fraternity, derived from the verb *giban* to pay, because every man paid his share towards the expenses of the community. *Spel. Gloss.*; *Ducange*. And hence their place of meeting is frequently called the *Gild* or *Guild hall*. 10 Rep. 30. See *Turner's Anglo-Saxons*, Bk. 8, c. 10.

(e) 10 Rep. 30; 1 Roll. Abr. 513. It was formerly held that if the crown granted land to the men of Islington, this grant incorporated them by necessary implication. *Anon.* Dyer, 100. See *Grant on Corporations*, 8.

(f) Bro. Abr. tit. Prerog. 53; Viner, Prerog. (M. b.) 16; Chitty, Prerog. 127, 128.

(g) Year-book, 2 Hen. 7, 13.

tion to be paid at one time or in installments. *Houn v. Mulberry, etc., Gravel Road Co.*, 33 Ind. 103.

A material alteration of the articles of association, if made without the consent of a subscriber, and before the final organization, will discharge him from liability on the subscription. *Burrows v. Smith*, 10 N. Y. (6 Seld.) 550.

But, before they are filed, a subscriber may alter them by reducing the amount of his subscription. *Burt v. Farrar*, 24 Barb. 518.

So of a material deviation from the route prescribed by the charter, which will render the subscription invalid. *Champion v. Memphis R. R. Co.*, 35 Miss. 692; *Witter v. Mississippi, etc., R. R. Co.*, 20 Ark. 463; *Plank Road Co. v. Arndt*, 31 Penn. St. 817. Unless the charter authorizes a change of location. *Ellison v. Mobile, etc., R. R. Co.*, 36 Miss. 573; *Fry v. Lexington, etc., R. R. Co.*, 2 Metc. (Ky.) 814.

Transfer of stock by a subscriber, without the assent of the corporation, for the purpose of escaping liability, will be no defense to an action for his subscription. *Eaverhart v. Westchester & Phila. R. R. Co.*, 28 Penn. St. 339; *Schenectady & Saratoga Plank Road Co. v. Thatcher*, 11 N. Y. (1 Kern.) 103.

A law, amending or impairing the charter of an incorporated company, without its consent, is unconstitutional, unless the right to amend is reserved in the act of incorporation, or by some general statute, giving that right as to all corporations. *Hamilton v. Keith*, 5 Bush (Ky.), 458; *Fry v. Lexington, etc., R. R. Co.*, 2 Metc. (Ky.) 314; *Stevens v. Rutland, etc., R. R. Co.*, 29 Vt. 545; *Macon & Western, etc., R. R. Co. v. Davis*, 13 Ga. 68; *Zabriskie v. Hackensack, etc., R. R. Co.*, 3 Green (N. J.), 178.

When such right is thus reserved, the charter may be altered by the legislature. *Hyatt v. Whipple*, 37 Barb. 595; *State v. Person*, 3 Vroom (N. J.), 134.

A statute which imposes personal liabilities, which were not imposed by the charter or the laws under which the corporation was organized, impairs the validity of a contract and is unconstitutional. *Ireland v. Palestine, etc., Turnpike Co.*, 19 Ohio St. 369.

A by-law cannot impose such a liability, where neither the charter nor any statute imposes it. *Reid v. Eatomar Manuf. Co.*, 40 Ga. 98.

and the subject is but the instrument: for, though none but the king can make a corporation, yet he can do it by deputy(*h*).

*When a corporation is erected, a name must be given to it; and by [*575] that name alone it must sue and be sued, and do all legal acts; though

A name is essential to a corporation. a minute variation therein is not material(*i*). Such name is the very being of its constitution; and though it is the will of the sovereign which erects the corporation, yet the name is the knot of its combination, without which it could not perform its corporate functions(*k*). (179) The name of incorporation, says sir Edward Coke, is as a proper name, or name of baptism; and therefore when a private founder gives his college or hospital a name, he does it only as a godfather; and by that same name the crown baptizes the incorporation(*l*).

2. When a corporation has been so formed and named, it acquires many powers, rights, capacities, and incapacities, which we are next to consider. Some

2. Capacities and Incapacities of corporations. of these are necessarily and inseparably incident to every corporation; which incidents, as soon as a corporation is duly erected, are tacitly annexed of course(*m*). As, (1.) To have perpetual

(1.) To have perpetual succession.

succession. This is the very end of its incorporation: for there cannot be a succession for ever without an incorporation(*n*); and

therefore all aggregate corporations have a power necessarily implied of electing

(2.) To sue and be sued.

members in the room of such as die(*o*). (180) (2.) To sue or be sued, grant or receive, by its corporate name, and do all other acts

(*h*) Thus the corporation of the city of London possesses by charter the power of establishing companies, fraternities, and guilds; which, however, are subject to the general control of the civic authorities. Other corporations may also establish such fraternities, if empowered so to do by their charter; see *Kyd, on Corp.* vol. 1, pp. 46—49. As to the origin, and nature of London companies, see

Pulling on the Laws, Customs, etc., of the Port and City of London, pp. 71 *et seq.*

(*i*) 10 Rep. 122.

(*k*) *Gilb. Hist. C. P.* 224—226.

(*l*) 10 Rep. 28.

(*m*) 10 Rep. 30; *Norris v. Staps*, Hob. 210.

(*n*) 10 Rep. 26.

(*o*) 1 Roll. Abr. 514.

(179) A name is an indispensable part of a corporation. See note 181.

A corporation may acquire a name by usage. *Smith v. Plank Road Co.*, 30 Ala. 650.

A mere change in the name by the legislature does not affect third persons, so long as the identity of the corporation appears. *Rosenthal v. Madison, etc., Co.*, 10 Ind. 359.

In a contract, a variance in the name of the corporation will not vitiate the agreement, if there is no doubt as to the identity of the corporation. *Boisgerard v. N. Y. Banking Co.*, 2 Sandf. Ch. 23; *Hagerstown Turnp. Co. v. Cruger*, 5 Harr. & Johns. 123; *Hoboken, etc., Association v. Martin*, 2 Beasley (N. J.), 427. A note and deed executed by an old corporation by a new name will bind it as though it had been executed in the proper name. *Mount Palatine Academy v. Kleinschmitts*, 28 Ill. 183.

So of a grant by or to a corporation. *Kentucky Seminary v. Wallace*, 15 B. Monr. (Ky.) 85; *Vansant v. Roberts*, 3 Md. 305; *Bank of Tennessee v. Burke*, 1 Cold. (Tenn.) 628. So in pleading. *Trustees of M. E. Church v. Tryon*, 1 Denio, 451.

A corporation can sue or be sued only in its corporate name, unless by special provision in its charter. *Mauney v. Mota*, 4 Ired. Eq. 195; *Elliott v. Branch Bank*, 4 Pike (Ark.), 424; *Hay v. McCoy*, 6 Blackf. 69; *Porter v. Neckervis*, 4 Rand. 359; *Insane Hospital v. Higgins*, 15 Ill. 185.

After a change in the name of a corporation, it may sue in its new name to enforce contracts made in the name of the old one, by making proper averments in the pleadings. *Ready v. Tuscaloosa*, 6 Ala. 327.

(180) The mode in which parties may become members of a corporation is usually declared or provided for in the statutes authorizing the formation of corporations. Some of the cases which show when a subscription of the articles of association, or for the stock of the corpo-

ration, will constitute them members, were cited in the last preceding note, No. 179. Where the members of a corporation are directed to be annually elected, the words are merely directory, and do not take away the power incident to the corporation to elect afterward, when the annual day has, by some means, free from design or fraud, passed by. *State v. Young*, 51 Ill. 149. The articles of association framed under the provisions of general statutes, usually provide for the mode in which parties may become members. The rights of a stockholder or member are frequently a subject of examination and decision by the courts. Before a stockholder can institute a suit in his own name against a wrong-doer, whose acts operate to the detriment of the stockholders, he must first apply to the directors to institute an action, and they must have refused. *Memphis v. Dean*, 8 Wall. (U. S.) 64.

The purchaser of a share of stock in a corporation takes it with all its incidents, one of which is the right to receive all future dividends declared on such shares. *March v. Eastern R. R. Co.*, 43 N. H. 515.

A minority of stockholders in a corporation may have a remedy in equity against the directors or the corporation, and all others, to prevent them from making a misapplication of their capital or profits, or from doing acts which will lessen their dividends, or the value of their shares, if the acts intended to be done are such as the law regards as a breach of trust or duty. *March v. Eastern R. R. Co.*, 40 N. H. 548; *Abbott v. American, etc., Co.*, 83 Barb. 578, 584; 21 How. Pr. 193; *Zabriskie v. Cleveland, etc., R. R. Co.*, 23 How. (U. S.) 381; *Allen v. Curtis*, 26 Conn. 456; *Bliss v. Anderson*, 31 Ala. 612; *Gifford v. New Jersey R. R. Co.*, 2 Stockt. (N. J.) 171; *Baltimore & Ohio R. R. Co. v. Wheeling*, 18 Gratt. (Va.) 40; *Dodge v. Woolsey*, 18 How. (U. S.) 331.

On a sale of the property of a corporation on an execution, a stockholder may bid it off for his own benefit, if there is no fraud in the sale. *Mickles v. Rochester City Bank*, 11 Paige, 118.

The right to remove or expel a member for improper conduct is incident to every corporation. *Smith v. Smith*, 3 Dessaus. 557; *Leech v. Harris*, 2 Brews. (Penn.) 571; *Commonwealth v. Pike Beneficial Society*, 8 Watts & Serg. 247.

But he cannot be expelled until he has had an opportunity to be heard in his defense before the society at large. *Commonwealth v. German Society*, 15 Penn. St. 251; *Delacy v. Neuse Navigation Co.*, 1 Hawks, 274; *Commonwealth v. Pa. Beneficial Institution*, 2 Serg. & Rawle, 141.

The power of expulsion is in the corporation, and cannot be delegated to the directors. *State v. Chamber of Commerce*, 20 Wis. 63.

Where a member of a corporation has been improperly expelled, the court will order his restoration, in a proceeding by mandamus. *State v. Georgia Medical Society*, 38 Ga. 608; *Evans v. Philadelphia Club*, 50 Penn. St. 107; *People v. Medical Society of Erie*, 24 Barb. 570; *People v. Medical Society of Erie*, 32 N. Y. (5 Tiff.) 187; *Commonwealth v. German Society*, 15 Penn. St. 251.

Where a statute imposes an individual liability upon stockholders for corporate debts, if one stockholder has been compelled to pay such a debt, he may have an action for contribution against the remaining stockholders who were originally liable with him for the debts. *Aspinwall v. Torrance*, 1 Lans. 381; *Cary v. Holmes*, 32 Mass. (16 Gray) 127.

The mode of electing officers is usually provided for by statute, or by the charter or articles of association, or the by-laws. And, in the absence of any express provision, the common law will furnish a proper rule of action.

Where the qualifications of persons who may vote for directors of a corporation are definitely prescribed by statute, the corporation cannot extend or limit the right to vote. *Brewster v. Hartley*, 37 Cal. 15, 24.

The right of *de facto* directors to act as directors cannot be questioned collaterally, in an action to try the title of their appointee to an office. *People v. Hills*, 1 Lans. 203.

A court of equity has no jurisdiction to determine the validity of an election of directors; it is a question for the common-law courts, upon a *quo warranto*. *Owen v. Whitaker*, 20 N. J. Eq. (5 C. E. Green) 122; *Hughes v. Parker*, 20 N. H. 58.

When the law creating a corporation requires that the stockholders shall elect trustees annually, at such time, place and manner as may be determined by the by-laws, the election must take place substantially every twelve calendar months. *State v. McCullough*, 3 Nev. 203. See *State v. Young*, 51 Ill. 149, stated *ante*.

Where the act of incorporation does not require a majority of votes of all the corporators

(3.) To purchase as natural persons may. (181) (3.) To purchase lands, and hold lands. them, for the benefit of themselves and their successors, though

to elect a board of directors, a majority actually voting is sufficient. *Columbia, etc., Co. v. Meier*, 39 Mo. 53.

The contracts and acts of a board of directors, if within the scope of its authority, will bind the corporation. *Spelman v. Fisher Iron Co.*, 56 Barb. 151. But the directors can only bind it within the scope of their duties and powers. *Boom v. City of Utica*, 2 id. 104.

The managing officers of a corporation have power to employ attorneys and counselors. *Western Bank v. Gilstrap*, 45 Mo. 419.

Directors of a corporation, formed under a general law, are chargeable with knowledge of the provisions of the law regulating their duties, or imposing liabilities upon them. *Van Ellen v. Eaton*, 19 Mich. 187. But, if the board acts in good faith, and with reasonable care and diligence, and nevertheless makes a mistake of law or fact, the members will not be liable for such mistake. *Hodges v. New England Screw Co.*, 3 R. I. 9.

A majority of a board of directors constitute a quorum, and a majority of such quorum can pass any resolutions that the whole board is authorized to pass. *Wells v. Railway, etc., Co.*, 4 Green (N. J.), 403; *Smith v. Law*, 21 N. Y. (7 Smith) 296.

The directors of a company have no power, under a by-law giving them mere general authority to amend the by-laws, to disregard or alter a by-law intended to impose a limitation on their powers. *Stevens v. Davison*, 18 Gratt. (Va.) 819.

Where the by-laws of a corporation provide that the directors shall, in managing the affairs of the corporation, have all the powers possessed by the corporation itself, not incompatible with the provisions of the by-laws, and the laws of the state, such directors have power to mortgage the land of the corporation as a security for its bonds, where the by-laws permitted. *Hendee v. Pinkerton*, 14 Allen (Mass.), 881.

Although a by-law of a corporation provides that a special meeting shall be called by the president, or, in his absence, by the secretary, on application to them in writing, by ten members, this does not preclude the directors from calling special meetings, without such application. *Citizens' Ins. Co. v. Sortwell*, 8 Allen (Mass.), 217. See *State v. Ancker*, 2 Rich. 245.

Directors have no power to give away, or to deprive the corporation of its funds, or of the means to accomplish the purposes for which it was chartered or organized. *Bedford R. R. Co. v. Boruser*, 48 Penn. St. 29; *Hills v. Parish*, 1 McCarter (N. J.), 380.

Nor can they secure to themselves advantages which are not common to the stockholders. *Ib.*; *Kochler v. Black River, etc., Co.*, 2 Black (U. S.), 715.

A vote of the directors, authorizing the president to sell and convey a tract of land belonging to the corporation, empowers him to execute a bond binding it to convey. *Augusta Bank v. Hamblet*, 35 Me. 491.

But directors, unless specially empowered, have no authority to make sale of any portion of the estate which is essentially necessary for the transaction of its ordinary business. *Rollins v. Clay*, 38 Me. 182.

In the absence of an express provision giving compensation to directors, they are not entitled to pay for services rendered for the corporation within the usual range of their duties. *New York, etc., R. R. Co. v. Ketchum*, 27 Conn. 170; *Hall v. Vermont & Massachusetts R. R. Co.*, 28 Vt. 40; *Loan Association v. Stonemets*, 29 Penn. St. 534.

Where a statute or the charter of the corporation provides that the directors, or the directors and stockholders, shall be personally liable if the indebtedness of the corporation shall at any time exceed a specified amount in proportion to the capital stock, this is binding upon the directors, and if the debts exceed the amount specified, an action will lie to enforce the liability thus incurred. *First National Bank v. Price*, 38 Md. 487; *Windham Provident Inst. v. Sprague*, 43 Vt. 502.

The resignation of the officers of a corporation does not destroy its existence; it has an existence *per se*, so as to maintain succession, and hold and preserve its franchises. *Muscatine Turn Verein v. Funck*, 18 Iowa, 469.

(181) A corporation will be treated as a citizen for the purposes of suing and being sued in the United States courts. *Ante*, note 180; *Hatch v. Chicago, etc., R. R. Co.*, 6 Blatchf. 105; *Stevens v. Phœnix Ins. Co.*, 41 N. Y. (3 Hand) 149; *Marshall v. Baltimore & Ohio R. R. Co.*,

16 How. (U. S.) 314; *Covington Bridge Co. v. Shepherd*, 20 id. 227, 232; *Minot v. Philadelphia, etc., R. R. Co.*, 2 Abb. (U. S.) 323.

It is a rule of very extensive application that corporations must sue and be sued by and in their corporate names. Where a note is payable to or belongs to a corporation, it ought to be sued in the corporate name. *McBroom v. Lebanon*, 31 Ind. 268; *Smith v. Branch Bank*, 5 Miss. 26; *McWalker v. Branch Bank of Mobile*, 3 Ala. 153.

So where a contract is made through an agent of a corporation, any action brought upon it by the corporation must be in its corporate name. *Garland v. Reynolds*, 20 Me. 45; *Alston v. Heartmann*, 2 Ala. 699; *Commercial Bank v. French*, 21 Pick. 486; *Binney v. Plumley*, 5 Vt. 500; *Leftwick v. Thornton*, 18 Iowa, 56.

In suits between corporations, the proceedings and judgment must be in the corporate names, and not by and against the individual members. *Campbell v. Brush*, 25 Ill. 225.

A corporation can sue or be sued only in its corporate name, unless by special provision of its charter. *Manney v. Mate*, 4 Ired. Eq. 195.

Two corporations, existing under the laws of adjoining states, although composed of the same corporators, cannot be joined in suits as one plaintiff. *Ohio, etc., R. R. Co. v. Wheeler*, 1 Black (U. S.), 286.

But two corporations may maintain a joint action on a bond payable to both of them. *Guthright v. Callaway County*, 10 Mo. 633. Or where money is deposited in a bank in their joint names. *New York & Sharon Canal Co. v. Fulton Bank*, 7 Wend. 412.

A corporation, formed of the members of a partnership, can sue in equity, in its corporate name, for a debt due to the partnership. *Griffin v. Macaulay*, 7 Gratt. 476.

A suit must be brought against a corporation by name, and not against the individuals who are incorporated by a common appellation. *Insane Hospital v. Higgins*, 15 Ill. 185.

Although the right to sue is not expressly granted to a corporation, it may still exercise the faculty, if all the powers incident to corporations are conferred upon it. *Marsh v. Astoria Lodge*, 27 Ill. 421.

Less than a majority of the trustees of a corporation cannot bring a suit for the corporation, unless such authority is contained in the act of incorporation. *Dart v. Houston*, 22 Ga. 506.

A member or stockholder of an incorporated company may sue the corporation. *Barnstead v. Empire Mining Co.*, 5 Cal. 299; *Waring v. Catawba Co.*, 2 Bay (S. C.), 109; *Peirce v. Partridge*, 3 Metc. (Mass.) 44; *Ex parte Booker*, 18 Ark. 338; *Jackson's Adm'rs v. Newark Plank Road Co.*, 2 Vroom (N. J.), 277.

Corporations may bring suits in the courts of other states and countries as well as in the state under whose laws they were created or incorporated. *Connecticut Ins. Co. v. Cross*, 18 Wis. 109; *Holcomb v. Illinois, etc., Canal Co.*, 3 Ill. (2 Scam.) 237; *American Ins. Co. v. Owen*, 15 Gray, 491.

The courts of this country recognize the common-law right of corporations to purchase and hold real estate. *People v. Mauran*, 5 Denio, 389; *Callaway, etc., Co. v. Clark*, 32 Mo. 305; *Moss v. Averell*, 10 N. Y. (6 Seld.) 449; *Nicoll v. New York & Eastern R. R. Co.*, 12 N. Y. (2 Kern.) 121; *Regents, etc., v. Detroit, etc., Society*, 12 Mich. 138; *Leazure v. Hillegas*, 7 Serg. & Rawle, 320; *Reynolds v. Commissioners of Starks*, 5 Ham. 205.

This common-law right is sometimes limited by statutes which restrict it to the purchase of such lands as may be necessary or useful for the purposes of the corporation in the transacting or conducting of its ordinary business. And whenever the charter, or a general or special statute, so restricts their powers, no other purchase of land will be sustained.

Where a charter declares that the corporators are constituted a body corporate for a specified purpose, this will not authorize the purchase of lands, even for that purpose. *Keyport Steamboat Co. v. Farmers' Transp. Co.*, 8 Green (N. J.), 13.

A charter which authorizes a railroad corporation to acquire a strip of land, of a specified width, for a road, does not authorize the purchase and holding of lands for the purposes of speculation. *Pacific R. R. Co. v. Seely*, 45 Mo. 212; *Waldo v. Chicago, etc., R. R. Co.*, 14 Wis. 575; *First Parish in Sutton v. Cole*, 3 Pick. 232.

A corporation may sell any lands which it can purchase or hold. *Miners' Ditch Co. v. Zellerback*, 37 Cal. 543.

So a corporation may mortgage its lands to secure the payment of its debts. *Barry v. Merchants' Exchange Co.*, 1 Sandf. Ch. 230; *Jackson v. Brown*, 5 Wend. 590; *Gordon v. Preston*, 1 Watts, 385.

this common law right has been considerably restricted by the various statutes of mortmain (*p*), and corporations can only under peculiar circumstances hold land. (4.) To have a common seal. For a corporation being an invisible body, cannot manifest its intention by any personal act or verbal order: it therefore acts and *speaks only by its common seal. (182) For, though the particular members may express their private consents to any act, by words or signing their names, yet this does not bind the corporation; it is the fixing of the seal, and that only, which unites the several assents of the individuals who compose the community, and makes one joint assent of the whole (*q*); but, nevertheless, for the sake of practical convenience, it has been held that a corporation may do necessary acts of frequent occurrence and within the scope of its ordinary duty, or incidental to its business (*r*). (183) Among such acts may be mentioned hiring or discharging a

(*p*) *Post*, vol. ii.

(*q*) *Dav.* 44, 48.

(*r*) The exception to the general rule here adverted to applies especially to trading corpo-

rations. See *South of Ireland Colliery Co. v. Waddle*, L. R. 8 C. P. 463, 469, 474, and cases there cited.

Where the charter of a corporation empowers it to hold, purchase and convey real estate, it authorizes the corporation to take lands by a devise. *American Bible Society v. Marshall*, 15 Ohio St. 337; *Downing v. Marshall*, 23 N. Y. (9 Smith) 366.

(182) In this country the old common-law rule that a corporation could only act and speak by its common seal, is almost entirely disregarded in the transactions relating to its ordinary business. The acts and contracts of its officers and agents, within the scope of their authority, bind the corporation in the same manner that they would bind an individual who employed them to do the same thing. And it is not necessary that an attorney should be appointed by an instrument, under the corporate seal. *Bank of Columbia v. Patterson's Adm'r*, 7 Cranch, 305; *Fleckner v. United States*, 8 Wheat. 357; *Osborn v. United States Bank*, 9 id. 738. Nor is it necessary that agents should hold their appointment by an instrument under such seal. The ordinary proof of the agent's appointment and authority is made by the production and proof of the records or books of the corporation, containing the entry or resolution of his appointment. And this will be ample proof of his authority to act as agent. *Perkins v. Washington Ins. Co.*, 4 Cow. 645; *Lathrop v. Bank of Scioto*, 8 Dana (Ky.), 115; *Buncombe Turnpike Co. v. McCann*, 1 Dev. & Bat. 306; *Wright v. Lanckton*, 19 Pick. 290; *Union Bank of Maryland v. Ridgeley*, 1 Harr. & Gill. 324; *Leonard v. Hampden Sidney College*, 5 Munf. 324; *Stamford Bank v. Benedict*, 15 Conn. 444; *Bates v. State Bank of Alabama*, 2 Ala. 461; *Hamilton v. Newcastle R. R. Co.*, 9 Ind. 359; *Cook v. Kuhn*, 1 Nebr. 472; *Mitchell v. Deeds*, 49 Ill. 416; *Chicago, etc., R. R. Co. v. James*, 24 Wis. 388; *Burr v. McDonald*, 8 Gratt. 215; *Alabama & Tenn. Rivers R. R. Co. v. Kidd*, 29 Ala. 221.

In the ordinary business of the corporation, the acts of an agent, or his contracts not under seal, are generally valid: and they may be subsequently ratified by the corporation, so as to bind it. *Hous v. Keeler*, 27 Conn. 538; *Buckley v. Briggs*, 30 Mo. 452; *Porter v. Androecoggin & Kennebec R. R. Co.*, 37 Me. 349; *Abbey v. Billups*, 35 Miss. 618.

A deed of lands belonging to a corporation must be under the corporate seal. *Gathwiter v. Willis*, 33 Cal. 11; *Eagle Woolen Mills v. Monteith*, 2 Oregon, 277; *Koehler v. Black, etc., Co.*, 2 Black (U. S.), 715; *Osborn v. Tunis*, 1 Dutch. (N. J.) 633. See *Johnston v. Crawley*, 25 Ga. 316.

But a written assignment of a lease by a corporation, through its agent, authorized in the manner required by law, does not need the corporate seal to render it valid. *Sandford v. Tremlett*, 42 Mo. 384.

An unauthorized use of the corporate seal will not bind the corporation. *Hoyt v. Thompson*, 5 N. Y. (1 Seld.) 820; *Leggett v. New Jersey Manuf. and Banking Co.*, Saxt. Ch. 542.

(183) Corporations may make all contracts necessary to the carrying on of their business, and within the limits of the authority conferred upon them. This will include the power

(5.) To make by-laws. servant, giving notice to quit, or distraining for rent(s). (5.) To make by-laws for the better government of the corporation; which are binding upon themselves(t), provided they be reasonable and not inconsistent with any statutory provisions, nor contrary to the laws of the land, or the terms of the charter (if any) of incorporation.(184) This power is included by law in

(s) *Nicholson v. Bradfield Union*, L. R. 1 Q. B. 620; *Clarke v. Cuckfield Union*, 21 L. J., Q. B. 849; *R. v. Bigg*, 8 P.Wm. 419; *Yurborough v. Bank of England*, 16 East, 6; *Smith v. Birmingham Gas Co.*, 1 A. & E. 526. See also *Grant on Corporations*, 62, 63. (t) *Per Lord Abinger, C. B., in Hopkins v. Mayor of Swansea*, 4 M. & W. 621, 640.

to purchase and sell real and personal property, which may be connected with the transaction of their business. So, too, it includes the case of employing attorneys, agents, servants and others, as well as agreements by the corporation to do acts and render services for others. In making all lawful contracts, they may give proper evidences of debt, and secure the debt by mortgages upon their property. So they may take securities for debts due to them from others; and, if need be, may indorse negotiable paper so received. A few of the numerous cases will serve to show the application of these general rules.

A corporation can make no contract and do no acts, except such as are authorized by its charter, and they must be done in the manner prescribed by it. *Talmdge v. North American Coal Co.*, 8 Head (Tenn.), 387.

If the contract is entirely foreign to the objects and purposes of the charter, the contract will be void. *Rock River Bank v. Sherwood*, 10 Wis. 280.

A corporation, which has authority to make contracts and acquire and transfer property, can make a valid sale of real estate belonging to it. *Buell v. Buckingham*, 16 Iowa, 284.

A negotiable promissory note, payable absolutely upon its face, and given to a mutual insurance company, may be negotiated by it in the usual and ordinary course of its business. *Farmers' Bank v. Maxwell* 32 N. Y. (5 Tiff.) 579.

So a railroad company may take and negotiate a promissory note in the course of its business. *Goodrich v. Reynolds*, 31 Ill. 490.

A corporation may borrow money to carry on its operations. *Burr v. McDonald*, 3 Gratt. 215; *Union Bank v. Jacobs*, 6 Humph. 515; *Nelson v. Eaton*, 26 N. Y. (12 Smith) 410; *Curtis v. Leavitt*, 15 N. Y. (1 Smith) 9, 219; *Susquehanna Bridge and Bank Co. v. General Ins. Co.*, 3 Md. 305.

For debts contracted in the course of its legitimate business, a corporation may give its note or bill. *Ketchum v. Buffalo*, 14 N. Y. (4 Kern.) 356; *Strauss v. Eagle Ins. Co.*, 5 Ohio St. 59; *Came v. Brigham*, 39 Me. 85; *Clark v. School District, etc.*, 3 R. I. 199; *Rockwell v. Elkhorn Bank*, 13 Wis. 658; *Olcott v. Tioga R. R. Co.*, 27 N. Y. (18 Smith) 546.

A corporation may be held liable upon an implied promise, the same as an individual. *Garrett v. Andover*, 21 Vt. 343; *Haynes v. Covington*, 13 Smedes & Marsh. 408.

Although a corporation cannot remove from the state where created, yet it may make valid contracts out of the state. *Wright v. Bensly*, 11 Ind. 398; *Mumford v. American Life Ins. and Trust Co.*, 4 N. Y. (4 Comst.) 463; *Ross v. City of Madison*, 1 Smith (Md.), 98; *Betts v. Outhbertson*, 6 Ga. 166.

(184) The regulations of a corporation are binding, unless repugnant to its charter or to a statute. *Anacosta Tribe v. Murback*, 18 Md. 91.

The by-laws of a corporation, made in pursuance of its charter, are equally as binding on all its members, and others acquainted with its methods of business, as any public law of the state. *Cummings v. Webster*, 43 Me. 192.

But a clause in a charter, which gives "the force and effect of a legal enactment" to the "constitution and by-laws" that may be adopted," confers no greater power than is usually given in charters without such a clause. *Martin v. Nashville Building Association*, 2 Cold. (Tenn.) 418.

No by-law is valid if it infringes upon the charter of the corporation. *Kearney v. Andrews*, 2 Stockt. (N. J.) 70; *Martin v. Nashville Building Association*, 2 Cold. (Tenn.) 418.

Or if it is contrary to the general laws of the state, or against public policy. *Dunham v. Trustees of Rochester*, 5 Cow. 462; *People v. Medical Society of Erie*, 24 Barb. 570, 577;

the very act of incorporation(*u*): it is legally incident to every corporation(*x*), and is *prima facie* to be exercised by all the members, though by statute, charter or custom it may be confined to a select body(*y*). These five powers are inseparably incident to every corporation, at least to *every corporation [*577] aggregate: for two of them, though they may be practised, yet are unnecessary to a corporation sole: viz. to have a corporate seal to testify his sole assent, and to make statutes for the regulation of his own conduct.

There are also certain privileges and disabilities that attend an aggregate corporation, and are not applicable to such as are sole: the reason of them ceasing, and of course the law. A corporation aggregate must appear by attorney; for it cannot appear in person, being, as sir Edward Coke says(*z*), invisible, and existing only in intendment and consideration of law.(185) A corporation cannot commit treason, felony, or certain misdemeanors in its corporate capacity(*a*); though its members may, in their distinct individual capacities(*b*). Neither is it capable of suffering a traitor's or felon's punishment, for it is not liable to corporal penalties, nor to attainder, forfeiture, or corruption of blood. It cannot be executor or administrator, or perform any personal duties; for it cannot take an oath for the due execution of the office. It cannot be seized of lands to the use of another(*c*); for such kind of confidence is foreign to the end of its institution(*d*). (186) Neither

Incidents
peculiar to
aggregate cor-
porations.

(*u*) *Norris v. Staps*, Hob. 210.
(*x*) *Sutton's Hospital Case*, 10 Rep. 81 a; *Corporation of Felmakers v. Davis*, 1 B. & P. 98, 100; *R. v. Head*, 4 Burr. 2515. See also *The Case of Corporations*, 4 Rep. 77 b.; and *R. v. Westwood*, 4 B. & C. 781, 806, 832.

(*y*) Some such power seems to have been allowed by the law of the twelve tables. *Sodales legem quam volent, dum ne quid ex publicis lege corrumpant, sibi forunt*. Tab. 8, c. 2.

(*z*) 10 Rep. 82.

(*a*) *Ib*.

(*b*) The civil law also ordains that, for the misbehaviour of a body corporate, the directors only shall be answerable in their personal capacities. Dig. 4, 8, 15.

(*c*) Bro. Abr. tit. Feoffm. al Uses, 40; Bacon on Uses, p. 57, note, 118. (Ed. 1806.)

(*d*) But a devise to a corporation, though void at law, may be good as a trust in equity, and may attach to the estate in the hands of the heir. See *The Incorporated Society v. Richards*, 1 Dr. & War. 293—333; Jarman on Wills, 3rd ed. vol. i. p. 59.

Austin v. Murray, 16 Pick. 121; *Gallatin v. Bradford*, 1 Bibb, 209; *Ex parte Burnett*, 80 Ala. 461.

A by-law, giving the directors of a corporation a mere general power to amend the by-laws, does not give them authority to disregard or alter a by-law intended to limit their powers. *Stevens v. Davison*, 18 Gratt. 819.

No by-law can impose an individual liability upon a member of the corporation, when it is not imposed by the charter or by any statute. *Reid v. Eatonton Manuf. Co.*, 40 Ga. 98.

By-laws cannot have a retroactive operation. *People v. Crockett*, 9 Cal. 112.

(185) The appearance of an attorney for a corporation is equally proper and valid in this country. A voluntary appearance, thus made, waives a defect in the process by which the action was commenced. *Virginia, etc., Steam Nav. Co. v. United States*, Taney, 418; *Murray v. Vanderbilt*, 89 Barb. 140.

Such appearance by a foreign corporation, by interposing a special demurrer, confers jurisdiction upon the court. *Reynolds v. La Crosse, etc., Packet Co.*, 10 Minn. 178.

Where a foreign corporation appoints an attorney for the purpose of accepting service of process issued against it, the service must be made upon such attorney. *Thayer v. Tyler*, 10 Gray, 373.

(186) A corporation cannot be seized of land, in trust, for purposes foreign to its constitution. *Jackson v. Hartwell*, 8 Johns. 423; *Trustees v. Peaslee*, 15 N. H. 317. Nor can a corporation be compelled to execute a trust which is foreign to the ends of its creation; but, if it refuses to do so, the trust need not fail, as a court of equity may appoint a new trustee. *Vidal v. Philadelphia*, 2 How. (U. S.) 127. So if a corporation, which is seized of lands in trust, is dissolved, equity will protect the trust by appointing a trustee. *Montpelier v. East Montpelier*, 24 Vt. 12.

can it be committed to prison(e): for its existence being ideal, no man can apprehend or arrest it. And therefore also it cannot be outlawed: for outlawry supposes a precedent right of arresting, which has been defeated by the party absconding, and that also a corporation cannot do. Neither can a corporation be excommunicated: for it has no *soul, as is gravely observed by sir [*578] Edward Coke(f): and therefore also it was not liable to be summoned into the ecclesiastical courts upon any account; for those courts acted only *pro salute animæ*.

A corporation as a general rule cannot commit any crime in its corporate capacity, and it was formerly held that it could not be indicted(g), but it has long been settled that an indictment will, under various circumstances, lie against it, as for the non-repair of a bridge(h), or highway(i), disobedience to an order of justices(k), the committal of a nuisance(l), or a misfeasance in obstructing a highway by carrying on works there(m). (187) When indicted, the appearance, which as just stated must be by attorney(n), may be compelled by distress infinite(o), though there will be a difficulty in enforcing the penalty, if there is no property(p).

Again, it was formerly laid down that a corporation could neither maintain, nor be made defendant in an action for battery or any personal injury; because it could neither beat nor be beaten, in its body politic(q); but it is now settled that a corporation is liable in trespass for assault, false imprisonment, or other intentional act of misfeasance by its servants if sufficiently within the scope of their authority(r). An action may also lie against a corporation for trover(s), *or libel(t), or for fraud by which it has benefited(u). (188)

(e) Plowd. 538.

(f) 10 Rep. 32.

(g) *Anon.* 12 Mod. 559.

(h) *R. v. Stratford-on-Avon*, 14 East, 348.

(i) *R. v. Mayor of Liverpool*, 3 East, 86.

(k) *Reg. v. Birmingham and Gloucester R. C.* 8 Q. B. 223.

(l) *Reg. v. Great North of England R. C.* 9 Q. B. 815, 826.

(m) *Reg. v. Great North of England R. C.* 9 Q. B. 815.

(n) *Reg. v. Birmingham and Gloucester R. C.* 8 Q. B. 223.

(o) *Id.*

(p) *Id.*

(q) Bro. Abr. tit. Corporation, 63.

(r) *Maund v. Monmouthshire Can. Co.* 4 M. & G. 452; *Eastern Counties R. C. v. Broom*, 6 Ex. 814; *Green v. London Gen. Omnibus Co.* 7 C. B., N. S., 290.

(s) *Yarborough v. Bank of England*, 16 East, 6.

(t) *Whitfield v. South Eastern R. C.* E. B. & E. 115. See *Stevens v. Midland R. C.* 10 Exch. 353.

(u) *Barnwick v. English Joint Stock Bank*, L. R. 2 Ex. 265.

(187) A corporation may be indicted for a misfeasance, as well as for a nonfeasance. *Commonwealth v. New Bedford Bridge*, 2 Gray, 339; *State v. Vermont R. R. Co.*, 27 Vt. 103; *State v. Morris & Essex R. R. Co.*, 3 Zab. 360; *Reg. v. Great North of England Railway Co.*, 9 Q. B. 223; 10 Jur. 755; 16 L. J. M. C. 16; *Boston, Concord & Montreal R. R. v. State*, 32 N. H. 215. Though the contrary has been held. *State v. Great Works Milling and Manuf. Co.*, 2 App. (20 Me.) 41. So by statute, in *State v. Ohio & Miss. R. R. Co.*, 23 Ind. 362. In most of the cases just cited, the court assign as a reason why a corporation cannot be indicted for a felony is, because the corporation cannot have the intent, which is an essential element of the felony.

(188) The tendency of American decisions is, to hold corporations liable as principals in the same cases that individuals would be held responsible; and they also hold that corporations are liable for torts in the same cases, and in the same manner, and to the same extent that individuals would be under the same circumstances.

An action lies against a corporation for an assault and battery. *Brokaw v. New Jersey, etc., R. R. Co.*, 8 Vroom (N. J.), 328; *St. Louis, Alton & Chicago R. R. Co. v. Dalby*, 19 Ill. 353;

There are, also, other incidents and powers, which belong to some sorts of corporations. A corporation aggregate may take goods and chattels for the benefit of themselves and their successors, but a corporation sole cannot(x); for such moveable property is liable to be lost or embezzled, and would raise a multitude of disputes between the successor and executor; which the law is careful to avoid. In ecclesiastical and eleemosynary foundations, the crown or the founder may give them rules, laws, statutes, and ordinances, which they are bound to observe: lay corporations, however, constituted for civil purposes, are subject to no particular statutes; but to the common law, and to their own by-laws, not being contrary to the laws of the realm(y). Corporations aggregate, also, which have by their constitution a head, as a dean, warden, master, or the like, cannot do any act during the vacancy of the headship, except appointing another: neither are they then capable of receiving a grant; for such corporation is incomplete without a head(z). But there may be a corporation aggregate constituted without a head(a); the component members whereof have no president or superior, but are all of equal authority. In a corporation aggregate, also, the act of the major part is esteemed the act of the whole(b). By the civil law this major part must have consisted of two-thirds of the whole; else no act could be performed(c); which perhaps may be one reason why by it were required three at least to make a corporation. But, with us, any majority is sufficient to determine the act of the whole body corporate.(189) And *whereas some founders of corporations had anciently made regulations [*580] in derogation in this respect of the common law, and rendering necessary the unanimous assent of the society to any corporate act (which king Henry VIII. found to be a great obstruction to his projected scheme of obtaining

(x) Co. Litt. 46 b.

(y) Lord Raym. 8.

(z) Co. Litt. 268, 264.

(a) 10 Rep. 80.

(b) Bro. Abr. tit. Corporation, 84.

(c) Dig. 3, 4, 3; Colquhoun's Civil Law, s. 865.

Moore v. Fitchburg R. R., 4 Gray, 465; *Eastern Counties Railway Co. v. Broom*, 6 Exch. 814; 15 Jur. 297; 20 L. J. Exch. 196; *Ramsden v. Boston & Albany R. R. Co.*, 104 Mass. 117; S. C., 6 Am. Rep. 200. See note 184.

So of an action for a malicious prosecution. *Vance v. Erie R. Co.*, 3 Vroom (N. J.), 384. See, *contra*, *Childs v. Bank of Missouri*, 17 Mo. 218.

An action may be maintained against a corporation for a false imprisonment. *Goff v. Great Northern R. Co.*, 8 Ell. & E. 672.

Or for a libel. *Maynard v. Fireman's Fund Ins. Co.*, 84 Cal. 48; *Philadelphia, etc., R. R. Co. v. Quigley*, 21 How. (U. S.) 203; *Whitfield v. South Eastern R. Co.*, Ell., Bla. & E. 115; 4 Jur. N. S. 688; 27 L. J., Q. B., 229; *Aldrich v. Press Printing Co.*, 9 Minn. 183.

So they are liable for a trespass upon real estate. *Crawfordsville R. R. Co. v. Wright*, 5 Ind. (Porter) 252; *Maund v. Monmouthshire Canal Co.*, 4 Man. & Gra. 452; *Dater v. Troy Turnpike & R. R. Co.*, 2 Hill, 629. See, *contra*, *Foot v. City of Cincinnati*, 9 Ohio (Ham.), 31.

They are also liable for negligence. *Brown v. South Kennebec, etc., Society*, 47 Me. 275; *Toensend v. Susequahanna Turnpike Road*, 6 Johns. 90.

The question how far the master is liable for the acts of his servant, or the principal for the acts of his agent, has been noticed. Note 184.

(189) The regular legal act of the majority of the corporation is considered the act of the whole. *Knabs v. Terno*, 16 La. An. 18; *Sprague v. Illinois River R. R. Co.*, 19 Ill. 174; *State v. Wilmington City Council*, 3 Harring. 294; *McNeely v. Woodruff*, 1 Green, 352; *Chenango Mutual Ins. Co.*, 19 Wend. 635; *St. Mary's Church*, 7 Serg. & Rawle, 517; *Horton v. Baptist Church*, 34 Vt. 316.

a surrender of the lands of ecclesiastical corporations,) it was therefore enacted by statute 33 Hen. 8, c. 27, that all private statutes should be utterly void, whereby any grant or election, made by the head, with the concurrence of the major part of the body, was liable to be obstructed by any one or more, being in the minority; but this statute extended not to any negative or necessary voice given by the founder to the head of any such society(*d*).

The general duties of bodies politic, considered in their corporate capacity, may, like those of natural persons, be reduced to this single one; that of acting Duties of bodies politic. up to the end or design, whatever it be, for which they were created by their founder(*e*).

3. We proceed therefore to inquire, how these corporations may be visited. For corporations, being composed of individuals subject to human frailties, are liable to deviate from their duties. And for that reason the law a. How corporations may be visited. has provided proper persons to visit, inquire into, and correct [*581] irregularities that may arise in any corporation, *whether sole or aggregate, and whether ecclesiastical, civil, or eleemosynary. With regard to ecclesiastical corporations, the ordinary is their visitor, so constituted by the canon law, and from thence derived to us. The pope formerly, and now the sovereign, as supreme ordinary, is the visitor of the archbishop or metropolitan; the metropolitan has the charge and coercion of his suffragan bishops; and the bishops in their several dioceses are in ecclesiastical matters the visitors of deans and chapters, of parsons and vicars, and all other spiritual corporations(*f*). With respect to lay corporations, the founder, his heirs, or assigns, are the visitors, whether the foundation be civil or eleemosynary(*g*); (190) for a lay corporation the ordinary is not to visit(*h*).

(*d*) See *Re Queen's Coll. Cambridge*, 5 Russ. 64.

(*e*) It may be here incidentally mentioned that in the administration of property left upon trust for charitable purposes, whether to a corporation or to trustees, the rule that the donor's intention shall guide the trustees in their administration of the trust funds, becomes much modified by the *cy-près* doctrine, which by a long series of decisions has now become fully established in courts of equity. Under this doctrine the Court of Chancery will, on failure of the express object of the

donor's charitable intentions, direct a reference to inquire what objects are (*cy-près*) nearest to such express objects, and will direct the application of the trust funds to such objects. As to the principles which govern the courts in the application of this doctrine, see *Cherry v. Mott*, 1 My. & Cr. 123; *Att.-Gen. v. Ironmongers' Co.*, 2 Beav. 313, Cr. & Ph. 208.

(*f*) See *Reg. v. Dean of Chester*, 15 Q. B. 513; *Reg. v. Dean of Rochester*, 17 Q. B. 1.

(*g*) *Grant on Corporations*, 517.

(*h*) 10 Rep. 31.

(190) The authority of trustees of an eleemosynary corporation having visitatorial powers, is more extensive, over the concerns and management of the corporation, than that of directors of a private moneyed corporation like a bank or railroad. But the authority of such trustees, although very extensive, is not absolute. It does not extend so far as to enable them to accept, on behalf of the corporation, any and all amendments of the charter, which the legislature may prescribe. Amendments found necessary to adopt the management of the corporate affairs to altered conditions, and enabling the corporation to attain the general objects of the founder by more appropriate means, may be sustained, when enacted by the legislature and accepted by the trustees. But it is not competent to the trustees to accept amendments which change the character and purpose of the foundation, and divert the property from the uses which the giver designed. *State v. Adams*, 44 Mo. 570.

The visitors of an incorporated institution are a domestic tribunal, possessing an exclusive jurisdiction, from which there is no appeal. 2 Kent's Com. 802. They may amend and repeal the by-laws and ordinances of the corporation, remove its officers, correct abuses, and generally superintend the management of the trust. *Ib.* But this visitatorial power is properly applied only for the correction of abuses, and for the enforcement of a due observance

It has often been said, that civil corporations are subject to no visitation, but merely to the common law of the land ; and this shall be presently explained. But first, as we have just stated that the founder, his heirs or assigns, are the visitors of all lay corporations, let us inquire who is meant by the founder. The founder of every corporation in the strictest and original sense is the sovereign, who only can incorporate a society: and of a civil corporation, such as mayor and commonalty, &c., where there are no possessions or endowments given to the body, there is no other founder but the sovereign: in eleemosynary foundations, however, such as colleges and hospitals, where there is an endowment of lands, the law distinguishes, and makes two species of foundation, which, according to sir E. Coke, are called, the one *fundatio incipiens*, or the incorporation, in which sense the king is the general founder of all colleges and hospitals; the other *fundatio perficiens*, or the dotation of it, in which sense the first gift of the revenues is the foundation, and he who gives them is in law the founder: and it is in this * last sense that we generally call a man the founder of a college or hospital(i). But here the royal prerogative has [*582] effect; for if the sovereign and a private man join in endowing an eleemosynary foundation, the sovereign alone shall be the founder of it. And, in general, the monarch being the sole founder of all civil corporations and the endower the perficient founder of all eleemosynary ones, the right of visitation of the former results, according to the rule laid down, to the crown; and of the latter to the patron or endower.

The sovereign being thus constituted by the law visitor of all civil corporations, the law has also appointed the place wherein this jurisdiction shall be exercised, viz. the court of queen's bench: where, and where only, all misbehaviours of this kind of corporations are inquired into and redressed, and all their controversies decided(k). And this is what was meant by those who said that these civil corporations were liable to no visitation; that is, that the law having by immemorial usage appointed them to be visited and inspected by their royal founder, in the court of queen's bench, according to the rules of the common law, they ought not to be visited elsewhere, or by any other authority(l).

(i) 10 Rep. 88.

(k) This only applies to strict visitatorial superintendence over the misbehaviour of the members of a civil corporation in their pure corporate capacity; for where a corporation is guilty of maladministration of trust property, the proper place for its remedy is the court of chancery. Of a civil corporation the sovereign is visitor through the court of queen's bench; for corporate bodies, which respect the regulation of trade, the public police, and the administration of justice, are necessarily better regulated under the superintendence of a court of law; but, as regards eleemosynary corporations, the visi-

tatorial power of the crown has been committed to the lord chancellor, as in matters of charity the more appropriate supervisor. *R. v. St. Catherine's Hall*, 4 T. R. 233, 244; *Ex parte Wrangham*, 2 Ves. 609, 619.

(l) This notion is perhaps too refined. The court of queen's bench (it may be said), from its general superintendent authority where other jurisdictions are deficient, has power to regulate all corporations where no special visitor is appointed. But not in the light of visitor: for as its judgments are liable to be reversed by writ of error, it may be thought to want one of the essential marks of visitatorial power.

of the statutes of the charity, and it is not a power to revoke the gift or change its uses, or to divest the rights of the parties to the bounty. *Allen v. McKeen*, 1 Sumn. 276.

In this country, in those cases where there is no individual founder or donor, the legislature are the visitors of all corporations founded by them for public purposes, and may direct judicial proceedings against them for abuses or neglect, which at common law would cause a forfeiture of their charters. *Amherst Academy v. Couls*, 6 Pick. (Mass.) 427, 433, per Parker, Ch. J.

And this is so strictly true, that though the king by his letters patent had sub-
 [*583] jected the *college of physicians to the visitation of four very learned
 persons, the lord chancellor, the two chief justices, and the chief baron;
 though the college had accepted this charter with all possible marks of acquies-
 cence, and had acted under it for nearly a century; yet in the year 1753, the
 authority of this provision, being in dispute, on an appeal preferred to these
 supposed visitors, they directed the legality of their own appointment to be
 argued: and, as this college was merely a civil, not an eleemosynary foundation,
 they at length determined, after several days solemn debate, that they had no
 jurisdiction as visitors; and remitted the appellant (if aggrieved) to his regular
 remedy in the court of king's bench, since which time persons having ground
 of complaining against the college have appealed to that court as of course(m).

Of an eleemosynary corporation, the founder and his heirs are, by the dota-
 tion, of common right the legal visitors, to see that such property as might
 otherwise have descended to the visitor himself is rightly employed; but if the
 founder has appointed and assigned any other person to be visitor, then his
 assignee so appointed is invested with all the founder's power in exclusion of
 his heir. Eleemosynary corporations are chiefly hospitals, or colleges in the
 old universities. These were all of them considered by the Roman catholic
 clergy as of mere ecclesiastical jurisdiction: however, the law of the land judged
 otherwise; and with regard to hospitals it has long been held(n), that if the
 hospital be spiritual, the bishop shall visit; but if lay, the patron. This right
 of lay patrons was indeed abridged by stat. 2 Hen. 5, stat. 1, c. 1, which ordained,
 [*584] that the ordinary should visit all hospitals *founded by subjects;
 though the king's right was reserved to visit by his commissioners
 such as were of royal foundation. But the subject's right was in part restored
 by statute 14 Eliz. c. 5, s. 32, which directed the bishop to visit those hospitals
 only, where no visitor is appointed by the founders thereof: and all the hos-
 pitals founded by virtue of the statute 39 Eliz. c. 5, are to be visited by such
 persons as shall be nominated by the respective founders. Yet still, if the
 founder appoints nobody, the bishop of the diocese must visit(o).

Colleges in the universities (whatever the common law might formerly have
 judged) were certainly considered by the popish clergy, under whose direction
 they were, as ecclesiastical, or at least as clerical, corporations; and therefore
 the right of visitation was claimed by the ordinary of the diocese. Where
 indeed the founder of a college wished to subject it to a visitor of his own nomi-
 nation, he obtained for that purpose a papal bull to exempt it from the juris-
 diction of the ordinary(p).

But whatever might have formerly been the opinion of the clergy upon this
 subject, it has been established that colleges are lay corporations, though some-
 times totally composed of ecclesiastical persons; and that the
 Power of the
 visitor. right of visitation does not arise from any principles of the canon
 law, but of necessity was created by the common law(q). The power and juris-
 diction of visitors of colleges and the doctrine relating thereto were considered

(m) *R. v. College of Physicians*, 7 T. R. 282.

(n) Year-book, 8 Edw. 3, 28; 8 Ass. 29.

(o) 2 Inst. 725.

(p) Of some of the colleges at Oxford, where no special visitor is appointed, the bishop of Lincoln (the diocese in which Oxford was formerly comprised), has immemo-

rially exercised visitatorial authority: which can only be ascribed to his supposed title as ordinary to visit this, among other ecclesiastical foundations. Of some colleges at Cambridge, the bishop of Ely is, in like manner, and probably for a like reason, the visitor.

(q) Lord Raym. 8.

by lord Holt in a case below cited(r). There the main question was, *whether the sentence of the bishop of Exeter, who (as visitor) had deprived doctor Bury the rector of Exeter college, could be examined [*585] and redressed by the court of king's bench. And the three puisne judges of that court were of opinion, that it might be so reviewed, for that the visitor's jurisdiction could not exclude the common law; and judgment was given accordingly. But the lord chief justice Holt was of a contrary opinion; and held, that by the common law the office of visitor is to judge according to the statutes of the college, and to expel and deprive upon just occasions, and to hear all appeals of course: and that from him, and him only, the party aggrieved ought to have redress; the founder having reposed in him so entire a confidence, that he will administer justice impartially, that his determinations are final, and examinable in no other court whatsoever. And, upon this, a writ of error being brought, the judgment of the court of king's bench was reversed by the house of lords. This leading case has been followed in subsequent decisions(s). But, where the visitor is under a temporary disability, there the court of queen's bench will interpose, to prevent a defect of justice(t). Also it is said(u), that if the founder of an eleemosynary foundation appoints a visitor, and limits his jurisdiction by rules and statutes, should the visitor in his sentence exceed those rules, an action lies against him; though not so where he mistakes in regard to a thing within his power.

*4. We will now, in the last place, consider how a corporation may be dissolved. Any particular member of it may be disfranchised, or [*586] 4. How a corporation is dissolved. lose his place in the corporation, by acting contrary to the laws of the society, or the law of the land(x); or he may resign by his own voluntary act.(191) But the body politic may also itself be dissolved in several ways; which dissolution is the civil death of the corporation: and in this case their lands and tenements will revert to the person or his heirs, who granted them to the corporation; for the law annexes a condition to every such grant, that, if the corporation be dissolved, the grantor shall have the lands again, because the cause of the grant has failed(y). The grant is indeed only during the life of the corporation; which may endure for ever; but when that life is determined by the dissolution of the body politic, the grantor takes it back by reversion, as in the case of every other grant for life.(192) The

(r) *Phillips v. Bury*, Lord Raym. 5: 2 T. R. 346.

(s) In *The King v. The Master and Fellows of St. Katherine's Hall, Cambridge*, 4 T. R. 238, it was decided that, if no special visitor of a private eleemosynary lay foundation has been appointed by the founder, the right of visitation in default of his heirs devolves to the crown, and that the court of queen's bench will not entertain visitatorial jurisdic-

tion over such foundation or interfere by mandamus in their elections, but such visitatorial jurisdiction must be exercised by the lord chancellor alone. See also the cases cited in *the matter of Downing College*, 2 My. & Cr. 642.

(t) *R. v. Bishop of Chester*, Stra. 797.

(u) 2 Lutw. 1566.

(x) *Bagg's Case*, 11 Rep. 98.

(y) Co. Litt. 13 b.

(191) Although all the officers or members of a corporation may resign, yet the resignation of its officers, and an omission to elect others, will not render the corporation extinct. *Bearts v. Killingworth Manuf. Co.*, 20 Conn. 447; *Muscatine Turn Verein v. Funck*, 18 Iowa, 469. No loss of members destroys a corporation, so long as a sufficient number remain to continue the succession and fill up vacancies. *State v. Trustees of Vincennes University*, 5 Ind. 77.

(192) The common-law rule, that, upon the dissolution of a corporation, all lands granted to it revert to the grantor, does not obtain in this country, where the rights of corporation

debts of a corporation aggregate, either to or from it, are totally extinguished by its dissolution; so that the members thereof cannot recover, or be charged with them, in their natural capacities(z); (193) agreeably to the maxim of the civil law(a), "*si quid universitati debetur, singulis non debetur; nec, quod debet universitas, singuli debent.*"

A corporation may be dissolved, (1.) By act of parliament, which is boundless in its operation.(194) (2.) By the natural death of all its members, in case of an aggregate corporation. (3.) By the total loss of one or more of its integral parts without the power of renewal(b). (4.) By surrender of its franchises to the crown, which is a kind *of suicide.(195) (5.) By forfeiture of its charter, through negligence or abuse of its franchises; in which case the law judges that the body politic has broken the condition upon

(s) *Edmunds v. Brown*, 1 Lev. 237.

(a) Dig. 3, 4, 7.

(b) This may take place when the majority of any one integral part is lost, and when the

constitution of the corporation is such that the minority cannot supply the vacancies and the rest of the body is unable to interfere. Grant on Corporations, p. 308.

creditors are concerned. Upon the dissolution of a corporation, the title to real property held by it does not revert to the original proprietors and grantors, or their heirs, but vests in the receiver of the corporation, and it is to be administered by him for the benefit of creditors and stockholders. *Owen v. Smith*, 31 Barb. 641.

If a municipal corporation acquires lands in pursuance of an exercise of the right of eminent domain, and the payment of the value of lands to the owner, no reversionary estate remains in the grantor. *Heyward v. Mayor, etc., of New York*, 7 N. Y. (3 Seld.) 814; *Brooklyn Park Commissioners v. Armstrong*, 45 N. Y. (6 Hand) 284. So of lands, thus taken, for a railroad. *Erie & North East R. R. v. Casey*, 26 Penn. St. 287, 325.

(193) A state may frame laws which will enable her citizens to subject the lands of a corporation, whose charter has expired and whose functions have ceased, to the debts which the corporation owes to the citizens. *McGoon v. Scales*, 9 Wall. (U. S.) 28.

In this country, it has been held in several cases that insolvent and dissolved corporations are not absolved from the obligations of their contracts; and their capital, property and debts owing to them will be treated as a trust fund and pledge for the benefit of creditors and stockholders, which a court of equity will require to be applied to that purpose. *Tinkham v. Borst*, 31 Barb. 407; *Mann v. Pentz*, 3 N. Y. (3 Comst.) 415, 422; *Wood v. Dummer*, 8 Mason, 809; *Mumma v. Potomac County*, 8 Pet. 281; *Wright v. Petrie*, 1 Smedes & Marsh. Ch. 809; *Reed v. Frankfort Bank*, 23 Me. 318; *Robinson v. Lane*, 19 Ga. 387.

So it has been held that, at common law, upon the dissolution of a corporation, the debts due and from it are extinguished. *President of Port Gibson v. Moore*, 18 Smedes & Marsh. 157; *Hightower v. Thornton*, 8 Ga. 486; *Thornton v. Lane*, 11 id. 459; *Commercial Bank v. Lockwood*, 2 Harring. 8.

(194) As has been already stated, the legislature cannot repeal a charter, or alter it so as to impair the obligation of a contract. Note 178.

The legislature may repeal a charter or act of incorporation where there is a clause in it to that effect, or where there is a general statute authorizing the alteration or repeal of all charters or acts of incorporation. *Suydam v. Moore*, 8 Barb. 358; *Erie & North East R. R. Co. v. Casey*, 26 Penn. St. 287, 302; *Crease v. Babcock*, 23 Pick. 234; *McLaren v. Pennington*, 1 Paige, 102; *Miners' Bank of Dubuque v. United States*, 1 Greene (Iowa), 553; *State v. Curran*, 7 Eng. (Ark.) 321; *Baltimore v. Pittsburgh, etc., R. R. Co.*, 1 Abb. (U. S.) 9.

(195) As a general rule the government must accept the surrender of a charter of a corporation, to effect its dissolution. *LaGrange, etc., R. R. Co. v. Rainey*, 7 Cold. (Tenn.) 420. *McMahon v. Morrison*, 16 Ind. 172; *Washington, etc., Road v. State*, 19 Md. 239; *Morris v. Mayor, etc., of Smithville*, 1 Swan (Tenn.) 164; *Town v. Bank of River Raisin*, 2 Doug. (Mich.) 580; *Revere v. Boston Copper Co.*, 15 Pick. 351; *Enfield Toll Bridge Co. v. Connecticut River Co.*, 7 Conn. 45; *New York Marbled Iron Works v. Smith*, 4 Duer. 362.

which it was incorporated, and thereupon the incorporation is void;(196) the regular course appropriate in such case having formerly been to bring an information in nature of a writ of *quo warranto*, to inquire by what warrant the members of the defunct body continued to exercise their corporate power; having forfeited it by such and such proceedings(c). The adoption of this procedure for purposes of state in the reigns of king Charles II. and king James II., particularly by seizing the charter of the city of London, gave great and just offence(d); though perhaps, in strictness of law, the proceedings in most of them were sufficiently regular: but the judgment against that of London was reversed by act of parliament(e) after the Revolution; and by the same statute it is enacted, that the franchises of the city of London shall never more be forfeited.

II. Municipal corporations, consisting of a mayor and commonalty, are institutions intended for the government of towns, for the preservation of order therein, and of the liberties of their inhabitants.(197)

(II.) Municipal corporations.

Boroughs in one form or another existed in the times of the

(d) The court will not now grant a *quo warranto* against an individual member of a corporation to test the validity of its charter. *Reg. v. Taylor*, 11 A. & E. 954; *post*, pp. 592, 598.

(d) Hall. Const. Hist., 11th ed. vol. ii. pp. 453—455; vol. iii. p. 75; Hume's Hist. Eng. viii. 178; Pulling, Laws and Customs of London, pp. 13, *et seq.*

(e) Stat. 2 Will. & M. c. 8.

(196) The acts or omissions which are claimed to be ground of forfeiture of the charter of a corporation must be willful, and not the result of mere accident or mistake. *State v. Pawtuxet Turnpike Co.*, 8 R. I. 183; *State v. Merchants' Ins. & Trust Co.*, 8 Humph. 235; *State v. Royalton Turnpike Co.*, 11 Vt. 431; *People v. Hillsdale Turnpike Co.*, 28 Wend. 254.

Where a corporation is guilty of acts or omissions which are a good ground of forfeiture of its charter, it cannot do any act which will avoid the effects of such acts or omissions. *People v. Fiskkill & Beekman Plank Road Co.*, 27 Barb. 415.

But the legislature may waive the forfeiture, and it will do so by enacting a subsequent law which recognizes the validity and existence of the corporation. *State v. Mississippi, etc. R. R. Co.*, 20 Ark. 495; *Lumpkins v. Jones*, 1 Kelly, 80; *Commercial Bank v. State*, 6 Smedes & Marsh. 622; *People v. Kingston Turnpike Co.*, 28 Wend. 198.

The forfeiture cannot be taken advantage of collaterally by individuals, but must be established by proceedings on behalf of the state for that purpose. *State v. Fourth New Hampshire Turnpikes*, 15 N. H. 162; *Pearce v. Olney*, 20 Conn. 544; *Bank of Gallipolis v. Trimble*, 6 B. Monr. 599; *Bank of Missouri v. Merchants' Bank*, 10 Mo. 123; *Johnson v. Bentley*, 16 Ohio, 97; *Dyer v. Walker*, 40 Penn. St. 157; *Vermont & Canada R. R. Co. v. Vermont Central R. R. Co.*, 84 Vt. 57; *Heard v. Talbot*, 7 Gray, 120; *Cahill v. Kalamazoo Ins. Co.*, 2 Doug. (Mich.) 124; *Young v. Harrison*, 6 Ga. 130.

A court of equity is not authorized to determine whether a corporation has forfeited its charter, and to decree a dissolution. *Doyle v. Peerless, etc., Co.*, 44 Barb. 239; *Slee v. Bloom*, 5 Johns. Ch. 380; *Bayless v. Orne*, 1 Freeman's Ch. (Miss.) 173; *State v. Merchants' Ins. & Trust Co.*, 8 Humph. 235.

(197) In the United States, municipal corporations are created by special charters or acts, or under general statutes for that purpose, while private corporations are generally in the nature of a contract, and cannot, therefore, be impaired by subsequent legislation, except under circumstances authorizing it; a municipal corporation is a public one, and the legislature may enlarge, abridge or repeal their powers as may seem proper or desirable. *State v. Linn County*, 44 Mo. 504; *Jersey City v. Jersey City R. R. Co.*, 20 N. J. Eq. (5 C. E. Green) 860; *Matter of Clinton Street*, 2 Brews. (Pa.) 599; *Berlin v. Gorham*, 84 N. H. 266; *Montpelier v. East Montpelier*, 29 Vt. 12; *Smith v. Adrian*, 1 Mann (Mich.) 495; *County of Richland v. County of Lawrence*, 13 Ill. 1.

Anglo-Saxons, and we read of charters having been granted to towns in the reigns of the earliest Norman kings, which differed however in form from those subsequently granted. The first borough expressly incorporated was perhaps

An unincorporated town cannot avail itself of the privileges which are conferred by statute upon incorporated towns only. *McMunning v. Farrar*, 46 Mo. 376.

Municipal corporations have power to make contracts for the purpose of carrying into effect the objects of the incorporation; and the contracts will be valid and binding upon the corporation. *Pullman v. Mayor, etc., of New York*, 54 Barb. 169; *People v. Swift*, 31 Cal. 26; *Meech v. City of Buffalo*, 29 N. Y. (2 Tiff.) 198; *Roun v. Cabot*, 28 Ga. 50; *Tucker v. Virginis*, 4 Nev. 20; *Miller v. Milwaukee*, 14 Wis. 642; *Mills v. Gleason*, 11 id. 470.

They have no power to make contracts which will embarrass or control their legislative powers and duties. *New York v. Second Avenue R. R. Co.*, 32 N. Y. (5 Tiff.) 261.

All contracts ought to be made in the mode prescribed by the charter, if such mode is therein declared; and a substantial neglect or disregard of its requirements will render a contract so made void. *Lowell v. Simpson*, 10 Allen (Mass.), 88; *Leavenworth v. Rankin*, 2 Kansas, 357; *McSpeden v. Mayor, etc., New York*, 7 Bosw. 601; *Zottman v. San Francisco*, 20 Cal. 96; *Brady v. Mayor, etc., New York*, 2 Bosw. 178.

Ordinances passed by a municipal corporation are legislative in their character; and are valid, and may be enforced when within the authority conferred by the charter, or the general laws under which the corporation was organized; and if not in violation of the general laws or statutes of the state. *State v. Welch*, 36 Conn. 215; *Waco v. Powell*, 32 Texas, 258; *Jones v. Firemen's Ins. Co.*, 2 Daly (N. Y. C. P.), 307; *Toledo, etc., R. R. Co. v. Chenoa*, 43 Ill. 209; *Gabel v. Houston*, 29 Texas, 335; *Smith v. Knoxville*, 3 Head (Tenn.), 245; *St. Paul v. Colter*, 12 Minn. 41; *Block v. Jacksonville*, 36 Ill. 301; *Arnysz v. Taber*, 23 Cal. 370; *Yates v. Milwaukee*, 12 Wis. 678.

An ordinance which operates in restraint of trade is invalid. *Bloomington v. Wahl*, 46 Ill. 489; *Caldwell v. Alton*, 33 id. 416.

An ordinance may be void for vagueness and uncertainty. *Commissioners v. Harris*, 7 Jones' Law (N. C.), 281. When not so vague as to be void. See *Huntsville v. Phelps*, 27 Ala. 55.

Corporations have no powers except such as are expressly conferred, or such as are necessary to carry into effect those expressly conferred. *Oakland v. Carpentier*, 13 Cal. 540; *Ruggles v. Collier*, 43 Mo. 353; *New London v. Brainard*, 22 Conn. 552.

A municipal corporation is authorized to regulate and direct the manner in which the streets, alleys, lanes, parks or public places shall be constructed or used. *McCarthy v. Chicago*, 53 Ill. 28; *State v. Morristown*, 33 N. J. Law (4 Vroom), 57; *Anderson v. Turbeville*, 6 Cold. (Tenn.) 150; *Toledo, etc., R. R. Co. v. Chenoa*, 43 Ill. 209; *Pedrick v. Bailey*, 12 Gray, 161; *Southwark, etc., R. R. Co. v. Philadelphia*, 47 Penn. St. 314; *State v. Graves*, 19 Md. 351; *Dubuque v. Maloney*, 9 Iowa, 450.

The corporate authorities of a city or town cannot, by an arbitrary ordinance, destroy private property by force, or compel the owner to destroy or remove it, unless it was a nuisance, and so declared by ordinance, and shown to be such by its locality, or the sanitary condition of the city or town. *Pieri v. Sheldsboro*, 42 Mo. 493.

The sale of liquor on Sundays by hotels, taverns, saloons and other similar places, may be prohibited by ordinance. *Gabel v. Houston*, 29 Texas, 335.

A city ordinance may prohibit the use of an awning before a building, unless done by the consent of the mayor and aldermen. *Pedrick v. Bailey*, 12 Gray, 161.

An ordinance which prohibits cattle and hogs from running at large in the streets is valid. *Waco v. Powell*, 32 Texas, 258; *Arnysz v. Taber*, 23 Cal. 370; *Roberts v. Ogle*, 30 Ill. 459; *Commonwealth v. Bean*, 14 Gray, 52.

City charters are strictly construed. *Leonard v. Canton*, 35 Miss. 189. See *Oakland v. Carpentier*, 13 Cal. 540.

A municipal corporation is bound to keep the public streets and sidewalks in a safe condition, and if this is not done, and an individual, in the exercise of due care, is injured while passing along them, the corporation will be liable. *Parker v. Macon*, 39 Ga. 725; *Champion v. Patterson*, 50 Ill. 61; *Reinhard v. Mayor, etc., of New York*, 2 Daly (N. Y. C. P.), 248;

that of Kingston-upon-Hull, A.D. *1439(*f*). At all events, in the charter then granted to that borough, we find words used granting to the mayor, burgesses, &c., that they should be one perpetual corporate commonalty in deed and name, and should have perpetual succession(*g*), words which seem to have been wanting in earlier charters granted not only to Kingston-upon-Hull but to other boroughs, and a charter granted to Kingston two years afterwards recited that it had been incorporated(*h*). Other boroughs were incorporated *temp.* Henry VI. in like manner, and from that time charters of incorporation were gradually granted to the principal towns throughout the kingdom.

All these municipal corporations were undoubtedly instituted for the advancement and regulation of trade, the local administration of justice, and the better government of their particular vicinities. About the reign of queen Elizabeth, however, the municipal and parliamentary franchises became in most cases united(*i*); and the great *Case of Corporations*(*k*) having, about the same time, vested the right of making by-laws in the "select bodies" of corporations, we find these institutions completely perverted from their original intention. In short, from this period the right of making by-laws, no less than another necessary corporate right, viz., the right of electing corporate members, seem to have been much abused, and at length the "select bodies" did not hesitate to alienate the corporate property for electioneering purposes(*l*). These circumstances, together with the fact that the boroughs throughout the country were subject to dissimilar regulations, led to the passing of the Municipal Corporation Act(*m*), A.D. 1835.

* This statute, as altered and amended by subsequent acts(*n*), now regulates all municipal corporations in England. It repeals the provisions of all charters, and all by-laws, so far, and so far only, as they are inconsistent with the act: it enumerates, in a schedule, all the existing municipal corporations, and empowers the crown to incorporate any town in accordance with the provisions of the act, on the presentation of a petition by its inhabitants(*o*).

(*f*) Merewether and Stephen's Hist. of Boroughs, xxxiii. *et seq.*; 860, *et seq.*

(*g*) *Ib.* 861.

(*h*) *Ib.* 869.

(*i*) Hall. Const. Hist. 11th ed., vol. iii. pp. 86-47.

(*k*) 4 Rep. 77 b.

(*l*) See 2 & 8 Will. 4, c. 69.

(*m*) 5 & 6 Will. 4, c. 76.

(*n*) The 6 & 7 Will. 4, cc. 103, 104, 105; 7 Will. 4 & 1 Vict. cc. 19, 81; 1 & 2 Vict. c. 81; 4 & 5 Vict. c. 48; 5 & 6 Vict. c. 111; 6 & 7

Vict. c. 89; 15 & 16 Vict. c. 5; 16 & 17 Vict. c. 79; 20 & 21 Vict. c. 50; 21 & 22 Vict. c. 48; 22 Vict. c. 85; 23 & 24 Vict. c. 16; 24 & 25 Vict. c. 75; are the principal acts affecting municipal corporations. See, further, Rawlinson's Municipal Corporation Acts, 5th ed. "Contents," pp. vii., viii.

(*o*) This power is not necessarily taken away by the fact of a second petition against the incorporation being presented by a larger number of inhabitants. *Rutter v. Chapman*, 8 M. & W. 1.

Covington v. Bryant, 7 Bush (Ky.), 248; *Baker v. Portland*, 58 Me. 199; *Blake v. St. Louis*, 40 Mo. 569; *Wendell v. Mayor, etc., of Troy*, 89 Barb. 829; 4 Keyes, 261.

A municipal corporation is liable for the tortious acts of its officers or its agents, if the acts were expressly authorized by the corporation, or were done in good faith, in pursuance of a general authority to act for the corporation on the subject in relation to which they were performed. *Lee v. Sandy Hill*, 40 N. Y. (1 Hand) 442; *Williams v. Dunkirk*, 8 Lans. 44; *Hildreth v. Lowell*, 11 Gray, 845.

They are not liable for the willful, unauthorized tortious acts of their officers or agents, though done in the course of their employment. *Small v. Danville*, 51 Me. 859; *Buttrick v. Lowell*, 1 Allen (Mass.), 172. See *Vanderbilt v. Richmond Turnpike Co.*, 2 N. Y. (2 Comst.) 479.

When incorporated, the management of the borough is committed to the care of the council, a body consisting of a mayor, aldermen, and councillors, the councillors being elected by the burgesses, the aldermen by the councillors out of their own body, or from amongst burgesses qualified to be councillors, and the mayor from and by the councillors. Every rated occupier of a house or shop in a borough who has paid the rates due, and who (not being an alien) has resided there (or within seven miles of it) for a certain time, and who has not been in the receipt of relief as a pauper, is entitled to be on the burgess roll(*p*). Further qualifications are required for the mayor, aldermen, and councillors. There are provisions in the act for the appointment of various officers, such as town clerk, treasurer, and clerk of the peace, and, in some instances, of sheriffs and coroners also. The crown may, under certain *circumstances, [*590] appoint a recorder, and also a salaried police magistrate. The general provisions for appointing police, and for lighting and paving boroughs are usually vested in the council, and exercised by certain committees chosen by them out of their own body; and when an act of parliament enacts that certain things shall be done by the "local authority" of a place, it usually declares that if there be a municipal corporation, such local authority shall be the council.

If unqualified persons, or those not duly elected, intrude themselves into corporate offices, the remedy is by *quo warranto*. This remedy was formerly only available to the crown, and could only be exercised by the attorney-general; but it is now open to any one, by virtue of the statute 9 Ann. c. 20, which permits an information in nature of *quo warranto* to be brought with leave of the court(*q*), at the relation of any person desiring to prosecute the same (who is then styled the relator(*r*)), against any person usurping, intruding into, or unlawfully holding any franchise or office in any city, borough, or town corporate; provides for its speedy determination; and directs that, if the defendant be convicted, judgment of ouster (as well as a fine) may be given against him, and that the relator shall pay or receive costs according to the event of the suit.

It was formerly held that length of time would never *establish a [*591] right gained by usurpation(*s*); but this doctrine became gradually qualified by rules of court, and subsequently, by statute 32 Geo. 3, c. 58, an information in the nature of a *quo warranto*, for the exercise of any office or franchise in any city, borough, or town corporate, was required to be brought within six years of the defendant's taking the office upon himself, or of his forfeiture, surrender, or avoidance of it. Also by the 7 Will. 4 and 1 Vict. c. 78, s. 23, it is enacted that every application to the court of queen's bench for the purpose of calling upon any person to show by what warrant he claims to exercise the office of mayor, alderman, councillor, or burgess in any borough, shall

(*p*) Certain persons who were burgesses or freemen before the passing of the act, by virtue of other qualifications, have their privileges preserved to them by 5 & 6 Will. 4, c. 76, s. 2.

(*q*) Sect. 4. *Per* Lord Mansfield, C. J., *R. v. Trelawney*, Selw. N. P. 13th ed. 1112; and *per* Wilmut, J., S. C. 8 Burr. 1615. By a rule of court of M. T. 8 Vict. (11 Ad. & E. 2), in order to obtain leave to file the information, there must be an affidavit of some person that the application is made at his instance as relator. And so strictly is this rule enforced, that it has been held to be insufficient

to say that it was the intention of the party, if leave was granted, to become really and *bonâ fide* the relator. *Reg. v. Hedges*, 11 Ad. & E. 163.

(*r*) No one is allowed to be a relator who has concurred in the election of the person objected to. *R. v. Slythe*, 6 B. & C. 240; *Reg. v. Greene*, 2 Q. B. 460; but a person who is estopped from being a relator may make an affidavit in support of the rule. *R. v. Brame* 4 Ad. & E. 664.

(*s*) See Tancred on *Quo Warranto*, 286, *et seq.*

be made before the end of twelve calendar months after the election, or the time when the person against whom such application may be directed has become disqualified.

Notwithstanding the above enactment, it was doubted whether an application in the nature of a *quo warranto* might not still be successfully made against any person holding the office of mayor, on the ground that he was not duly qualified to be so elected, by reason of some informality in his previous election to the office of alderman or councillor, although more than twelve calendar months might have elapsed since such election to the office so alleged to have been informal or defective, and likewise whether a like application might not be made against any other corporate officer on similar grounds. This doubt led to the passing of the stat. 6 & 7 Vict. c. 89, which enacted that no election of a mayor in any borough should be liable to be questioned by reason of a defect in the title of such person to the office of alderman or councillor, to which he might have been previously elected, unless application should have been made to the court of queen's bench, calling upon such person to show cause by what warrant he claimed to exercise such office of alderman or *councillor, within twelve calendar months after his election to the said office; and [*592] that every election to any corporate office within a borough which is not called in question by application to the court of queen's bench, shall be deemed valid to all intents and purposes. Though an application such as mentioned cannot now be made after the twelvemonth specified, the court is not bound to grant it if made within that time, but will in their discretion refuse it, if they think there has been undue delay(*t*). On an information for exercising the office of mayor, it was held no objection to the title that the party who was councillor when elected mayor, was not shown to have been on the burgess roll at that time, it being admitted that he was *de facto* councillor when elected mayor, and that he was on the burgess roll when elected councillor(*u*).

To justify a *quo warranto* being issued, the person against whom it is applied for must have actually exercised the office, his title to which is called in question(*x*). And it is not sufficient that he has merely been elected(*y*), but the fact of his having been sworn in, though informally, has been held to be a sufficient user(*z*).

The provisions of the statute of Anne are confined to proceedings taken against an individual for usurping an office by the party aggrieved. An information against a body of persons for claiming to be a corporation can only be taken by the attorney-general(*a*). Indeed the court have held that they will not even grant an information at the suit of a private person against an individual, when the object is to try the legality of the charter, and when it is clear that the information if successful must dissolve *the corporation(*b*), though it would not suffice merely to show that it might possibly have [*593] that effect(*c*).

Further, the writ of *mandamus* is made by the statute 9 Ann. c. 20, an effectual remedy, in the first place, for refusal of admission where a person is

(*t*) *Reg. v. Hodson*, 11 L. J. Q. B. 219; S. C., 4 Q. B. 848 n. See Rawlinson's Municipal Corporation Acts, 5th ed. pp. 357—363 n.

(*u*) *Reg. v. Dixon*, 15 Q. B. 33.

(*x*) *Re Armstrong*, 25 L. J. Q. B. 239.

(*y*) *Reg. v. Slatter*, 11 A. & E. 505.

(*z*) *R. v. Tate*, 4 East, 337.

(*a*) *R. v. Ogden*, 10 B. & C. 230; *R. v. Corporation of Carmarthen*, 2 Burr. 869.

(*b*) *Reg. v. Taylor*, 11 A. & E. 949.

(*c*) *Reg. v. White*, 5 A. & E. 613; *Reg. v. Parry* 6 A. & E. 810, 820.

entitled to an office or place in any corporation such as treated of(*d*); and, secondly, for wrongful removal, when a person is legally possessed(*e*). These are injuries, for which, as the franchise concerns the public, and may affect the administration of justice, this prerogative writ issues from the court of queen's bench, upon good cause shown to the court, commanding the complainant to be admitted or restored to his office. And the statute requires, that a return be immediately made to the first writ of *mandamus*; which return may be pleaded to, traversed, or demurred to(*f*) by the prosecutor, and his antagonist may reply, take issue, or demur, and like proceedings may be had, as if an action on the case had been brought, for making a false return(*g*). After judgment obtained for the prosecutor, he may have a peremptory writ(*h*) of *mandamus* to compel his admission or restitution. So that now this writ of *mandamus*, in cases within the statute of Anne, is [*594] *in the nature of an action: whereupon the party applying and succeeding may be entitled to costs, in case the franchise in question be that of a citizen, burgess, or freeman; and a writ of error may be had upon it(*i*).

The writ of *mandamus* may also be issued, in pursuance of the statute 11 Geo. 1, c. 4, in case within the regular time no election be made of the mayor or other chief officer of any city, borough, or town corporate, or elect corporate officer. (being made) it afterwards become void; requiring the electors to proceed to election, and proper courts to be held for admitting and swearing in the magistrate who may be chosen. The provisions of this statute are extended by 7 Will. 4 & 1 Vict. c. 78, s. 26, to the case where an election has not taken place at the time provided by the Municipal Corporation Act, 1835; and it has been determined that a mere *de facto* election will not prevent the court from issuing a *mandamus* under the statute, but one will be issued if they see the election is merely colourable and void(*k*).

III. Railway companies, gas, canal, and dock companies, waterworks, telegraph, and other companies requiring special parliamentary powers, constitute the third subdivision of our present subject.(198) The persons forming such associations require extraordinary powers to enable them to make their works, carry on their business, and perform the functions for which they were called into existence. It is often necessary for them to take possession of

(*d*) That is, when the office is vacant; when it is full *de facto*, the remedy is by *quo warranto*. *Reg. v. Phippen*, 6 A. & E. 966.

(*e*) When the *mandamus* is to restore a person to an office, the return must be very accurate in stating, first, the power of the corporation to remove; and, secondly, a just and reasonable cause of removal. *Selw. N. P.* 13th ed. 1037. *Tapping on Mandamus*, 195, 199.

(*f*) By 6 & 7 Vict. c. 67, if the prosecutor wishes to object to the validity of the return, he must demur to it.

(*g*) Before this statute the truth of the state-

ments in a return could not be inquired into in any proceedings on the *mandamus*, and the only remedy for the prosecutor was by action on the case for a false return. These provisions were extended by stat. 1 Will. 4, c. 21, to writs of *mandamus* in all other cases.

(*h*) To which no return is admissible. *Reg. v. Ledyard*, 1 Q. B. 616.

(*i*) By 6 & 7 Vict. c. 67. See also 17 & 18 Vict. c. 125, ss. 75—77.

(*k*) See *R. v. Mayor of Cambridge*, 4 Burr. 2008.

(198) In the United States almost every variety of business is carried on by incorporated companies. To enumerate them all would be difficult; and useless if done. The rules which are applicable to all corporations aggregate are applicable to them either as to their organization, their powers and duties, or their liabilities. See notes 174 to 196, inclusive.

lands and houses (without consent of owners), to interfere with, obstruct, and divert highways, or to cross navigable rivers; and, as the prerogative of the crown does not extend to the granting of powers so extensive, these associations can only be efficiently formed by act of parliament. Prior to the year 1845, whenever it was *desired to execute works such as specified, a company was [*595] formed and incorporated for the purpose by act of parliament, which act strictly defined the powers it conferred, beyond which the company so formed was unable to proceed.

When railways began everywhere to intersect the kingdom, and other public companies were set a-going, special acts for constituting them became very numerous, and as of course there were many provisions common to all such acts, it was deemed expedient to pass certain general enactments, to wit, the Companies Clauses Consolidation Act, 1845(*l*), the Lands Clauses Consolidation Act, 1845(*m*), and the Railways Clauses Consolidation Act, 1845(*n*), in reference to all associations which might come within their purview.

These acts, amended by subsequent statutes(*o*), contain many useful provisions which are applicable to undertakings of this class, and apply to the companies in question, except in so far as they may be altered or affected by their special acts of incorporation.

These acts regulate the respective rights of shareholders and directors of the companies, provide for the making of mortgages and the borrowing of money, and settle what notice is to be given to persons whose land may be taken, and how the amount of compensation due to such persons is to be assessed.

There is one important particular in which corporations such as now treated of differ from those previously mentioned; the property of the company is divided into shares, of which each member holds one or more, and which he may transfer to any other person, who on the completion of the transfer becomes *ipso facto* a member of the corporation. These shares are, however, in very many *companies converted into stock(*p*), which is divided among the shareholders according to their respective interests(*q*), it may be [*596] transferred in the same manner as shares(*r*), and the stockholders have the same privileges and advantages as shareholders, but, except as regards participation in dividends and profits, these privileges are not conferred by any aliquot part of such amount of consolidated stock as would not if existing in shares have conferred the same(*s*).

IV. Joint Stock Companies for trading purposes are of comparatively recent origin.(199) With the increase of trade in modern times, it became usual to form companies embracing a great number of individuals for the purpose of raising the requisite amount of capital for carrying on large operations. It is obvious that considerable inconveniences must attend

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| (<i>l</i>) 8 & 9 Vict. c. 16. | (<i>p</i>) 8 & 9 Vict. c. 16; 26 & 27 Vict. c. 118; |
| (<i>m</i>) 8 & 9 Vict. c. 18. | 82 & 83 Vict. c. 98. |
| (<i>n</i>) 8 & 9 Vict. c. 20. | (<i>q</i>) 8 & 9 Vict. c. 16, s. 67. |
| (<i>o</i>) See 23 & 24 Vict. c. 106; 26 & 27 Vict. c. 92; 29 & 30 Vict. c. 108; 81 & 82 Vict. c. 119; | (<i>r</i>) <i>Ib.</i> s. 62. |
| amended by 82 Vict. c. 6. | (<i>s</i>) <i>Ib.</i> s. 64. |

(199) What is called a joint-stock association in England is treated as a corporation by our courts, when the association has the usual faculties or powers of corporations. *Liverpool Ins. Co. v. Massachusetts*, 10 Wall. (U. S.) 566.

ordinary copartnerships consisting of very many partners, *ex. gr.*, in a legal proceeding it might be necessary to make every partner a party thereto, this would be difficult to accomplish when the company was plaintiff, and almost impossible when it was defendant in a suit; also in the course of time, as the different partners died, the difficulty of settling accounts with their executors and administrators would be well nigh insuperable. For these and other reasons it had long been thought desirable to incorporate companies such as treated of for certain purposes; this was at one time effected by charter, or special act of parliament: and afterwards, in the year 1837(*t*), the crown was empowered to incorporate such companies by means of letters patent. Then, as the number of these undertakings increased, various statutes were passed which allowed persons to incorporate themselves, or rather which [*597] *incorporated them on their complying with certain formalities prescribed in the acts themselves. The statutes now regulating such companies are the Companies Act, 1862 (25 & 26 Vict. c. 89), and the Companies Act, 1867 (30 & 31 Vict. c. 131), by the former of which statutes it is provided that any number of persons not less than seven(*u*) associated for any lawful purpose may by subscribing their names to a memorandum of association, and otherwise complying with the requisitions of the act in respect of registration, form an incorporated company with or without limited liability. All necessary formalities being complied with, the company becomes a corporation, and is capable of suing and being sued in its corporate name, and of having a common seal and perpetual succession.

A company thus constituted differs from other corporations in many important respects, *inter alia*, the property of the company is, like that of railway companies, divided into shares, which may be transferred from one member to any other person, who thereby becomes a member of the company, and this may (usually) be done without the consent of its other members. Each and every member of the company is liable for its debts, unless the company be "limited," in which case he is liable only to the amount of capital (if any) not called up on the shares which he holds in it(*x*). There are statutory provisions for the dissolution of the company by winding it up, either voluntarily or compulsorily, in the court of chancery when it fails to meet its obligations, or has lost a certain portion of its property.

[*598] *A consideration, how brief soever, of these associations, naturally suggests some reference to the law of partnership in general. (200) To constitute a partnership in respect of strangers as well as *inter sese*, it has usually been said, that a participation in the profits and loss of the concern(*y*) is necessary, and it is clear that wherever persons are engaged in any trade, business, or adventure on the terms of sharing in any proportion the profits and losses therefrom, they are at common law partners(*z*). The true test of part-

(*t*) By stat. 7 Will. 4 & 1 Vict. c. 73.

(*u*) After August 7, 1862, no ordinary partnership for the purpose of carrying on trade can lawfully consist of more than twenty persons, or of more than ten persons if established for the purpose of banking. 25 & 26 Vict. c. 89, s. 4.

(*x*) Under the stat. 30 & 31 Vict. c. 131, ss.

4 *et seq.*, the directors of a limited company may themselves be saddled with unlimited liability; these provisions, however, have not, it is believed, been practically operative.

(*y*) Selw. N. P. 13th ed. ii. p. 1088.

(*z*) Lindley on Partnership, 18. See *Green v. Beesley*, 2 Bing. N. C. 108.

(200) The subject of partnerships is a most important one, and furnishes materials for a volume. See 1 *Wait's Law and Practice*, 277 to 306, and the various works on partnership.

nership, however, is the fact of agency, or a participation in profits, evidencing that each partner worked for the benefit of the others, and was therefore agent for the firm(a). The liability of one partner for the acts of his copartner is in truth the liability of a principal for the acts of his agent. Where two or more persons are engaged as partners in an ordinary trade, each of them has an implied authority from the others to bind all by contracts entered into according to the usual course of business in that trade. Every partner in trade is, for the ordinary purposes of the trade, the agent of his copartners, and each is therefore liable for the ordinary trade contracts of the others. "Partners, indeed, may stipulate among themselves that some one of them only shall enter into particular contracts, or into any contracts, or that as to certain of their contracts none shall be liable except those by whom they are actually made; but with such private arrangements third persons, dealing with the firm without notice, have no concern. The public have a right to assume that every partner has authority from his copartners to bind the whole firm in contracts made according to the ordinary usages of trade. This principle applies not only to persons acting openly and avowedly as partners, but to others who, though not so acting, are by *secret or private agreement, partners with those [*599] who appear exposed to the world as the persons carrying on the business"(b).

To exhibit in other words the reasoning above set forth, "a man who allows another to carry on trade, whether in his own name or not, to buy and sell, and to pay over all the profits to him, is undoubtedly the principal, and the person so employed is the agent, and the principal is liable for the agent's contracts in the course of his employment. So if two agree that they should carry on a trade, and share the profits of it, each is a principal, and each is an agent for the other, and each is bound by the other's contract in carrying on the trade, as much as a single principal would be by the act of an agent, who was to give the whole of the profits to his employer. Hence it becomes a test of the liability of one for the contract of another, that he is to receive the whole or a part of the profits arising from that contract by virtue of the agreement made at the time of the employment"(c). Such is the true principle of partnership liability, and perhaps the maxim, that he who partakes the advantage ought to bear the loss(d), often stated in the earlier cases on this subject, is only the consequence, not the cause why a man is made liable as partner(e).

The doctrine of implied agency must be applied only in regard to contracts made in the usual course of trade, and a question sometimes arises whether a particular contract was made in the ordinary course of trade, so as to give one copartner an authority to bind the firm. Thus, although it is clear that merchants and partners in trade can bind each other by accepting bills of exchange, this being an act necessarily done in the regular course of *business, [*600] it has been held that attorneys *quod* attorneys have no such power(f), nor, it would appear, have farmers(g). So a horse dealer would have the power to bind his partner by the warranty of a horse, though given contrary to a private agreement between themselves(h), though persons in another business could not.

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| (a) <i>Cox v. Hickman</i> , 8 H. L. Ca. 268. | (e) <i>Per Lord Wensleydale, ubi supra.</i> |
| (b) <i>Per Lord Cranworth</i> , 8 H. L. Ca. 304. | (f) <i>Hedley v. Bainbridge</i> , 3 Q. B. 816. |
| (c) <i>Per Lord Wensleydale</i> , 8 H. L. Ca. 312. | (g) <i>Greenslade v. Dover</i> , 7 B. & C. 685. |
| (d) <i>Qui sentit commodum, sentire debet et onus.</i> Broom's Leg. Max. 4th ed. 677 <i>et seq.</i> | (h) <i>Per Abbott, C. J., Sandilands v. Marsh</i> , 2 B. & Ad. 678, 679. |

In applying the doctrine that community of profit and loss constitutes or evidences a partnership as regards third persons, difficulty often arose at common law in determining what participation in the profits might thus suffice(*i*), and cases occurred of extreme hardship, as where a servant was held to be a partner, and liable for the debts of the firm, merely because a per centage of the profits had been paid to him in part of wages. All difficulty of this kind has however been obviated by the statute 28 & 29 Vict. c. 86, which enacts that no person shall be constituted a partner by advancing to a trader a sum of money as a loan, with the understanding that he shall receive a share of the profits by way of interest or otherwise(*k*); also, that no servant or agent, shall be accounted a partner, because his remuneration consists of a specified share of the profits(*l*). There are, further, provisions in this enactment that a man who sells the goodwill of his business and reserves a share of the future profits as a consideration for the sale(*m*), and that the widow or child of a deceased trader, receiving by way of annuity a portion of the profits of the business(*n*), shall not be subject to the liabilities of the trader carrying on the same. Though [*601] *in the event of the bankruptcy of a trader, or his making a composition with his creditors, the lender of any loan or seller of any goodwill as before mentioned will not be entitled to recover anything till the rest of the creditors have been satisfied in full(*o*).

(*i*) The question—what amount of participation in the profits constituted a partnership, was fully considered in *Bullen v. Sharp*, L. R. 1 C. P. 86; and also in *Cox v. Hickman*, 8 H. L. Ca. 268.

(*k*) Sect. 1.

(*l*) Sect. 2.

(*m*) Sect. 4.

(*n*) Sect. 3.

(*o*) Sect. 5.

BOOK THE SECOND.

THE RIGHTS OF THINGS.

CHAPTER I.

PROPERTY IN GENERAL.

THE former book of these Commentaries having treated at large of the *jura personarum*, or such rights and duties as are annexed to the persons of men, the objects of our inquiry in this second book will be the *jura rerum*, or those rights which a man may acquire in and to such external things as are unconnected with his person. These are what writers on natural law style the rights of dominion, or property; concerning the nature and origin of which we will premise a few observations, before proceeding to classify and consider its several objects.

There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic dominion *which a man claims and exercises over the external things of the world, in total exclusion of the right of [*2] other men. And yet there are few that consider the origin and foundation of this right. We are pleased with the possession, and we care not to look back to the means by which it was acquired, as if fearful of some defect in our title; or at best we rest satisfied with the decision of the laws in our favour, without examining the reason or authority upon which those laws have been built. We think it enough that our title is derived by the grant of the former proprietor, by descent from our ancestors, or by the last will and testament of the dying owner; not caring to reflect that (accurately and strictly speaking) there is no foundation in nature or in natural law, why a set of words upon parchment should convey the dominion of land; why the son should have a right to exclude his fellow-creatures from a determinate spot of ground, because his father had done so before him: or why the occupier of a particular field or of a jewel, when lying on his death-bed, and no longer able to maintain possession, should be entitled to tell the rest of the world which of them should enjoy it after him. These inquiries, it must be owned, would be useless and even troublesome in common life. It is in practice well if the mass of mankind will obey the laws when made, without scrutinizing too nicely into the reasons of making them, so long as those laws are clearly for the benefit of society. But, when law is to be considered not only as a matter of practice, but also as a rational science, it

cannot be improper or useless to examine more deeply the rudiments and grounds of these positive constitutions of society.

In the present stage of scientific examination into the early history of man, it is not possible to do more than state a probable theory of the origin of law as regards property. As the reason of man by degrees enabled him to acquire [* 3] dominion over the whole animal kingdom, there must have grown up at the same time the sense of *power which superiority of intelligence induces in conflict not only with unreasoning animals, but even with other men. This power would obviously seek its first gratification in the enjoyment of the largest attainable amount of physical pleasure. So long as nature abundantly supplied the purposes of human life, by the exercise of only the pleasurable excitement of the chase or by merely reaping the natural fruits of the earth, and so long as their mental developement was insufficient to suggest to men any further wants than those of food and rest, there would seem to be small place for the idea of property to gain ground. But the most ancient records which modern researches have brought to light of man's habitations tell us that the period of an amply sufficient natural supply of the necessities of life to every individual man was, if it ever existed, not of long duration; for, at least in the colder climates of northern regions, something of the nature of houses must soon be felt as necessities (*a*), and the mere mention of structures erected by labour draws with it the concurrent idea of their ownership by individuals. For there always must have been an inequality of powers in individuals, and it is impossible to suppose any state of society in which the superior strength or intelligence of one man as compared with that of others, would not be exercised for his own especial benefit.

It may in fact be reasonably doubted whether at any time when men enjoyed the result of labour in the form of substantial and permanent works, there was [* 4] or could be a communion of goods (*b*). A distinction has been taken *between ownership and the right of user of a material object, which in the case of a natural thing not the production of labour, has some apparent foundation. By the law of nature and reason, he, who first began to use it, acquired therein a kind of transient property, that lasted so long as he was using it, and no longer (*c*): or, to speak with greater precision, the right of possession continued for such time only as the act of possession lasted. Thus the ground was in common, and no part of it was the permanent property of any man in particular; yet whoever was in the occupation of any determined spot of it, for rest, for shade or the like, acquired for the time a sort of ownership, from which it would have been unjust and contrary to the law of nature, to have driven him by force: but the instant that he quitted the use or occupation of it, another might seize it without injustice. Again, a vine or other tree growing naturally might be said to be in common, as all men were equally entitled to its produce; and yet any private individual might gain the sole property of the fruit which he had gathered for his own repast. This doctrine is illustrated by Cicero, who compares the world to a great theatre, which is

(*a*) See Lyell's *Antiquity of Man*, where the interesting account of the lake dwellers proves that these early specimens of humanity had an object in erecting houses beyond even the desire of shelter.

(*b*) Justinian, l. 43, c. 1, following the mere conceptions of poets, describes the early state

of things as follows:—*Erant omnia communia et indivisa omnibus, veluti unum cunctis patrimonium esset*, but no evidence that it ever existed can be given. See Mill. Pol. Ec. Book ii, c. 1.

(*c*) Barbegr. Puff. l. 4, c. 4.

common to the public, and yet the place which any man has taken is for the time his own (d).

But the distinction seems one rather of words than substance. Because, in many cases, the only right which a man can have is but one of user during his lifetime. He cannot destroy land, nor does it cease to exist after his death, and though he may be allowed to a limited extent to point out who shall have the use afterwards, these rights of property which he exercises only differ in degree, and not in kind, from the rights of possession above noticed.

The sense of ownership which permitted a man whilst *in possession of a piece of land to prevent others from interfering with his enjoyment, [*5] is not different from that which enables him to consume absolutely the fruits, even though it may be that through circumstances of the habits of his life there comes a time when he ceases to care for the possession, and so abandons it. All questions in fact of the original right or property, hang upon the circumstance whether or not there is by nature a practically unlimited supply of fresh land or other objects of man's wishes. If there be, the idea of property is almost unnecessary; if there be not, it at once comes into play.

As soon, therefore, as mankind increased in number, it became necessary to entertain conceptions of permanent dominion; and to appropriate to individuals not the immediate use only, but the very substance of the thing to be used. Otherwise innumerable tumults must have arisen, and the good order of the world been continually broken and disturbed, while a variety of persons were striving who should get the first occupation of the same thing, or disputing which of them had actually gained it. The growth of intelligence and ingenuity, in contriving means for meeting the increasing wants of men, would naturally be accompanied by the development of the idea that something more than mere enjoyment, protected by the strong arm of the holder, was involved in the relations of men and things. The idea of justice allowing possession to remain with the weak, even in the presence of the strong, would spring up. This, like the reed which bows before the storm without breaking, must pass through many vicissitudes, which history sufficiently exemplifies, but even among the rudest nations its roots have always remained alive.

The idea of property, then, or the right of user of those things which are not and can not be destroyed by their use, and the right of consuming those things *quæ ipso usu consumuntur*, takes its origin from some of the very [*6] *fundamental requirements of society. The ground of this right is apparent enough when exercised by an individual man over a thing which owes its value entirely to labour, that is an article which is made out of materials supplied by nature in abundance. He who bestowed the labour, and thus in a sense created the article, is obviously the owner of it (e).

(d) *Quomodo theatrum, cum commune sit, recte tamen dici potest, ejus esse eum locum quem quisque occupavit.* De Fin. l. 3, c. 23.

(e) Mr. Locke says,—"That the labour of a man's body, and the work of his hands, we may say are properly his. Whatsoever then he removes out of the state that nature hath provided and left it in, he hath mixed his labour with, and joined to it something that is his own, and thereby makes it his prop-

erty." (On Gov. c. 5.) This of course only applies to the case where there is no contract express or implied with another respecting the thing in question, and also where the material is really the property of no one, which though hardly possible in a country like England, may exist in a country where there are regions of land unclaimed by any one.

Some further difficulty exists in the investigation how property is first acquired, or to what principle it owes its origin, when the subject of the right is apparently a thing existing by nature, and to some extent valuable in itself, without the expenditure of any labour upon it. Land, for instance, seems to be of this kind. The difficulty is, however, only apparent, because in reality the case scarcely can have occurred. If land be of unlimited extent, as where a few people land upon a large uninhabited continent, it cannot be said to have a value, every person may take as much as he requires, and the very fact of his taking possession and setting it apart for himself, leading as it certainly would do to his expending some labour upon it, places this case of land in the same category as a boat manufactured out of wood taken from a primeval forest.

Occupancy and labour, which are almost convertible terms, seem therefore to be the basis upon which the theory of property rests. And it is to be noticed [*7] that the extent of the right arising from this occupancy is not a matter which is concerned in the first *enjoyment. Whether or not a man may have the power of saying who shall enjoy the land after his death, so that his words shall be respected, or whether or not, in the event of his saying nothing, his son or somebody else shall have the land, can be determined by no first principle of justice such as that which decides that so long as he himself lives, he shall not be ousted. Such questions must of necessity depend upon the common consent of men, unless left to the simple arbitrament of the sword, so that he who is strongest shall come and claim both of right and of might. The solutions they have received have materially differed in different countries. Of this we shall see more hereafter.

But we cannot agree with some writers on natural law, such as Grotius and Puffendorf, who think that the whole right of possession and enjoyment arising from occupancy is founded on a tacit and implied but special assent of all mankind, that the first occupant should become the owner; we hold with Barbeyrac, Titius, Mr. Locke, and others, that there is no such implied assent, neither is it necessary that there should be; for the very act of occupancy, being a degree of bodily labour, is, alone, from an obvious principle of natural justice, without any consent or compact, sufficient of itself to gain a title. To go deeper than this, and seek the cause why men should have adopted and enforced any principle of natural justice, would lead into disquisitions inappropriate to this place. We have already (*f*) sufficiently indicated the ground upon which all laws must rest, and no reasonable distinction can be drawn between those which sanction the right of property, and those which protect a man's life and limb from the assault of others (*g*).

Property, both in lands and moveables, being thus *originally acquired [*8] by the first taker, whose taking amounts to a declaration that he intends to appropriate the thing to his own use, remains in him, by the principles of universal law, till such time as he does some other act which shows an intention to abandon it; for then it becomes, naturally speaking, *publici juris* once more, and is liable to be again appropriated by the next occupant. So, if one is possessed of a jewel, and casts it into the sea or a public highway, this is such an express dereliction, that a property will be

(*f*) *Ante*, vol. i, chap. 1.

(*g*) For interesting discussions on these questions the reader is referred to Hume's Philosophical Works, vol. ii.; Bentham, Fragment of Government, Ed. 1776, p. 179 n.; Austin, Province of Jurisprudence.

vested in the first fortunate finder that will seize it to his own use. But if he hides it privately in the earth or other secret place, and it is discovered, the finder acquires no property therein; for the owner does not then indicate any intention to abandon it, but rather the contrary: and if he loses or drops it by accident, no design to abandon it can be inferred; therefore in such a case the property still remains in the loser, who may claim it again of the finder. And this, in fact, is the doctrine of the law of England with relation to treasure trove.

But this method of one man's abandoning his property, and another seizing the vacant possession, however well founded in theory, could not long continue, even if it ever did subsist in fact. It might suffice merely for the rudiments of civil society, whilst there was no difficulty in finding unoccupied land, but could not be applicable to any country so far peopled that all valuable land had been taken possession of, and it necessarily entirely ceased to exist when other substantial wealth, derived from artificial culture or the production of man's labour, formed a material part of a man's desires. Because it followed that even if a man ceased to have a personal desire to retain lands, yet there would be other things which he would desire; if therefore the right of declaring who should be the next occupant were established, he in fact obtained means of securing some desired object. This very simple and obvious accessory to the original right of *undisturbed possession arising from occupancy would be soon recognized by society as a general benefit. At the same time it might easily be, and [* 9] in fact in many countries even in the earliest times it was, that some restriction as to the mode of transfer should be insisted upon for the benefit of society, because a fundamental principle underlies every system of society that the possession of property draws with it some correlative duties, the discharge of which must not be rendered impossible. What these duties may be depends upon the conditions of society, and will be found to differ materially according to the state of civilization. Amongst people of a savage and warlike character, the general defence is always a prominent feature of such obligations.

Among other modes of giving up possession of property, the one which is at the same time most universal and most important in its results as affecting the relations of the owner to society at large is that by the death of the owner, and accordingly we find that this case has been provided for, to some extent, in almost every nation. If the right of an owner of property depended only upon the natural right of possession accompanying the act of occupancy, when both the actual possession and intention of keeping possession cease, the property, which is founded upon such possession and intention, ought of course also to cease. For, naturally speaking, the instant a man ceases to be, he ceases to have any dominion: else, if he had a right to dispose of his acquisitions for one moment beyond his life, he would also have a right to direct their disposal for a million of ages after his death: which would be highly absurd and inconvenient. All property must therefore cease upon death, if men are considered as absolute individuals, unconnected with civil society, and the next immediate occupant acquires a right in all that the deceased possessed. But as, under civilized governments which are calculated for the peace of mankind, such a constitution would be productive of endless disturbances, it has almost *universally been permitted to the dying person to exercise a power of [* 10]

continuing his property, by disposing of his possessions by will; or, in case he neglects to dispose of it, or is not permitted to make any disposition at all, the law of the country then steps in, and declares who shall be the successor, representative, or heir of the deceased; that is, who alone shall have a right to enter upon this vacant possession, in order to avoid that confusion which its becoming again common would occasion. (h). And farther, in case no testament be permitted by the law, or none be made, and no heir can be found qualified as the law requires, still, to prevent the robust title of occupancy from again taking place, the doctrine of escheats is adopted in almost every country; whereby either the state takes possession for the benefit of the community, or the sovereign becomes the owner, which is, or ought to be, the same thing.

Some right of inheritance, or descent to the children and relations of the deceased, seems to have been allowed much earlier than any right of devising by testament. We are apt to conceive at first view that it has nature on its side; yet we often mistake for nature what we find established by long and inveterate custom. It is certainly a wise and effectual, but clearly a political, establishment; since the permanent right of property, vested in the ancestor himself, was no natural, but merely a civil, right. It is true, that the transmission of one's possessions to posterity has an evident tendency to make a man a good citizen and a useful member of society: it sets the passions on the side of duty, and prompts a man to deserve well of the public, when he is sure that the reward of his services will not die with himself, but be transmitted to those

with whom he is connected by the dearest and most tender affections. [*11] Yet, reasonable as this foundation of the right of inheritance may seem, it is probable that its immediate origin did not arise from speculations so delicate and refined, and, if not from fortuitous circumstances, at least from a plainer and more simple principle. A man's children or nearest relations have usually assisted in his labours, and shared their fruits, they are about him on his death-bed, and are the earliest witnesses of his decease. They became therefore generally the next immediate occupants, till at length in process of time this frequent usage ripened into general law.

While property continued only for life, testaments were useless and unknown; and, when it became inheritable, the inheritance was long indefeasible, and the children or heirs at law were incapable of exclusion by will. Till at length it was found, that so strict a rule of inheritance made heirs disobedient and headstrong, defrauded creditors of their just debts, and prevented many provident fathers from dividing or charging their estates as the exigence of their families required. This introduced pretty generally the right of disposing of property, or a part of it, by testament; that is, by written or oral instructions properly witnessed and authenticated, according to the pleasure of the deceased; which we therefore emphatically style his will. This was established in some countries much later than in others. With us in England, till modern times, a man could only dispose of one-third of his moveables from his wife and children; and, in general, no will was permitted of lands till the reign of Henry VIII.; and then only for a certain portion: for it was not till after the Restoration that the power of devising real property became so universal as at present.

(h) It is principally to prevent any vacancy the death of either, the inheritance does of possession, that the civil law considers not so properly descend, as to continue in the father and son as one person; so that upon hands of the survivor. (Dig. 28, 2, 11.)

Wills therefore and testaments, rights of inheritance and successions, are all of them creatures of the civil or municipal laws, and accordingly are in all respects regulated by them; every distinct country having different ceremonies and requisites for making a testament completely *valid: neither does anything vary more [*12] than the right of inheritance under different national establishments. In England particularly, this diversity has been carried to great lengths, almost as if it had been meant to point out the power of the laws in regulating the succession to property, and how futile every claim must be, that has not its foundation in the positive rules of the state. In general only the eldest son, in some places only the youngest, in others all the sons together, have a right to succeed to the inheritance of land: and again males are preferred to females; but in the division of goods and chattels and other property of the kind called personal estate, the females of equal degree are admitted together with the males, and no right of primogeniture is allowed (†).

There are some few things, which, notwithstanding the general introduction and continuance of property, must still unavoidably remain in common; being such that nothing but an usufructuary property is capable of being had in them; and therefore they still belong to the first occupant, during the time he holds possession of them, and no longer. Such (among others) are the elements of light, air, and water; which a man may occupy by means of his windows, his gardens, his mills, and other conveniences; such also, are the generality of those animals which are said to be *feræ naturæ*, or of a wild and untameable disposition: which any man may seize and keep for his own use or pleasure. All these things, so long as they remain in possession, every man has a right to enjoy without disturbance; but if once they escape from his custody, or he voluntarily abandons the use of them, they return to the common stock, and any man else has an equal right to seize and enjoy them *afterwards; but even the enjoyment of these will be subject to divers regulations and restrictions in a highly artificial [*13] state of society such as exists in England, where, moreover, the density of population and the consequent pressure upon the resources of nature induce each man to take the utmost advantage of his rights. We shall hereafter dwell more upon this subject.

There are, besides, other things in which permanent property may exist, which yet, from the circumstance of their not rendering any profit to the owner, would, in the early stages of a country's history, not be appropriated to any individual owner. Such are waste grounds and forest lands, which, though at the present day far from valueless, would not have been of much esteem two thousand years ago even in England. In order to avoid the disturbances and quarrels which frequently arise among individuals contending about the acquisition of this species of property by first occupancy, the law wisely cuts up the root of dissension by vesting the things themselves in the sovereign of the state: or else in his representatives appointed and authorized by him, being usually the lords of manors. The legislature of England has endeavoured to promote the grand ends of civil society, the peace and security of individuals,

(†) Much public attention is at the present time (1869) directed to this variegated law of succession, and a bill has been introduced into Parliament to abolish primogeniture and assimilate the inheritance of land to the succession to goods and chattels.

by pursuing that wise and orderly maxim, of assigning to everything capable of ownership a legal and determinate owner. Though it must be confessed that in the course of doing so it has occasionally introduced and sanctioned many highly artificial and some very inconvenient doctrines which it has been and is the task of the present century to modify or abrogate.

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*CHAPTER II.

REAL PROPERTY, ITS CLASSIFICATION AND LEGAL NATURE.

By English law the objects of property are things as distinguished from persons: and things are distributed into two primary classes, things real and things personal. The former class contains those things which are by their nature permanent and immoveable, such as land, and profitable rights connected with and arising out of them, and capable of being enjoyed in perpetuity. The latter class contains those things which are by their nature moveable, such as goods and money, and profitable rights connected with them, such as a right to demand them or their value from another person, or a debt. Things of this latter class being usually unconnected with any particular locality, are considered as attending their owner's person wherever he may think proper to go. They will be considered at length hereafter. At present we will confine our attention to the former class, with the anticipatory remark, that amongst the members of the second class are included, according to our law, although not perhaps by a very scientific classification, certain interests of a more or less temporary nature in immoveable things. And we may here also notice at the outset, in connection with real or immoveable things, that the theory of English law relating to them is that the things themselves are not so much the subjects of property as interests in them either of indefinite or of limited duration, conferring upon the owner of such interests rights of a more or

[*15] *less absolute character. The origin of this theory will hereafter appear. In treating of things real, therefore, we will consider, in the first place, their several sorts or kinds. We can then with greater advantage investigate the modes in which they become the subjects of property: which will involve the following matters:—first, the tenures by which they may be holden; secondly, the estates or interests which may be had in them; thirdly, the title to them, or the manner in which those estates or interests may be gained or lost.

First, their several sorts. First, with regard to their several sorts or kinds, things real are usually said to consist of lands, tenements, or hereditaments (a).

Land, according to the legal acceptation of the word, comprehends all things of a substantial immoveable nature; it is a word of very extensive meaning (b), including all kinds of ground, arable, meadows, pastures, woods, moors, marshes, furze, and heaths: also everything fixed or united with the soil, such

(a) These terms are fully described in Co. Litt. 4a to 6b.

(b) Co. Litt. 3, 4; see the legislative interpretation of the word in Lord Romilly's Act, 13 & 14 Vict. c. 21, s. 4.

as houses and other buildings, trees, or even unsevered crops (c). It also includes pools, water-courses or other waters, which are in fact as well as in law land covered with water (d); for water in a water-course, being a moveable, wandering thing, must necessarily by its nature continue, to a considerable extent, common, and so permanent property can be enjoyed in it; if there be a flow of water from a man's pool to that of his neighbour, he has no right to reclaim it. The land under the water alone therefore is capable of being the object of rights of ownership (e), though these may draw with them other rights relative to the water. (201)

* The expression land, moreover, includes an indefinite extent upwards as well as downwards. *Cujus est solum, ejus est usque ad cælum*, is the [* 16] general maxim. Therefore no man may erect any building or structure of any kind to overhang another's land. Again, it is usually the case that whatever is in a direct vertical line from the surface of the earth downwards belongs to the owner of the surface. Minerals belong usually to the owner of the surface. We say usually, because the law admits of there being separate owners of the surface and of the minerals beneath, such division of the property arising sometimes by contract or other dealings between men, and sometimes even by rule of law. Thus a man, being owner of the land, may sell or otherwise dispose of the minerals, retaining the surface and giving his purchaser only a right of so far breaking the surface as may be necessary for the purpose of opening a mine. And the ownership of any portion of the space from the centre of the earth outwards may be held as a distinct property; a man may have an estate of inheritance not only in a seam of coal, but even of a story of a house or a box at a theatre (f).

In some cases the law requires that there should be a division of ownership of this kind. For railway companies are not allowed to own the minerals under the ground which belongs to them, except in certain cases (g); and a parson having glebe lands is restricted in his rights to the minerals (h).

(c) As to these last, however, special rights have in certain cases been established, distinguishing them from the soil for purposes of convenience, as will be seen hereafter.

(d) *Challenger v. Thomas*, Brownl. 142.

(e) Hence "if a man grant *aquam suam*, the soil shall not pass, but the piscary within the water passes therewith." Co. Litt. 4, 6. See *Smith v. Barret*, 1 Lev. 114.

(f) *R. v. Inhabitants of St. Martin's*, 2 Gale & D. 426; *Rowe v. Brenton*, 3 M. & R. 138, where the mutual rights and duties of the separate owners in such cases are dis-

cussed; and see *Goold v. Great Western Deep Coal Company*, 2 De G. J. & S. 600; *Bainbridge On Mines*, ch. 2.

(g) See *Railways Clauses Consolidation Act*, 1845 (8 Vict. c. 20), sects. 77 & 78.

(h) *Barlett v. Phillips*, 4 De G. & J. 414. Again, mines of silver and gold cannot by common law be possessed by private individuals, but belong to the crown as an appendage of its prerogative of coining, *The Case of Mines*, Plowd. 837. The exercise of the royal right is now regulated by 1 W. & M. stat. 1, c. 20, s. 4, and 5 & 6 W. & M. c. 6, s. 2.

(201) Ordinarily, a grant of water, under any designation, does not convey the land which it covers. A grant of a river, *eo nomine*, will not pass the soil of the river, or an island within it. *Jackson v. Halstead*, 5 Cow. 216. So a grant of a "stream and pond of water and saw-mill thereunto belonging" will not convey the land covered by the waters of the stream and the pond. *Nostrand v. Durland*, 21 Barb. 478. A deed of a well by the terms "spring or well of water" includes not only the orifice which reaches down to the water, but also the whole opening in the earth, before it was stoned, and the stone laid into the well, and the water therein. *Mixer v. Reed*, 25 Vt. 254. The grantee also has a right of way to and from the well. *Ib.* The words in a deed: "Together with all and singular the well, house, mill-dam, races, flood-gates, mill-wheels, stones, hoppers, bolting chests and cloths, waters, water-courses, and other the appurtenances," do not pass the title to the bed of the mill-pond. *Bartholemew v. Edwards*, 1 Houston (Del.), 17. So one

[* 17] *The word land nevertheless includes not only the surface of the earth, but everything under it or over it; and if a man being the owner of land in this general manner grants his land, all the minerals, the woods,

who conveys "so much of my land lying, etc., as will conveniently carry the water to a saw-mill, so as to be to his profit and advantage," conveys only a privilege or easement, with a right of ingress and egress for repairs, etc. *Merriman v. Russell*, 2 Jones' Eq. (N. C.) 470. A grantor who owns land on which there is a mill, with a dam and race, and who grants a part of the land on which the mill stands, but not the dam and race, "together, also, with the mill-dam and race on the several courses as they now run, and have heretofore been in use for the mills through the upper plantation * * and all the land now drowned and occupied by said dam and race, or that has been drowned by the same, with the full and uninterrupted right and use of all the water falling into the said dam and race, and to be conveyed along the same, will pass the title to the land. *Hannum v. Chester*, 70 Penn. St. 367; *Swartz v. Swartz*, id. 353. A grant of a specified parcel of land carries the title to a stream or other body of water on its surface.

A deed of all the land which a specified dam will cover with water, conveys all the land which would be covered with water if such dam were in use, although at the date of the deed the dam was not in use, and the water flowed within the banks of the natural stream through the waste way, as freely as though no dam had been there. *Morse v. Marshall*, 11 Allen (Mass.), 229.

A deed of lands "lying and being on the west side" of a specified river, which is not navigable, conveys the title to an island in the river, which lies to the west of the main channel. *Stanford v. Mangin*, 30 Ga. 355. A deed of lands adjoining a stream or body of water carries with it adjoining flats and islands as well as the mainland. *Hill v. Lord*, 48 Me. 83. So a deed of "all the right of way in and upon the land owned by" a certain party, "in, to and for a ditch called the Mountain Brow Water Company," will carry the ditch. *Reed v. Spicer*, 27 Cal. 57.

Generally an easement appurtenant to land will pass by a conveyance of the land, although not specified in the deed. *Karmüller v. Krote*, 18 Iowa, 352; *Sheets v. Selden's Lessee*, 2 Wall. (U. S.) 177; *Eety v. Baker*, 50 Me. 325; *Ammidown v. Ball*, 8 Allen (Mass.), 293; *Neaderhouser v. State*, 28 Ind. 257.

A deed or grant of land carries with it all trees standing or growing upon the land, and all trees or timber lying thereon. *Cockrill v. Downey*, 4 Kan. 426; *Brackett v. Goddard*, 54 Me. 309; *Green v. Armstrong*, 1 Denio, 550. But see *Brock v. Smith*, 14 Ark. 431; *Strong v. Eddy*, 40 Vt. 547; *Plumer v. Prescott*, 43 N. H. 277.

Standing trees are a part of the land. *Goodyear v. Vosburgh*, 57 Barb. 243; 37 How. 377; *White v. Foster*, 102 Mass. 375.

Growing grass passes by a grant of the land. *Wescott v. Delano*, 20 Wis. 514.

So of growing crops. *Austin v. Sawyer*, 9 Cow. 39; *Tripp v. Haseig*, 20 Mich. 254; *Chapman v. Long*, 10 Ind. 465. See *Lauchner v. Rex*, 20 Penn. St. 464; *Gibbons v. Dillingham*, 10 Ark. (5 Eng.) 19; *Wilkins v. Vashbinder*, 7 Watts, 378; see, also, *Wintermute v. Light*, 46 Barb. 278, 283.

So where lands are mortgaged, a foreclosure and sale of the land carries the growing crops. *Shepard v. Philbrick*, 2 Denio, 174; *Sherman v. Willett*, 42 N. Y. (8 Hand) 146.

Where a tree stands entirely upon the lands of an individual, he is the owner of all its fruit, notwithstanding some of its branches hang over the lands of another person. *Hoffman v. Armstrong*, 48 N. Y. (3 Sick.) 201; *Dubois v. Beaver*, 25 N. Y. (11 Smith) 123.

As to a conveyance of mines or minerals, see *Hartwell v. Camman*, 2 Stockt. (N. J.) 123. Mines and minerals may be granted separately from the land. *Id.* A grant of the mines in land gives a right to dig for them, and to work the mines. *Shep. Touch.* 96.

Ordinarily, and in the absence of words expressing a different intention, a deed or grant of lands bounded by a street extends to or is bounded by the center of such street. *Mankato v. Willard*, 13 Minn. 18; *Boston v. Richardson*, 13 Allen (Mass.), 146; *Sherman v. McKeon*, 38 N. Y. (11 Tiff.) 266; *Hinchman v. Paterson Horse R. R. Co.*, 2 C. E. Green (N. J.), 75; *Bank v. Ogden*, 2 Wall. (U. S.) 57; *Marsh v. Burt*, 34 Vt. 289; *Dunham v. Williams*, 36 Barb. 316; 37 N. Y. (10 Tiff.) 251; 4 Trans. App. 209.

But the highway may be excluded by the terms used in the conveyance. A deed of lands

the waters, the horses, will pass under the grant quite as certainly as the fields and meadows.

If things are described by particular names in a grant, it will be effectual to pass them, except indeed in the case of water, by a grant of which, as we have already seen, nothing valuable passes but a right of fishing. But the distinction between any such particular names as castle, messuage, toft, croft (*i*), and land, is that a grant *of the former conveys nothing but what falls within their specific meanings, but the latter being *nomen generalis* [*18] *simum*, denotes everything terrestrial (*k*).

The word tenement is a word of larger signification than land, inasmuch as it is not confined to corporeal things. The proper meaning will more fully appear when we come to the discussion of tenures, or the circumstances and conditions in and under which real property is held or possessed. A tenement is anything that may be holden in the technical sense of that word (*l*). Not only lands, but a right of common, a rent, an office, an advowson (*m*), a peerage, and other property of a similarly unsubstantial kind, are tenements.

(i) By the name of a castle one or more manors may be conveyed; and, *e converso*, by the name of a manor a castle may pass. 1 Inst. 5; 2 Inst. 81. "When land is built upon, it is a messuage, and if the building afterwards fall to decay, yet it shall not have the name of land, although there be nothing in substance left but the land, but it shall be called a toft, which is a name superior to land and inferior to messuage; and this name it shall have in respect of the dignity which it once bore." (Plowd. 170.) A croft is an inclosed piece of land near to a messuage.

By a grant of a house or messuage, the orchard, garden, and cartilage pass (Co. Litt. 56), and see *Partridge v. Strange*, Plowd. 85, 86, where it is said that eleven acres might pass by the grant of a messuage as being parcel of it. *Nicholas v. Chamberlain*, Cro. Jac. 121; *Hill v. Grange*, Plowd. 170; but the land must consist only of the close on which the house is built, see *Blackburn v. Edgley*, 1 P. W. 600; *Bodenham v. Pritchard*, 1 B. & Cr. 350; *Smith v. Martin*, 2 Saund. 401; see note 2; *Doe d. Norton v. Webster*, 12 A. & E. 442. In *Doe v. Collins*, 2 T. R. 498, a coal pen on the side of a public road, opposite to that of the house, was held to pass as part of the house. See, also, as to what are or what are not appurtenances, *London v. Coll. St. Mary*, Hob. 303 (advowson not an appurtenance or profit of a prebend); *Higham v. Baker*, Cro. Eliz. 15, 16; *Shep. Touch*, 89, 94, Prest. Ed.; *Coulam v. Slack*, 15 East, 109 (common under an implied grant); *Morris v. Edgington*, 3 Taunt. 24 (ways and easements under a lease);

Buck d. Whalley v. Clark, 1 B. & P. 53, 55 (lands as appurtenant to a messuage under a devise); *Barlow v. Rhodes*, 1 Cr. & M. 439 (ways under a grant); *James v. Plant*, 6 Nev. & M. 282 (an apparent easement does not pass under a grant as an appurtenance). Much discussion has recently taken place upon the meaning of the word "house" in cases arising under sec. 92 of The Lands Clauses Consolidation Act, 1845. See *Governors of St. Thomas's Hospital v. Charing Cross Railway Co.*, 1 J. & H. 400; *King v. Wycombe Railway Co.*, 28 Beav. 104; *Cole v. West London, &c., Railway Co.*, 27 Beav. 243; *Alexander v. Crystal Palace Railway Co.*, 30 Beav. 556; *Gardner v. The Charing Cross Railway Co.*, 2 J. & H. 248; *Fergusson v. London, Brighton and South Coast Railway Co.*, 11 W. R. 1088; *Pulling v. London, Chatham and Dover Railway Co.*, 33 Beav. 644, on app. 12 W. R. 969; *Chambers v. same*, 1 New R. 517; *Steele v. The Midland Railway Co.*, L. R. 1 Ch. 275.

(k) Co. Litt. 4, 5, 6. See judgment in *Hill v. Grange*, Plowden, 170; *Denn d. Bulkeley v. Wulford*, 8 Dowl. & Ry. 549; *R. v. Great Northern Railway Co.*, 14 Q. B. 25, where a ferry passed under a conveyance of land, "with all profits and commodities belonging to the same."

(l) The common colloquial meaning of the word as denoting houses or other buildings, is but an example of the ordinary case of using a general word to denote a particular meaning.

(m) *Westfaling v. Westfaling*, 3 Atk. 459; *Savil v. Savil*, Fortescue, 351. These cases show, also, that under the word lands an ad-

"on the south-west side of" a specified highway, excludes the highway, where there are no other words to show the intent. *Hoboken, &c., Land Co. v. Kerrigan*, 2 Vroom (N. J.), 13; see, also, *Brainard v. Boston, &c., R. R. Co.*, 12 Gray (Mass.), 407; *Hughes v. Providence & Worcester R. R. Co.*, 2 R. I. 508.

A boundary by a river or stream not navigable, generally extends to the center of the river or stream. *Gove v. White*, 20 Wis. 425; *Phinney v. Watts*, 9 Gray (Mass.), 269; *Seneca Nation of Indians v. Knight*, 23 N. Y. (9 Smith) 498; *Middleton v. Pritchard*, 3 Scam. 510; *Morrison v. Keen*, 3 N. H. 474.

An hereditament is, says Sir Edward Coke (*n*), by much the largest and most comprehensive expression; for *it includes not only lands and tenements, but whatsoever may be inherited, be it corporeal, or incorporeal, real, personal, or mixed. Thus, an heir-loom, or piece of furniture, which by custom descends to the heir together with a house, is neither land, nor tenement, but a mere moveable; yet, being inheritable, is comprised under the general word hereditament: and so a condition, the benefit of which may descend to a man from his ancestor, is also an hereditament (*o*).

Hereditaments then, to use the largest expression, are of two kinds, corporeal and incorporeal. Corporeal consist of such as affect the senses; such as may be seen and handled by the body. Their nature sufficiently appears from what has been already said. Incorporeal hereditaments are not the objects of sensation, they are creatures of the mind existing only in contemplation: and although they commonly (*p*) lead to the personal enjoyment by their owner of sensible results, these are not the hereditaments themselves, but their profits.

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* CHAPTER III.

INCORPOREAL HEREDITAMENTS.

AN incorporeal hereditament may be described as a right to the enjoyment of certain profits or advantages, which right is transmissible to heirs according to the law regulating the transmission of land. Except in a few cases (*a*) an incorporeal hereditament issues out of or is annexed to a corporeal hereditament, and the profits of it are objects of our bodily senses, but itself is an abstract idea. A rent issues out of land, and the product is money, but the right which produces that money is a thing invisible. It is necessary, in order to form a clear notion of incorporeal hereditament, to distinguish the profits produced, the incorporeal hereditament, which gives a right to enjoy them and the corporeal hereditament (if any)

Incorporeal
hereditaments
defined.

vowson will not pass. Under a devise of "lands and tenements" in F, and all other lands and tenements not thereafter devised upon trust for charities, it was held that an advowson did not pass. *Kensley v. Langham*, Ca. T. Talb. 143; see as to this case, *A. G. v. Ward*, 7 L. J. Ch. 114.

(*n*) 1 Inst. 6; see *Chorlton-on-Medlock v. Walker*, 10 M. & W. 742, where a question arose relating to the vaults under a church.

(*o*) *Winchester's case*, 3 Rep. 1, 5, 6, Shep. Touch. 92 Prest. Ed. By a condition is here meant a qualification or restriction annexed to a conveyance of lands, whereby it is provided that in case a particular event does or does not happen, or a particular act is done or omitted to be done, an estate shall commence, be enlarged or defeated. As an instance of the condition here intended, suppose A. to have enfeoffed B. of an acre of ground, upon condition that, if he or his heir should pay the feeoffee 20s., he or his heir

should re-enter; this condition would be an hereditament descending on A.'s heir after A.'s death; and if such heir after A.'s death should pay the 20s. he would be entitled to re-enter, and would hold the land as if it had descended to him. (Co. Litt. 201, 214b.) Instances similar to this are of daily occurrence in the case of mortgages, but the modern form of mortgages provides for a re-conveyance upon payment of the money on a day stated.

(*p*) Not invariably, e. g. a peerage is an example of an incorporeal hereditament, which in itself is unaccompanied by any profit.

(*a*) As to these exceptions, see *Earl Stafford v. Buckley*, 2 Ves. Sen. 170, which concerned an annuity granted by Chas. 2 out of Barbadoes duties; *Holderness v. Marquis Carmarthen*, 1 Bro. C. C. 377; *Smith v. Pybus*, 9 Ves. 566 (annuity out of mixed assets).

from which they issue. An annuity charged on land, for instance, is an incorporeal hereditament: for though the money, which is the fruit or product of this annuity, is doubtless of a corporeal nature, as is the land, yet the annuity itself, which produces that money, is a thing invisible, has only a mental existence, and cannot be delivered over from hand to hand. So tithes, which still more closely relate to the land, being (before the commutation acts,) payable in kind, as the tenth sheaf or tenth lamb, were still an incorporeal hereditament, for they, being merely a *contingent springing right, collateral to the land, can never be the object of sense. The share of the [*21] annual increase is not, till severed, capable of being shown to the eye, or of being delivered into bodily possession.

There are nine principal classes of incorporeal hereditaments — I. Commons; II. Easements; III. Rents; IV. Advowsons; Corodies; VI. Annuities; VII. Franchises; VIII. Offices; IX. Dignities (*b*).

I. Common, or the right of common, is a right which one person may possess over the land of another; it is an incorporeal hereditament entitling its owner I. Commons. to enjoy certain substantial parts of the land or the produce of the land, such as to dig and carry away turf, to hunt, hawk (*c*), catch fish, or cut wood. It is, in mediæval law French, described as a profit à prendre, and must be distinguished from an easement which also gives certain rights over the land, but does not entitle its owner to take absolutely any substantial part of the land, though it may entitle him to take and enjoy those natural accessories of land which are of a universal kind, such as light, or air, or a flow of water, and do not grow or spring out of the particular piece of land itself. Thus the right to have the light and air over the land unobstructed by buildings on it, or the right to the lateral support of land or buildings, are easements: as also the right to draw water out of a well for domestic purposes (*d*), or to wash and water cattle at a pond (*e*). An easement may involve a duty to be discharged on the *part of the landowner, such as to maintain his land at a level [*22] sufficient to secure his neighbour's wall from falling, or to keep a fence or road in repair (*f*). This, however, can never be the case with a common or profit à prendre, which only entitles the owner to take the particular produce if it be there, but creates no obligation on the part of the landowner to provide it, by keeping up the stock of fish or planting wood. The distinction between the two classes of right is, as we shall see, important on account of the law providing different rules of evidence for the establishment of the claims (*g*).

(*b*) It will be seen that a species of incorporeal hereditaments formerly classified separately, is here omitted from the list of classes. Tithes no longer exist in a distinct species; they have become members of the class of rents.

(*c*) See the discussion in *Moore v. Earl Plymouth*, 1 Moore, 346, as to the nature of "hawking and hunting," and in *Wickham v. Hawker*, 7 M. & W. 68.

(*d*) See *Tyler v. Bennett*, 5 A. & E. 377, and *Race v. Ward*, 4 E. & B. 702, where the right was claimed by all inhabitants of a township, which could not be done of a profit à prendre.

(*e*) *Manning v. Wardale*, 5 A. & E. 758; S. C. 1 N. & P. 172.

(*f*) Such a duty on the part of the owner of the servient land is contrary to the original idea of an easement. *Servitutum non ea est natura ut aliquid faciat quis, sed ut aliquid patiatur vel non faciat*. Dig. viii. 1, 15, 1, and see Bract. lib. 4, 222; but the owner of the land may be bound by express stipulation or prescription (which implies a contract by deed) to perform the duty in question; see *Taylor v. Whitehead*, 2 Doug. 749; *Rider v. Smith*, 3 T. R. 766.

(*g*) See *Blewitt v. Tregonning*, 3 A. & E. 544, where a right to take sand blown on a field from the sea shore was considered to be a profit à prendre, and therefore could not be claimed by custom.

Of common there are four different principal sorts: common of pasture, of piscary, of turbary, and of estovers. (202)

Common of pasture is, as its name imports, the right of pasturing cattle upon the land of another. (203)

Common of turbary is the right of digging turves for fuel: this right necessarily extends only to those parts of a waste piece of ground where there is dry peat or heather, and not to grass turf (*h*); consequently in this case a commoner could not interfere with the lord enclosing at pleasure any waste land suitable for a meadow.

Common of piscary is a liberty of fishing in the lord's river or ponds. (204)

(*h*) *Pearson v. Underhill*, 16 Q. B. 120.

(202) The cases in relation to rights of common are not numerous in this country, and the subject is not one frequently occurring. A reference to some of the cases will enable the reader to see what points have been decided. See *Livingston v. Ten Broeck*, 16 Johns. 14; *Leyman v. Abeel*, id. 80; *Van Rensselaer v. Radcliff*, 10 Wend. 639; *Trustees of Western University v. Robinson*, 12 Serg. & Rawle, 29; *Knowles v. Nichols*, 2 Curtis' C. C. 571; *Worcester v. Green*, 2 Pick. 429; *Hall v. Lawrence*, 2 R. I. 218; *Bell v. Ohio and Pennsylvania R. R. Co.*, 25 Penn. St. 161; *Hobert v. Lavalley*, 27 Ill. 448; *Funkhouser v. Langkopf*, 26 Mo. 455; *Livingston v. Ketcham*, 1 Barb. 592; *Smith v. Floyd*, 18 id. 522. As to permitting lands to "lie open to a public common," see *Perkins v. Perkins*, 44 Barb. 134.

(203) A custom that all the inhabitants of a particular town, for the time being, have the right to the depasture of uninclosed woodlands of individual proprietors within the town, is not a mere easement like a right of way, or a right to flow water. It is a right to take a profit, and for such a right the commoner must prescribe in respect to some estate, and not in respect to mere inhabitancy. The custom is therefore void. *Smith v. Floyd*, 18 Barb. 522.

There can be no inter-commonage, or common because of vicinage, unless there are contiguous townships, the inhabitants of which, seeking to excuse a trespass for that cause, have common rights of pasturage appendant, appurtenant or in gross, in the towns where they reside. *Ib*. The proof required to establish a customary right cannot be less than that required to establish a prescriptive right. The entry or use must have been adverse or hostile to the true owner in its commencement. It must have been used and enjoyed under a claim of right, and have continued uninterrupted for a length of time sufficient to bar an entry. *Ib*. The fact that cattle are suffered without objection to run at large over the uninclosed lands of a new country, affords no ground from which to imply a grant; because such use is not adverse, and is not accompanied by any claim, and because such a user is oftentimes unknown to the true owner, and takes nothing away which he would naturally appropriate to his own benefit. *Ib*. He is deprived of nothing which is to him of any real value; he is not interrupted in the enjoyment of his property, and there is no reason why he should assert his title. He does not, therefore, acquiesce in the claim and dominion of another, or in the appropriation of his property to the use of another. *Ib*. See *Donnell v. Clark*, 19 Me. 174, 183; *Thomas v. Marshfield*, 18 Pick. 240.

Common of estovers cannot be divided or apportioned; and if severed by the act of the party the right is extinguished; and this will be done by a partition of the land by the voluntary acts of the tenants. *Livingston v. Ketcham*, 1 Barb. 592; *Van Rensselaer v. Radcliff*, 10 Wend. 639; *Hall v. Lawrence*, 2 R. I. 218, 236. The taking of sea-weed from a beach may be a commonable right. *Knowles v. Nichols*, 2 Curtis' C. C. 571.

(204) The right to take fish in the waters upon the soil of a private proprietor, for one's own use, is not an easement, but a profit in lands. It can only be acquired by grant or prescription, from which a grant may be presumed. Nor will prescription, or custom, or dedication, raise a general right in the public to enter upon the lands of a private owner, at their own pleasure, to catch fish in the waters thereon. *Cobb v. Davenport*, 33 N. J. L. (4 Vroom) 223; 3 id. 369; *McFarlin v. Essex Co.*, 10 Cush. (Mass.) 304; *Chalker v. Dickinson*,

Common of estovers or estouviers, that is, necessities, (from estoffer, to furnish), is a liberty of taking necessary wood, for the use or furniture of a house or farm, from off another's estate. (205) The Saxon word, *bote* (*i*), is used *by us as synonymous to the French estovers: and [*23] therefore house-bote is a sufficient allowance of wood, to repair, or to burn in, the house; which latter is sometimes called fire-bote; plough-bote and cart-bote are wood to be employed in making and repairing all instruments of husbandry: and hay-bote, or hedge-bote, is wood for repairing of hays, hedges, or fences (*k*). These botes or estovers must be reasonable ones; ordinarily they

(i) Saxon. *Emendatio, reffectio, restauratio, compensatio*. Spelm. Gloss.

(k) *Douglas v. Kendall*, 1 Bulstr. 94, Cro. Jac. 256, a case of cutting thorns; the defend-

ant claimed successfully as common appendant to his house, the right of cutting all thorns upon the *locus in quo*.

1 Conn. 382; *Waters v. Lilley*, 4 Pick. 145; *Ingram v. Threadgill*, 3 Dev. 59; *Hooker v. Cummings*, 20 Johns. 90.

Unless restricted by some local law or usage, a riparian proprietor of the land on both sides of a stream or body of water where the tide does not ebb and flow, has the exclusive common-law right to take fish there; and if he owns on one side only, his right extends to the thread of the stream, and an action will lie against an invader of this right. *Beckman v. Kreamer*, 43 Ill. 447; *People v. Platt*, 17 Johns. 209; *Waters v. Lilley*, 4 Pick. 145; *Adams v. Pease*, 2 Conn. 481; *Ingram v. Threadgill*, 3 Dev. 59.

In tide-waters the right to take fish is common to all citizens. *Preble v. Brown*, 47 Me. 284; *Parker v. Cutler Mill Dam Co.*, 20 id. (7 Shep.) 353; *Coolidge v. Williams*, 4 Mass. 140; *Shrunk v. Schuylkill Navigation Co.*, 14 Serg. & Rawle, 71; *State v. Glen*, 7 Jones' Law (N. C.), 321; *Lakeman v. Burnham*, 7 Gray (Mass.), 437; *Collins v. Benbury*, 3 Ired. 277. But even where the stream is navigable, and the tide ebbs and flows, the public have no right to go upon or use in any manner the lands or flats of the adjoining owner of the soil. *Whittaker v. Burhans*, 62 Barb. 287; *Coolidge v. Williams*, 4 Mass. 140; *Bickel v. Polk*, 5 Harr. (Del.) 325; *Moulton v. Libbey*, 37 Me. 485; *Delaware, etc., R. R. v. Stump*, 8 Gill & J. 479, 510.

The owner of land upon the banks of a river, in which the tide ebbs and flows, does not make himself liable to an action by planting stakes on his own flats in such a manner as to obstruct another person's right of taking fish. *Locke v. Metley*, 2 Gray (Mass.), 265. See *Chapman v. Hoskins*, 2 Md. Ch. Decis. 485.

The right of fishing in a navigable river is subordinate to the right of navigation. *Lewis v. Keeling*, 1 Jones' Law (N. C.), 299.

Adversary and exclusive use for a period sufficiently long to justify the presumption of a grant, is indispensable to establish a several right of piscary in the navigable waters of Maryland, in case such right can be acquired by prescription under any circumstances. *Day v. Day*, 4 Md. 262; *Delaware, etc., R. R. v. Stump*, 8 Gill & J. 479, 510. If a several right of fishing on the land of another can be acquired by prescription, it must be by an actual and exclusive occupation and enjoyment of the fishery, adverse to the riparian proprietor, and continued for at least twenty years. *McFarlin v. Essex Co.*, 10 Cush. (Mass.) 304; *Delaware, etc., R. R. v. Stump*, 8 Gill & J. 479, 510; *Collins v. Benbury*, 5 Ired. 118, 124.

Oysters, planted by an individual in a bed duly marked out and defined, in the tide-waters of a bay or arm of the sea, which is a common fishery to all the inhabitants of the state where the bay or arm of the sea is situated, and where there are no oysters growing spontaneously at the time, are the property of the person who plants them, and the taking of them by another person is a trespass, for which an action lies; but it is indispensable to the existence of the right of property in oysters thus planted, that the bed shall not interfere with the common right of fishing; for if the oysters are mingled with and undistinguishable from others of a natural growth, in the public waters, the interest of the person planting them will be subservient to the public use. *Lowndes v. Dickerson*, 34 Barb. 586; *Fleet v. Hegeman*, 14 Wend. 42; *Decker v. Fisher*, 4 Barb. 592.

(205) See note 203.

may be taken in such quantities as any tenant or lessee may take off the land let or demised to him, without waiting for any leave, assignment, or appointment of the lessor, unless he be restrained by special covenant to the contrary. But it has been held that a common of estovers, even for building new houses upon the land, was good (*l*).

There is also a common for digging for coals, minerals, stones and other similar substances (*m*). This last, however, is rare, the minerals under all lands in a manor usually belonging to the lord as a part of the soil of which the freehold is in him (*n*). All these resemble in many respects the common of pasture, but in one respect they go much further: common of pasture being only a right of feeding on the herbage and vesture of the soil, which renews annually; but common of turbary, and those aftermentioned, are a right of carrying away the very soil itself.

The history of what are usually called common lands, or commons, is to some extent identical with that of manors, and of the tenure by which copyholds are held; of this we shall treat hereafter. It will be sufficient here to say (*o*) that when arable lands were granted by the lords *among their [*24] tenants, to be holden in socage tenure (*p*), in order to enable the tenants to maintain beasts for the plough and to manure the land, the right to pasture upon the great uninclosed wastes belonging to the lords was by universal consent and as a necessity of the case, for the maintenance and advantage of tillage, annexed to such grants, and in a similar manner and for similar reasons the other kinds of common also had their origin. The common so annexed to the holding of particular lands by universal consent came to be recognized by the common law, upon which therefore it now depends, and is called common appendant. Common of pasture appendant, therefore, was annexed to arable land (*q*), and now can be claimed only in respect of arable land, from which alone the necessity for it arose (*r*), and in those places where the number has not been fixed by usage (*s*) it can only be claimed for so many cattle as are necessary to plough or manure the tenant's arable land, or so many commonable cattle (*i. e.* horses, kine, and sheep,) (*t*) as are *levant and couchant* upon the land of the commoner, that is, so many as the produce of the land in summer and autumn can maintain during the winter (*u*). This right of common may be limited in various ways as to the time of exercising it (*v*). In like manner common of turbary appendant can only be claimed in respect of a house, for "the thing which is appendant ought to agree with [*25] the *nature and quality of the thing to which it is appendant, and turves are to be spent in a house" (*x*). And the right is limited as to

(*l*) *Arundel v. Steers*, Cro. Jac. 25; see also *White v. Coleman*, Freem. 143; see *Luttrell's case*, 4 Rep. 2.

(*m*) Co. Litt. 122.

(*n*) See *Duke of Portland v. Hill*, L. R. 2 Eq. 765.

(*o*) See *Tyrringham's case*, 4 Rep. 36 a.

(*p*) See the chapters on Tenures, *post*.

(*q*) 1 Roll. Abr. 397, E. 28, 29; *Scholes v. Hargreaves*, 5 T. R. 46.

(*r*) But where a farm is partly pasture land, it will be presumed in favour of a claim to common, if there is evidence of usage, that it

was originally all arable, Bac. Ab. Common, A. 1; *Tyrringham's case*, 4 Rep. 37.

(*s*) When the right is said to be "stinted," see 18 E. 3, 27, 34; Roll. Ab. 398 b.

(*t*) *Bunn v. Channen*, 5 Taunt. 244; a plea claiming common appendant for all kinds of beasts is bad, 31 Hen. 6, 34; 25 Ass. pl. 8; *Standred v. Shoreditch*, Cro. Jac. 58.

(*u*) See *Cheesman v. Hardham*, 1 B. & Al. 706; *Bennett v. Reeves*, Willes, 227; *Brooke* Abr. Common, pl. 8.

(*v*) 28 E. 3, 866; Roll. Ab. 396, 397.

(*x*) *Tyrringham's case*, 4 Rep. 37.

quantity by the requirements of the house (*y*): the same remark applies to common of estovers under which the wood must be used in the house or on the land.

The rights of the commoners were limited, as we have said, but in process of time these claims of the tenants became somewhat oppressive upon the lords, who found considerable difficulty, through the interference of commoners, in taking the profits of the wastes, woods, and pastures. In order to remedy this, the statute of Merton (20 Hen. 3, c. 4,) was passed, which, in substance, provided, that so long as common land was left unenclosed sufficient for the tenements of commoners, with free egress and regress from their tenements to the pasture, the lords might enclose as much as they pleased of the residue. This act has been confirmed and extended by subsequent statutes (*z*). It, however, was simply declaratory of the common law (*a*). But the benefit of it was so far felt and admitted that the court of chancery has given its powerful assistance to lords in approving, by restraining commoners from pulling down enclosures until the sufficiency of the remaining common land had been determined, and in other ways (*b*). The right given by these statutes has been so extensively used that it is believed no *common now exists [* 26] which has not been reduced to its smallest extent consistently with pre-serving the rights of the commoners (*c*). The onus of proving that these rights have been sufficiently preserved lies upon the lord or the owner of the soil enclosed (*d*); but it seems that the power of enclosing under the statute extends to any owner in fee of the soil of a common, though he be not the lord of the manor (*e*).

Besides the common called appendant, which had its origin in the way we have mentioned, there are other ways in which common has arisen. Common appurtenant is common which has been, or by law is presumed to have been, created by grant: consequently it may be annexed to any lands though not arable and not even in the manor (*f*), and may extend in the case of common of pasture to other beasts than those generally commonable, to hogs, goats, or other animals, or geese (*g*).

This, then, does not depend upon any general right by common law, for it rather is against common right; it is claimed by immemorial usage and prescription (*h*), in the absence of a modern grant by which it may be created.

Common appurtenant must be limited in extent in some way similar to that by which common appendant is limited. Thus pasture may be stinted or limited by levancy or couchancy, which is generally the case, or in some other

(*y*) *Valentine v. Penny*, 145; *Dean of Ely v. Warren*, 2 Atk. 189; *Courtoun v. Ward*, 1 Sch. & L. 8, where tenants having a right to estovers only, was restrained from cutting turf for sale, notwithstanding it had been done for eighty years. *Wilson v. Willes*, 7 East, 131, where a custom to cut turves for the "improvement" of the gardens held of the manor, as well as the repairs of grass plots was held bad.

(*z*) 13 Edw. 1, c. 1; 3 & 4 Edw. 6, c. 3; 29 Geo. 2, c. 36; and 81 Geo. 2, c. 41. The inclosure under this act when justifiable by law is called "approving," i. e. improving the land. See, Com. Dig. Common; Selw. N. P. Common.

(*a*) 2 Inst. 85; *Glover v. Lane*, 3 T. R. 445.

(*b*) See *Weekes v. Staker*, 2 Vern. 301; *Arthington v. Flukes*, 2 Vern. 356; *Filerwood v. Palmer*, 5 Vin. Abr. pl. 8, s. 83; s. c. Mose. 171; s. c. Melmoth, MSS. E. 53, Lincoln's Inn Library.

(*c*) See report of Select Committee on Open Spaces, 1865.

(*d*) *Arlett v. Ellis*, 7 B. & C. 463; *Lake v. Plaston*, 10 Exch. 196.

(*e*) *Glover v. Lane*, 3 T. R. 445; *Patrick v. Stubbs*, 9 M. & W. 880.

(*f*) *Sacheverill v. Porter*, Cro. Car. 432; s. c. Jones, 396.

(*g*) Co. Litt. 121, 122.

(*h*) *Cowlan v. Slack*, 15 East. 116; *Tyrtingham's case*, 4 Rep. 37.

[* 27] way (i). So common of turbary or piscary *and the like must be limited, usually by the domestic requirements of the commoner; though, as before mentioned in the case of estovers, a prescription for such commoner is not necessarily bad, because it is for a larger quantity than at first sight appears reasonable, for such might be granted at this day. As a consequence of this imitation the lords claimed the right of approving common appurtenances, to support which claim the statute of Merton was expressly extended to common appurtenant by a later act (j.)

In those cases where common is appurtenant to a house, if the house be pulled down and another rebuilt in its stead, the prescription will not be thereby lost (k), and of course, therefore, alterations in a house do not destroy the right so long, nevertheless, that the new buildings or alterations are not such as to require larger profits; but if that be the case, as, for instance, if new chimneys be added to a house, the common will remain restricted by the former requirements, no turves or estovers could be used in the new chimneys (l). Upon similar grounds common appendant or appurtenant to a house or land cannot be severed (m), unless the amount be limited by numerical quantity, in which case no injury could arise to the landowner by the common being severed (n).

[* 28] *Lastly, there is what is called common in gross, or at large, which is neither appendant nor appurtenant to land, but is simply a right belonging to a person under a grant to a man and his heirs; it may be claimed by prescription where the nature of the case admits of such a thing, as where the claim is by a parson of a church or other corporation (o). It is a separate inheritance, may be vested in one who does not possess any land whatever: it may be for any certain and definite number of cattle; but it cannot be for an unlimited number, for a claim to such a right must be, if it exist at all, a claim to the exclusive pasturage, which is not a common (p), but a separate ownership in part of the land just as much as the ownership of the minerals under the surface (q). Common in gross does not appear ever to have existed except for pasture, though there is no legal reason against its existence in the other cases (r).

We have hitherto explained the different modes in which commons have arisen, so far as they include all the different species of common; but common

(i) A claim to pasture any number of cattle upon the common of another is bad in law. *Benson v. Chester*, 8 T. R. 396, 401. See *Cole v. Foxman*, Noy, 80.

(j) 13 Edw. 1, c. 46. It seems that the lord's right to approve simpliciter under the statute without any custom, does not extend to common of turbary, &c. *Duberly v. Page*, 2 T. R. 391; *Grant v. Gunner*, 1 Taunt. 435; *Arlott v. Ellis*, 7 B. & C. 346. In *Shakespeare v. Peppin*, 6 T. R. 748, an approvement was permitted in the case of common of pasture, although the commoners also had common rights of turbary, but the enclosure under the approvement would appear to have been those parts of the common where the other common rights could not from their nature be exercised.

(k) *Costard and Wingfield's case*, Godb. 97; *Cowper v. Andrews*, Hob. 40.

(l) *Luttrell's case*, 4 Rep. 86 a.

(m) 1 Roll. Abr. 401; where it is said that to convey the tenement reserving the right of common extinguishes the right; *Drury v. Kent*, Cro. Jac. 14.

(n) So said in *Nevill's case*, Plowd. 381; Co. Litt. 121, b; *Leniel v. Harslop*, 3 Keb. 66.

(o) A town corporation may prescribe for common in gross for cattle levant and couchant within the town. *Mellor v. Spateman*, 1 Saund. 343.

(p) *Bennett v. Reeve*, Willes, 227, 232; *Mellor v. Spateman*, 1 Saund. 343; *Benson v. Chester*, 8 T. R. 396; 2 Saund. N. S. 26.

(q) Co. Litt. 123; *Welcome v. Upton*, 6 M. & W. 536; *Bunn v. Channen*, 5 Taunt. 244; *Leatt v. Mann*, 4 Scott, N. R. 342, 356; though it may be prescribed for. Co. Litt. 123; *Hoskins v. Robins*, Pollexf. 13; *Potter v. North*, 1 Vent. 885.

(r) See Co. Litt. 121, b.

of pasture may exist in another form, which springs from its nature. This is called common by reason of vicinage or neighbourhood (*pur cause de vicinage*), where the inhabitants of two townships which lie contiguous to one another have been accustomed to intercommon one with another, the beasts of one straying into the other's fields without molestation. This is in reality a permissive right arising by tacit consent to excuse what is in strictness a trespass, *and to prevent multiplicity of suits (s): but it cannot exist between [* 29] adjoining individual owners (t).

The inhabitants of one township has no right to put his beast into the other's common; but the custom is that if the beast stray there, it is no trespass (u). It follows that one township may at any time, and notwithstanding that the two have so intercommoned time out of mind, inclose, and so put an end to the custom (x).

The nature of a common, from what has been said, is such that the lord has the sole interest in the soil, and so long as he does not interfere with the right of the commoners may do what he pleases (y); but the interests of the lord and the commoner in the common are looked upon in law as mutual. They may each bring an action for damage done either against a stranger or against the other (z); or they may "abate" any interference with their rights; thus a commoner may knock down any hedge or gate which the lord has improperly erected (a).

Common rights are extinguished by operation of law if the tenement to which they are appendant or appurtenant, and the soil of the common be absolutely owned by the *same person (b). If, however, part of the land over which common is claimed be purchased by the commoner, then, [*30] if the common be appendant, it shall be apportioned; if appurtenant, it is extinguished altogether (c). (206) This, however, would not be the case if the part purchased had been previously approved. Again, where a lord enfranchised a copyhold tenement (d), the right of common annexed to the tenement will be lost (e).

We have explained all the different kinds of common as distinguished by the modes in which they may have arisen, and the nature of the title under which they are held. We shall again, in explaining at length the titles by which real

(s) Co. Litt. 122; *Tyrringham's case*, 4 Rep. 88; *Wells v. Percy*, 1 Scott, 426; *Broomfield v. Kirker*, 11 Mod. 72.

(t) *Heath v. Elliott*, 6 Scott, 172.

(u) *Supra*, n. (s).

(x) *Gullett v. Lopez*, 13 East, 848.

(y) E.g., plant trees, make fish ponds, open mines or quarries. *Kirby v. Sadgrove*, 1 Bos. & Pul. 13; *Hassard v. Cantrell*, 1 Lutw. 107; *Coo v. Cawthorn*, 1 Keb. 390; *Rowbotham v. Wilson*, 8 H. L. C. 348; as to what are included in the word mines, see *Bell v. Wilson*, L. R. 1 Ch. 303.

(z) *Mary's case*, 9 Rep. 110; see also as to the rights of the lord, *Bateson v. Green*, 5 T. R. 411; *Sadgrove v. Kirby*, 6 T. R. 483, s. c. 1 Bos. & Pul. 13; *Wakefield v. Duke of Buccleugh*, L. R. 4 Eq. 613. A bill in equity will lie against the lord by one copyholder to have the common rights ascertained if he

sue on behalf of himself and all other copyholders, but not if he sue on his own behalf alone. *Philips v. Hudson*, L. R. 2 Ch. 243.

(a) *Penruddock's case*, 5 Rep. 101; *Batten's case*, 9 Rep. 503; *Cooper v. Marshall*, Burr. 265; 2 Inst. 88.

(b) *Tyrringham's case*, 4 Rep. 86 a; *Bradshaw v. Fyre*, Cro. Eliz. 570; *Nelson's case*, 8 Leon. 128.

(c) *Tyrringham's case*, 4 Rep. 86 a.; the reason there given being that common appendant is of common right, whilst common appurtenant is against common right, and cannot be extinct for part, and be in esse for part by act of the parties. See *ante*, p. 26.

(d) See *post*, as to copyholds.

(e) *Fort v. Ward*, Mo. 667; Cro. Jac. 253; see as to copyholds, *Badger v. Ford*, 3 B. & Ald. 153.

property is held or enjoyed, have to revert to the subject of commons and other analogous hereditaments. We may here mention some long-established usages which obtain in particular localities, and which, to some extent, resemble common, though different in their nature. These are what are called "cattle-gate" in the north and "beastgate" in the south, and "shack" in Norfolk, Lincolnshire, and Yorkshire. These seem all to have similar origin, where several owners of small adjoining parcels of ground, in order to save the expense of fences and for more beneficial enjoyment, have allowed their cattle to wander promiscuously over the whole, the number of cattle being, of course, limited proportionally to the several parcels of land. "Shack" is upon arable land after harvest until the land is sowed again. In some cases where the original boundaries have been lost, the result is that the ownership of the land is the right to turn so many beasts upon it, but it is essentially different [*31] *from common rights in that the soil itself belongs to the proprietors. It is said that "where one who has purchased divers parcels together in which the inhabitants have used to have 'shack,' and long since has inclosed it, and notwithstanding always after harvest the inhabitants have had shack there by passing into it by bars or gates with their cattle, there it shall be taken as common appendant or appurtenant, and the owner cannot exclude them of common there notwithstanding that he will not common with them, but hold his own so inclosed in severalty; and that is proved by the usage, for, notwithstanding the ancient inclosure, the inhabitants have always had shack there" (f). In the absence of such an usage an owner of "shack" may inclose, if he please, and hold in severalty absolutely without regard to other owners: and even when the right of shack continues the land becomes his in severalty, and subject only to that right. In the other cases of the "cattle-gate" and "beastgate," the original boundaries seem to have been lost, and the owners jointly possess the land in undivided shares with several inheritance (g). It is conceived that each of them may obtain by partition his share of the land in severalty, which, if there existed minerals under the land, might be of the utmost importance; and from this the distinction between these customs and commons is apparent.

We have referred to the powers which the lords of *manors and [*32] others seized in fee of the lands over which rights of common exist, have to inclose parts of the land: these powers did not extend to diminish or interfere with the rights of the commoners, which could only be done by the consent of all, a thing never in practice capable of being obtained where the numbers are large. In order, however, to render the large tracts of common land more beneficial to society by cultivation, acts of parliament have been from time to time passed authorizing inclosure of particular commons, and the allotment of specific parts in severalty to the commoners in lieu of their rights of common. This has been reduced to a systematic process. A general act

(f) *Sir Miles Corbet's case*, 7 Co. 5 a.

(g) *R. v. Inhabitants of Wixley*, 1 T. R. 187; where a "cattle-gate" was held to be a "tenement" within 18 & 14 Car. 2, c. 12; *Bennington v. Goodlittle*, Strange, 1084, where ejectment was held to lie for a beastgate; see as to the recognition which the law gives to these and similar local terms, *Barnes v. Peterson*, Strange, 1062. The question what

is a tenement within the statute has led to frequent discussions on points similar to the one just noticed. Thus, see *R. v. Stoks*, 2 T. R. 451 (as to the taking the hay grass and aftermath for ten months in the year); *R. v. Hollington*, 3 East, 118 (as to a ley i. e. pasture for two cows); *R. v. Darley Abbey*, 14 East, 280.

has been passed under which inclosure commissioners for England and Wales have been established, before whom proposals for inclosures are laid, and who arrange and sanction the details of each, and the allotments to be made to the lord and the commoners in lieu of their respective interests. The commissioners make an annual report to parliament of the commons which have been dealt with by them during the preceding year, and in pursuance of this report an act is now annually passed authorizing the enclosures reported upon (*h*).

II. In defining a right of common (*i*) we had occasion to distinguish it from an easement, and therein partially to exhibit the nature of an easement, which II. Easements. is the next kind of incorporeal hereditament that we have to consider. When the owner of one tenement called the dominant tenement has a right to compel the owner of *another called the servient tenement to permit to be done or refrain from doing something which as owner of [* 33] his tenement he would otherwise have been entitled to restrain or to do respectively, together with (in those cases where such further right exists) power to compel him to do those things which may be necessary for the convenient enjoyment of the right claimed, such a right is called an easement (*k*).

Roman law distinguished easements into two classes, rural and urban, placing in the former class the rights of way and water, and in the latter those rights which are connected with the convenient enjoyment of buildings, the right of support by a neighbour's wall, either by resting a building thereon or inserting a beam into it, that of emptying a gutter into a neighbour's drain, and the right of light and air, or the prevention of building by a neighbour so as to obstruct light and air (*l*). These and a few other analogous rights have been adopted by English law. It is, however, a principle of law that a novel burden bearing the character of an easement cannot be imposed upon land so as to bind every owner into whose possession it may come (*m*).

In order to constitute a valid easement of a kind which the law recognises, there must exist the two tenements, the dominant and the servient, and besides this there are other conditions which must be observed. An easement must be limited in extent, and must be in some way for the benefit of the alleged dominant tenement, and not for some general benefit of its owner (*n*). Thus a claim to discharge the foul water of a mill into an adjoining brook may be a good easement appurtenant to the *mill (*o*), but a claim by the owner of a house to discharge foul water *simpliciter* could not be claimed as an easement appurtenant to [* 34] the house, nor could a right of way in Kent be claimed as an easement appur-

(*h*) See the General Inclosure Act, 41 Geo. 3, c. 109, amended by the following acts, 1 & 2 Geo. 4, c. 23; 3 & 4 Will. 4, c. 87; 3 & 4 Vict. c. 41; 8 & 9 Vict. c. 118; 9 & 10 Vict. c. 70; 10 & 11 Vict. c. 111; 11 & 12 Vict. c. 99; 12 & 13 Vict. c. 88; 14 & 15 Vict. c. 53; 15 & 16 Vict. cc. 2, 79; 17 & 18 Vict. c. 97; 20 & 21 Vict. c. 81; 21 & 22 Vict. c. 53; 23 & 24 Vict. c. 43; as to the right of allottees under these acts, see *Roberts v. Haines*, 6 E. & B. 643; *Wakefield v. Duke of Buccleugh*, L. R. 4 Eq. 618.

(*i*) See *ante*, p. 21.

(*k*) See *ante*, pp. 21, 22.

(*l*) Dig. viii. 2, §; Inst. lib. ii. tit. 3, Servitutes.

(*m*) *Ackroyd v. Smith*, 10 C. B. 164; *Kepel v. Bailey*, 2 M. & K. 517; *Murgatroyd v. Robinson*, 7 E. & B. 891; and see *Hill v. Tupper*, 3 N. R. 201.

(*n*) *Ackroyd v. Smith*, 10 C. B. 164; *Clayton v. Corby*, 5 Q. B. 415; *Bailey v. Stephens*, 12 C. B. N. S. 91.

(*o*) *Bazendale v. M'Murray*, L. R. 2 Ch. 790.

tenant to an estate in Northumberland. Such claims, if made at all, must be supported by a title deduced in a regular way from a grant to a person and his heirs (*p*); they would not pass as appurtenances of any alleged dominant tenement, or under any deed unless expressly conveyed.

Among the principal easements which have the sanction of time and are allowed by law, are the following:—The right to water, the right to light and

Easements enumerated. air, the right of way, right to the natural support of land, the right to the support of buildings by adjacent land, and in some exceptional cases to such support by adjacent buildings, the right to have party walls and fences kept in repair, and the right to commit nuisances with impunity. In addition to these there are a few others to be occasionally found which have been established by long custom, and, where they exist, could not now be disputed, such as the right to bury the dead in a particular vault (*q*); but it is conceived such unusual rights could not now be created.

All easements are created by grant from the owner of the servient to the owner of the dominant tenement, express, implied, or presumed by law, or by How created. reservation, express or implied, out of a grant of the servient tenement (*r*). (207) Express grants or reservations must be by *deed, [* 35] in order to create a legal right to the easement (*r*), though equity will, where valuable consideration has been given, and great injustice would otherwise ensue, interfere and protect the enjoyment of the easement (*s*). An

(*p*) *Bailey v. Stephens*, 12 C. B. N. S. 91; as to what rights may be thus held under a grant by a man and his heirs, without reference to the possession of any particular land, see *Sir F. Barrington's case*, 8 Rep. 136; *Liford's case*, 11 Ib. 486; *Thomas v. Sewell*, Vaugh. 351; *Muskett v. Hill*, 5 Bing. N. C. 694. It seems such a right could not be prescribed for under the Prescription Act. See *Upton v. Williams*, 6 M. & W. 548; *Gale on Easements*, pp 10, 13.

(*q*) *Davney v. Dee*, Cro. Jac. 606; *Bryan v. Whistler*, 8 B. & C. 288; s. c. 2 Man. & Ry. 318.

(*r*) Some easements which are neither par-

cel nor issuing out of the land, such as a right of way, cannot strictly be reserved. *Wallis v. Harrison*, 11 L. J. Exch. 440.

(*r*) *Wood v. Leadbitter*, 13 M. & W. 888; *Howlins v. Shippam*, 5 B. & C. 221.

(*s*) *Duke of Devonshire v. Eglin*, 14 Beav. 530; *Powell v. Thomas*, 6 Hare. 300; it seems that a court of equity will interfere to prevent injustice, where a person has allowed expenditure to be incurred which would be obviously useless without his consent to an easement over his land. *Clavering's case*, cited 5 Ves. 690; and see *Laird v. Birkenhead Railway Co.*, John. 500.

(207) In this country a right to an easement is sometimes created or given by deed. *Knight v. Dyer*, 57 Me. 174; *Fuhr v. Dean*, 26 Mis. 116.

Twenty years is the usual time required to acquire a right to an easement by prescription or adverse enjoyment. *Carlisle v. Cooper*, 4 C. E. Green (N. J.), 256; *Stearns v. Jones*, 12 Allen (Mass.), 582; *White v. Chapin*, id. 516; *Cherry v. Stein*, 11 Md. 1; *Hammond v. Zehner*, 21 N. Y. (7 Smith), 118; *Jones v. Crow*, 32 Penn. St. 398; *Mebam v. Patrick*, 1 Jones' Law (N. C.), 23; *Esling v. Williams*, 10 Penn. St. 126; *Watkins v. Peck*, 13 N. H. 360.

A man can have no easement in his own land. *Brakely v. Sharp*, 1 Stockt. (N. J.) 9; *McTavish v. Carroll*, 7 Md. 353; *Carbrey v. Willis*, 7 Allen (Mass.), 864.

One having an easement in the lands of another is bound so to use it as not to unnecessarily injure the owner's right. *Kaler v. Beaman*, 49 Me. 207.

A covenant restricting the use of lands in favor or on account of other lands, creates an easement, and makes one tenement servient and the other dominant; and this without regard to any priority or connection of title or estate in the two parcels, or their owners. *Gibert v. Peteler*, 88 Barb. 488; 38 N. Y. (11 Tiff.) 165; 6 Trans. App. 329.

The right to overflow the lands of another is an easement, and the title to do so must be shown by actual grant, by deed, or by prescription. *Snowden v. Wilas*, 19 Ind. 10.

The public cannot acquire an easement by prescription; a prescription supposes a grant, and in the case of the public there can be no grantee. *Curtis v. Kessler*, 14 Barb. 511, 521; *Perley v. Langley*, 7 N. H. 238.

easement is created by an implied grant in cases where the two tenements being held by one owner are dealt with by him so as to sever in part the inheritance, and when the intention of the parties would be frustrated unless the easement were granted. Thus, if a man sells and conveys a piece of land surrounded by other land belonging to himself, by implication he grants also a right of way over his own land to that sold (*t*). The law implies that by such a grant to a purchaser *conceditur et id sine quâ res ipsa haberi, non potest*, so when mines or trees are sold, the power of entry to dig shafts or carry away the timber is by implication granted (*u*). For a similar reason an easement may by implication be reserved to a vendor or grantor of the servient tenement. Thus, if a man excepts out of a grant all mines and minerals (*x*), he excepts also the right of going upon the land and making *shafts and erecting engines. But there is considerable difference between the case of [*36] implied grant and that of implied reservation. In the former case the law will construe the implied grant in a liberal manner, so as to include all those continuous and apparent easements which have in fact existed and been enjoyed by the previous owner for the benefit of the tenement granted, and which though not absolutely necessary to the enjoyment of it, are yet necessary for the complete and comfortable enjoyment in the manner in which it has been previously used (*y*): but an implied reservation will only extend to cases of absolute necessity, because the principle that a man may not derogate from his own grant must not be infringed except in cases of absolute necessity (*z*); and if the grant be made for a particular purpose, the grantor is bound not to do anything that will prevent the land from being used for that purpose (*a*).

A distinction is also taken between those easements which are apparent and continuous and those which are discontinuous, the construction of a grant being more readily extended, so as to create by implication of grant or reservation the former than the latter. As examples of the former kind, we may mention right to light and air, *or a drain through the servient [*37] tenement, and of the latter the right to use a pump (*b*). Cases often arise between two grantees of severed tenements from the same grantor under grants

(*t*) *Plowd.* 16 a; *Pomfret v. Ricroft*, 1 Saund. 323; *Hinchliffe v. Earl Kinnoul*, 5 Bing. N. C. 1, 24; an easement of necessity, such as that mentioned, can only arise by express or implied grant. Thus where closes A. and B., being held by the same owners, escheat to different lords, a way of necessity to close B. over A. will not arise. See *Proctor v. Hodgson*, 10 Exch. 624.

(*u*) *Liford's case*, 11 Rep. 25 a; *Darcy v. Askwith*, Hob. 234; *Dand v. Kingscote*, 6 M. & W. 174, 196; *Swansborough v. Coventry*, 9 Bing. 305; *Elliot v. North Eastern Railway Co.*, 10 H. L. 833; *Roubootham v. Wilson*, 8 H. L. 348.

(*z*) *Shep. Touch.* 160; 1 Wms. Saund. 828; 2 Roll. Abr. tit. *Grants*; *Clark v. Cogge*, Cro. Jac. 170.

(*y*) *Nicholas v. Chamberlaine*, Cro. Jac. 121; *Coppy v. I. de B.*, 11 Hen. 7, 25, pl. 6; *Hinchliffe v. Earl of Kinnoul*, 5 Bing. N. C. 1; *Ewart v. Cochrane*, 4 H. L. 117; and see as to what rights in the nature of easements will

or will not pass under the word appurtenances or pertinents, *Worthington v. Gimson*, 29 L. J. Q. B. 116; *Baird v. Fortune*, 7 Jur. N. S. 926; and *ante*, p. 17.

(*e*) *Tenant v. Goldwin*, 2 Ld. Raym. 1093; *Suffield v. Brown*, 33 L. J. Ch. 249, s. c. 3 N. R. 340, in which case L. C. Westbury dissented from *Pyer v. Carter*, 1 H. & N. 916; see also *Elliot v. North Eastern Railway Co.*, 10 H. L. 833; *White v. Bass*, 7 H. & N. 722; and the opinion of V. C. Kindersley in *Curriers' Co. v. Corbett*, 2 Dr. & Sm. 355 (which case was reversed on appeal but upon another point); *Crossley v. Lightowler*, L. R. 3 Eq. 279, s. c. 2 Ch. 478; *Morland v. Cook*, L. R. 6 Eq. 252.

(*a*) *Caledonian Railway Co. v. Sprot*, 2 Macq. 449; *Elliot v. North Eastern Railway Co.*, *ubi sup.*

(*b*) See *Nicholas v. Chamberlaine*, Cro. Jac. 121; *Polden v. Bastard*, 1 N. R. 856, s. c. 83 L. J. Q. B. 372; *Glave v. Hardiny*, 27 L. J. Exch. 286.

made contemporaneously; the rule there seems to be to construe them as if the grant of the alleged dominant tenement was made first (c).

The third mode in which the right to an easement may be acquired, is that in which the law presumes a grant to have been made, although there is no evidence to show it, other than long usage and enjoyment of the right claimed. Of this we shall speak more hereafter in explaining title by prescription, a title common to many different kinds of incorporeal hereditaments (d).

Having said so much as to the mode by which easements may be acquired, we are next to explain the nature and legal incidents peculiar to those different kinds of easements which are most commonly found, and have been above enumerated.

First, as to the Right of Water.—Of this right there are two kinds: one where the water flows in a natural course, and the other where it flows through an artificial drain or canal. The former kind, since water *natura* Right of water. *sua descendit*, and has its origin, as it were, from the creation (e), stands upon a somewhat different footing from *the majority of easements. [*38] Every proprietor must necessarily have been in long enjoyment, and is entitled to have the full benefit of it in the state in which it exists naturally, uncontaminated and substantially undiminished in quantity by the acts of the owners of the land from which it flows (f). (208) He may apply it to any pur-

(c) *Swansborough v. Coventry*, 9 Bing. 305; *Pinnington v. Galland*, 9 Exch. 1.

(d) Since the Prescription Act, 2 & 3 Will. 4, c. 71, those rights which are within the operation of that act, although they previously entirely depended upon the presumption of a grant, now depend upon that enactment, and are matters *juris positivi*. Per Lord Westbury, in *Tapling v. Jones*, 11 H. L. 290, 304.

(e) See *Sury v. Pigot*, Poph. 166; *Wood v. Waud*, 3 Exch. 775; the soil of the alveus of a non-navigable river belongs to the riparian owners in severalty, the share of each extending *usque ad medium flum aqua*. *Bickett v. Morris*, L. R. 1 H. L. S. C. 47; *Berridge v. Ward*, 10 C. B. N. S. 400; where the question concerned the soil of a road; and see *Crossley*

v. Lightowler, L. R. 3 Eq. 279, s. c. 2 Ch. 478, as extending to the case of a stream. The property in such soil must, however, be so enjoyed as not to interfere with the flow of the stream; and an encroachment upon the alveus may be complained of without the necessity of proving damage has been sustained, or is likely to be sustained. *Bickett v. Morris*, *ubi sup*.

(f) *Goldemid v. The Tunbridge Commissioners*, Law R. 1 Ch. 349; *Stockport Waterworks v. Potter*, 3 H. & C. 300, s. c. 32 L. J. Exch. 9; *Laing v. Whaley*, 8 H. & N. 675, 901; *Manchester, &c., Railway Co. v. Workop Board*, 23 Beav. 198; and the right extends to prevent a person taking the water at the spring head. *Dudden v. Clutton Union*, 1 H. & N. 627; see, however, *Raustron v. Taylor*, 11 Exch. 369.

(208) The owner of land through which a stream of water naturally flows has a right to its use; but it is a right of use only; and where he detains the water in a dam for several hours daily, thereby depriving the owners of factories or mills on the stream below of the use of it during that time, and then lets it off in unusual quantities so that such owners below cannot use it to advantage while passing, this is a good ground of action. *Pollitt v. Long*, 58 Barb. 20; *Merritt v. Brinkerhoof*, 17 Johns. 306; *Clinton v. Myers*, 46 N. Y. (1 Sick.) 511; *Brace v. Yale*, 97 Mass. 18; 10 Allen (Mass.), 441.

The detention of water in a reasonable or usual manner is not actionable, although it may cause an injury to the owners below. *Springfield v. Harris*, 4 Allen (Mass.), 494; *Gould v. Boston Duck Co.*, 18 Gray (Mass.), 443.

The use of a stream must be such as will not cause a needless injury to the owners below. Throwing tan-bark into a stream in such quantities as to clog it, and to injure the mills below, is actionable. *Honsee v. Hammond*, 39 Barb. 89; *Thomas v. Brackney*, 17 id. 654. So of throwing other materials or substances which obstruct the stream and impair the use of the mills, etc., below. *O'Riley v. McChesney*, 8 Lans. 278; *Veazie v. Dwinel*, 50 Me. 479; *Gerriah v. Brown*, 51 id. 256; *Jacobs v. Allard*, 42 Vt. 303; 1 Am. R. 331.

Any use of the water of a stream which so corrupts it that it cannot be used by the owners below, or so as materially to injure the quality of the water to the detriment of such

pose he pleases in the way of reasonable enjoyment, so that he does not substantially injure the quantity or quality of that which flows onward to the lands of others (g). The right, however, exists only in reference to water flowing on the surface, and not to any underground flow of water. An owner of land in which there is a well supplied by a subterranean flow of water, cannot complain of his well being drained through the operations of a neighbouring mine owner (h).

The other case of a right of water is where a stream of water runs through an artificial course (i). This right *may be subdivided into two sorts: the right to receive and the right to discharge the water. The latter [* 39]

(g) *Mason v. Hill*, 5 B. & Ad. 1; *Wright v. Howard*, 1 S. & S. 190; *Embrey v. Owen*, 6 Exch. 353. See as to the right of widening and scouring a channel, *Peter v. Daniel*, 5 C. B. 568, s. c. 5 Dowl. & L. P. C. 501.

(h) *Acton v. Blundell*, 12 M. & W. 324; *Hammond v. Hall*, 10 Sim. 551; *Chasmore v. Richards*, 2 H. & N. 168, s. c. 7 H. L. 349; *Dickinson v. Grand Junction Canal*, 7 Exch. 283. See as to the Roman law on the points,

Dig. lib. 39, tit. 8; and as to water soaking through marshy ground, *Broadbent v. Ramsbotham*, 11 Exch. 602; *Rawstron v. Taylor*, *Ib.* 369.

(i) See the distinction drawn in *Arkwright v. Gell*, 5 M. & W. 203; and see *Staffordshire, &c., Canal Navigation v. Birmingham Canal Navigation*, L. R. 1 H. L. E. & I. App. 254, and *Greatrex v. Hayward*, 8 Exch. 291.

owners, is actionable. *Merrifield v. Lombard*, 13 Allen (Mass.), 16; *Howell v. McCoy*, 8 Rawle, 256; *Carhart v. Auburn Gas Light Co.*, 23 Barb. 297, 312; *Holeman v. Boiling Springs, &c.*, Co., 1 McCarter (N. J.), 335.

The rule is the same in relation to polluting the water of a well by placing noxious matter in close proximity to it, so that it is washed by rains or soaks into the well. *Brown v. Illius*, 25 Conn. 538; *Norton v. Scholesfield*, 9 Mees. & Wels. 665; *Clark v. Lawrence*, 6 Jones' Eq. (N. C.) 783.

Where large numbers of persons are mining on a small stream, and each deteriorates the water a little, so that their combined acts render the water utterly unfit for further use, an action lies, and it will not be a defense by each person that his act alone did not materially injure the water. *Hill v. Smith*, 32 Cal. 166.

The non-joinder of others who contributed to the injury is not material, except upon the question of damages. *Wheeler v. Worcester*, 10 Allen (Mass.), 591.

In the use of a stream the owner must not cause the water to flow or set back upon the lands of the owners above, nor to the injury of mills or factories situated above. *Stiles v. Hooker*, 7 Cow. 266; *Munroe v. Gates*, 43 Me. 463; *Buts v. Ihrie*, 1 Rawle, 218; *Gilman v. Tilton*, 5 N. H. 232.

No action lies for turning mere surface water from one man's land upon those of another while lawfully improving and using his own land. *Greeley v. Maine Central R. R. Co.*, 53 Me. 200; *Bowlsby v. Speer*, 2 Vroom (N. J.), 351; *Gannon v. Hugadon*, 10 Allen (Mass.), 106; *Goodale v. Tuttle*, 29 N. Y. (2 Tiff.) 459. But it has been held that water which accumulates in swamps and low grounds cannot be lawfully turned upon the lands of another by means of a drain or cut made for that purpose. *Dickinson v. Worcester*, 7 Allen (Mass.), 19; *Butler v. Peck*, 16 Ohio St. 334.

But such owner may prevent surface water from flowing upon his lands by erecting barriers or changing the level of his soil. *Gannon v. Hugadon*, 10 Allen (Mass.), 106.

If one in the lawful use of his land, as by digging a ditch, or a well, or by opening a quarry or the like, intercepts or interrupts the flow of an underground current of water, to the injury of another, no action lies. *Ellis v. Duncan*, 21 Barb. 290; *Village of Delhi v. Youmans*, 45 N. Y. (6 Hand) 862; 50 Barb. 316; *Haldeman v. Bruckhart*, 45 Penn. St. 514; *Brown v. Illius*, 27 Conn. 84. A railroad company has a right to drain the surface water from its lands through ditches dug therein into a stream which is the natural outlet, although the quantity of water in the stream is increased in time of high water and diminished at other times to the damage of a riparian proprietor below. *Waffle v. New York Central R. R. Co.*, 38 N. Y. (8 Sick.) 11.

Where a stream breaks away from its channel and inundates the lands of a person, he may legally turn the stream back into its old channel; but while preventing the inundation of his own land, he has no right to cause the water to flow upon the lands of another person, except in the old channel of the stream. *Tuthill v. Scott*, 48 Vt. 525.

is the one more easily acquired otherwise than by contract, because, if a man make an artificial watercourse upon his own lands, presumably it is for his own benefit and not that of his neighbour, and he cannot be compelled to continue it after it ceases to be beneficial to him (*k*). On the other hand, if he makes a watercourse for his own purposes which runs into his neighbour's land, he is obviously doing that which is an infringement of his neighbour's property: this infringement may by prescription at length be legalised so as to become a right over that land if suffered to continue without interruption (*l*), though, of course, until then his neighbour may at any time block up the watercourse, and so put an end to the infringement.

It seems that by allowing without active interference contamination or diminution of quantity on the part of those from whose lands the water runs, to continue for a period sufficient to create an easement by prescription, the right to the flow of water in its natural purity and quantity may be prejudiced or destroyed, at least to the extent of the contamination and diminution which has existed (*m*): but beyond this it is not necessary to exercise *such rights as [**40*] arise *ex rei natura* in order to preserve them (*n*). It need hardly be mentioned that where there is a natural stream of water, the owner of land through which it passes has a right to insist upon its being allowed to flow from his land to that of the next proprietor below him.

The right to light and air is the right to enjoy the free passage laterally of light and air from a neighbour's land. It is obvious that the light which falls vertically from the sky cannot form the subject of an easement, ^{Right of light and air.} as it necessarily must be enjoyed by the owner of the land, upon 'the maxim *cujus est solum, ejus est usque ad cælum et inferos*. This easement is one which at first sight may seem to have a similar character in regard to its having a natural origin, as the right of water; it is, however, not so, because the first right which the ownership of land seems to give is that of doing what the owner pleases thereon, either by building or otherwise; and therefore he has, by virtue of such primary right, the power of obstructing the free passage of light and air from over his own land to that of his neighbour; if, then, his neighbour is in any way entitled to have such passage of light and air free from obstruction, it is no inconsiderable interference with or abridgment of the dominion which a man usually possesses over his land. Inasmuch, however, as it would be productive of injurious results in many cases, where men have built houses or other buildings upon or near to the extremities of their lands, having windows opening towards the neighbouring land, if it were lawful for

(*k*) *Wood v. Waud*, 3 Exch. 748; *Arkwright v. Gell*, 5 M. & W. 203; but there is no absolute impediment to the acquisition of such an easement. See *Beaston v. Weate*, 5 E. & B. 986.

(*l*) *Saunders v. Newman*, 1 B. & Al. 258; *Wright v. Williams*, 1 M. & W. 77; *Lady Brown's case*, Palm. 446; *Thomas v. Thomas*, 2 Cr. M. & R. 34; a case of water dropping from eaves upon the ground of a neighbour, what the Romans called *stillicidium*. See *Elliot v. North Eastern Railway Co.*, 10 H. L. 883.

(*m*) See *Wood v. Waud*, 3 Exch. 748; *Murgatroyd v. Robinson*, 7 E. & B. 391; *Stockport Waterworks v. Potter*, 8 H. & C. 300, s. c. 81

L. J. Exch. 9; *Goldsmid v. Tunbridge Wells Commissioners*, L. R. 1 Ch. 349; *Nuttall v. Bracewell*, L. R. 2 Ex. 1; *Sampson v. Hoddinott*, 1 C. B. N. S. 590; *Dudley Canal v. Grazebrook*, 1 B. & Ald. 59; *Crossley v. Lightowler*, L. R. 2 Ch. 479; *Carlyon v. Lovering*, 1 H. & N. 784. Where, however, a person has thus acquired as against other proprietors below him to use the water to their prejudice, such acquired right gives no right as against proprietors above; *Sampson v. Hoddinott*, *ubi sup*.

(*n*) *Sampson v. Hoddinott*, 1 C. B. N. S. 590; *Embrey v. Owen*, 6 Exch. 353; *Bickett v. Morris*, L. R. 1 H. L. S. C. 47.

their neighbours to obstruct the light and air coming to those windows, the law recognises the right to prevent such obstruction when duly acquired as a proper *easement. Such an easement may of course, though it rarely [* 41] happens, be acquired by express grant, and in that case may be unlim- ited. But where, as is generally the case, the right is acquired by prescription (o), i. e., by user, which user must be by a building (p), it follows that the extent of light and air must depend upon the amount which has been enjoyed during the period which has gained the prescriptive right (q), and is limited to that which is necessary for the ordinary occupation and use of the building in respect of which the claim is made (r), regard being had to the general character and situation of such building. (209)

The law, of course, permits a man at any time before the prescribed period has expired to do any act, such as building or placing any other obstruction on his own land to prevent the user of light and air, and thereby to prevent the acquisition of an easement (s). It may be here remarked that the law does not recognise the enjoyment of a prospect as a right which can be acquired otherwise than by grant or covenant (t), and it is very doubtful whether it can even be so acquired as an easement, whether any grant or covenant could do more than create a personal obligation between the parties not attaching as an easement either to the house where the prospect is enjoyed, or the land over which the prospect is seen. So also the right to a current of wind for the *purpose of working a windmill cannot be claimed as an easement [* 42] under the Prescription Act (u).

The right to light and air being the easement which most frequently leads to litigation, this may be a suitable place to notice briefly the remedies which the law provides for the infringement of such rights. The redress Remedies afforded by law which common law provides is that of damages, or a payment of such an amount of money as shall in the opinion of the jury be a reasonable equivalent of the injury done. In estimating these damages, it would seem now that a jury would be bound to take into account "the nature and locality

(o) The legislature in the Prescription Act, 2 & 3 Will. 4, c. 71, has somewhat favoured the acquisition of the right to light more than that of any other easement, see sect. 3, which fixes the period of twenty years' enjoyment without interruption as sufficient in all cases where such user is not licensed by word or writing.

(p) *Roberts v. Macord*, 1 Moo. & Rob. 230.

(q) *Martin v. Goble*, 1 Camp. 322; *Roberts v. Macord*, 1 Moo. & Rob. 230.

(r) See *Clarke v. Clark*, L. R. 1 Ch. 16.

(s) *Chandler v. Thompson*, 3 Camp. 83; *Moore v. Rawson*, 3 B. & C. 340.

(t) *Fishmongers' Co. v. East India Co.*, 1 Dick. 163; *A.-G. v. Doughty*, 2 Ves. S. 453.

(u) *Webb v. Bird*, 81 L. J. C. P. 335. The contrary seems formerly to have been thought the law. 2 Roll. Abr. p. 704; 16 Vin. Abr. tit. *Nuisance*, G. pl. 19; *Treherne's case*, Godb. 233; but though the judgment in the above case was merely upon 2 & 3 Will. 4, c. 71, s. 2, deciding that such a claim was not within the words "any way or other easement, or to any watercourse, or to the use of any water to be enjoyed, &c.," yet it is conceived that a claim to wind or an easement could not be made in any other way.

(209) In this country the general rule is that there can be no prescriptive right as to light and air. *Mullen v. Stricker*, 19 Ohio St. 185; *Ward v. Neal*, 37 Ala. 501; *Myers v. Gommel*, 10 Barb. 587; *Rogers v. Savin*, 10 Gray (Mass.), 376; *Carraig v. Dee*, 14 id. 538; *Cherry v. Stein*, 11 Md. 23; *Hubbard v. Town*, 33 Vt. 295; *Haverstick v. Sipe*, 33 Penn. St. 368; *Parker v. Foote*, 19 Wend. 309; *Pierre v. Fernald*, 26 Me. 436; *Napier v. Buwinkle*, 5 Rich. 311, and numerous other cases.

The cases sustaining the English rule as to prescriptive rights to light and air are, *Gerber v. Grabel*, 16 Ill. 217; *Robeson v. Pittenger*, 1 Green's Ch. (N. J.), 57, 64; *Dural v. Botsblanc*, 1 La. Ann. 407.

of the windows, the supply of light to which has been interfered with. Persons who live in towns, and more especially in large cities, cannot expect to have continually the same unobstructed volumes of light and air which fall to the lot of those who live in the country. The steady spread of buildings in and round large towns gradually, but surely, obstructs some of the light and air which the houses in the interior of the place formerly enjoyed" (x). Also, in calculating such damages the present injury alone ought to be considered, and the future possible uses to which the building might be put if the light and air had not been affected, ought to be disregarded (y).

In addition, however, to the remedy of damages which the court of [*43] law afford, the court of chancery affords a *means of obtaining relief by restoration of the state of things existing before the obstruction and equity.

had been erected. It is not in every case of this kind in which an action may be maintained that a court of equity will grant an injunction; something more is required; the case must be one in which there is a material injury to the comfort of the inhabitants of the building which has suffered the damage (z).

The right of way is the right of going over another man's ground. (210)

(x) *Per* Lord Cranworth in *Clarke v. Clark*, L. R. 1 Ch. 16.

(y) *Jackson v. Duke of Newcastle*, 38 L. J. Ch. 698. See as to damages the following cases at law, *Back v. Stacey*, 2 Carr. & P. 465; *Parker v. Smith*, 5 Carr. & P. 498; *Pringle v. Wernham*, 7 Carr. & P. 877; *Wells v. Ody*, *Id.* 410.

(z) *Fishmongers' Co. v. I. I. Co.*, 1 Dick.

163; *A.-G. v. Nichol*, 16 Ves. 342; *Jackson v. Duke of Newcastle*, 38 L. J. Ch. 698, s. c. 4 N. R. 448. Under 21 & 22 Vict. c. 27, the Court of Chancery now has the power in those cases where it has jurisdiction to grant an injunction of assessing damages as well as or in lieu of granting an injunction. See *Johnson v. Wyatt*, 2 De G. J. & S. 18.

(210) The text relates to private ways alone. A brief notice of public ways may be of use in this connection. In this country public highways are established by a dedication of the land by the owner for the public use, or it is taken under the authority of the State by an exercise of the right of eminent domain. In most, and probably in all of the States, there are statutes relating to this subject, and they usually provide for the manner of determining the necessity for taking lands for highways, and for the payment of a proper compensation to the land owners. Statutes which authorize the taking of land for public highways, upon the payment of a fair price, are constitutional, as has been held in numerous cases. A dedication of land is an appropriation of it to some public use, made by the owner, and accepted by the public. An express dedication is one made by deed, vote or declaration; an implied dedication is one that is presumed from an acquiescence in the public use. No particular formality is required; for any act or declaration, whether written or oral, which clearly expresses an intention to dedicate, will amount to a dedication, if accepted by the public, and will conclude the donor from ever after asserting any right incompatible with the public use. *Hauley v. Baltimore*, 38 Md. 270; *Trickey v. Schlader*, 53 Ill. 78; *Pope v. Town of Union*, 3 C. E. Green (N. J.), 282; *Missouri Institute, etc., for Blind v. How*, 27 Mo. 211; *Haynes v. Thomas*, 7 Ind. 88; *Mayor, etc., of Macon v. Franklin*, 12 Ga. 289.

And even where there is no express appropriation by the owner, a dedication may be presumed from a public use of the land. *Louk v. Woods*, 15 Ill. 256; *Hughes v. Providence & Worcester R. R. Co.*, 2 R. I. 498; *Holt v. Sargent*, 15 Gray (Mass.), 97; *Onstott v. Murray*, 22 Iowa, 457; *Devenpeck v. Lambert*, 44 Barb. 596; *Holcraft v. King*, 25 Ind. 352; *Parrish v. Stevens*, 1 Oregon, 59; *Leviston v. Proctor*, 27 Ill. 414; *Lemon v. Hayden*, 13 Miss. 159; *Campton's Petition*, 41 N. H. 197.

A dedication is incomplete and does not bind the public unless they accept such dedication. *Pope v. Town of Union*, 3 C. E. Green (N. J.), 282; *Muzzey v. Davis*, 54 Me. 361; *Dodge v. Stacy*, 39 Vt. 558; *Gentleman v. Soule*, 32 Ill. 271.

The acceptance need not be express and in terms, but may be inferred and established by the use of the property dedicated; and such acceptance will be presumed when the acts of

It may be divided into several kinds, according to the limitation which may govern the enjoyment. Thus it may be limited to passage on foot or on horseback, but not in carriages; or it may be limited to particular kinds of vehicles, and for special purposes (a). Like other easements, it is limited to the requirements of the dominant tenement to the

(a) *Jackson v. Stacey*, Holt's N. P. 455; *Jones v. Moore*, Ld. Raym. 496; *M. of Stafford Knight v. Woore*, cited 5 Bing N. C. 625; *v. Coyney*, 7 B. & C. 257.

the public in using the land are such as are in harmony with the dedication, and are such as would occur in cases of acceptance. *Barbeau v. West*, 28 Wis. 416; *Buchanan v. Curtis*, 25 id. 99; *Manderschid v. Dubuque*, 29 Iowa, 73; *Beach v. Frankenberger*, 4 W. Va. 712; *Pickett v. Brown*, 18 La. Ann. 560; *Rees v. Chicago*, 38 Ill. 322; *State v. Atherton*, 16 N. H. 203; *Stevens v. Nashua*, 46 id. 192; *Day v. Allender*, 22 Md. 511; *New Orleans, etc., R. R. Co. v. Moya*, 39 Miss. 374; *Cole v. Sprout*, 35 Me. 161; *Curtiss v. Hoyt*, 19 Conn. 154; *Remington v. Millerd*, 1 R. I. 98; *State v. Carver*, 5 Strobb. 217.

Turnpikes and plank-roads are public highways. *Craig v. People*, 47 Ill. 487; *Benedict v. Gott*, 3 Barb. 459; *Commonwealth v. Wilkinson*, 16 Pick. 175; *Plank-road Co. v. Thomas*, 20 Penn. St. 91; *Ohagrín Falls, etc., P. R. Co. v. Cane*, 2 Ohio St. 419.

A right of way is frequently created or given by deed, and the right may be granted separately, or as appendant or appurtenant to an estate which is conveyed. So a right of way may be created by a reservation in a deed which conveys land, or by a devise. A right of way, which is devised in express terms, is appurtenant to the dominant estate, and passes by a conveyance of such estate without express mention of the appurtenances. *Lide v. Hadley*, 36 Ala. 627. A right of way which is appurtenant or annexed to an estate passes with a conveyance of the estate. And when a right of way is appurtenant to land it is appurtenant to the whole of it; and if the land be divided, and conveyed in separate parcels, a right of way thereby passes to each grantee. *Underwood v. Carney*, 1 Cush. (Mass.) 285. So, where the owner of a block in a city makes a partition of it among several persons, and in each deed makes an alley running through the block the boundary of the lots, each proprietor becomes entitled to a private right of way in the alley. *Carlin v. Paul*, 11 Mo. 32.

A right of way reserved by a grantor is an easement in gross, which is a mere personal right, and cannot be granted to another. *Garrison v. Rudd*, 19 Ill. 558.

A private way may be established by prescription; and if a person has used a way over the land of another for twenty years, it will be presumed that the use had its origin in a grant, if the following things concur: 1. The use must have been definite, both as to manner and as to locality. 2. It must have continued for the whole period without interruption. 3. It must have been accompanied by a claim of right adverse to the owner of the land, and not have been under leave and license of the owner; for if the claim has been in subordination to the right of the owner, a grant could not be presumed, since that would be inconsistent with the claim. *Sibley v. Ellis*, 11 Gray (Mass.), 417; *Peirce v. Cloud*, 42 Penn. St. 102; *Bannon v. Angier*, 2 Allen (Mass.), 128; *Hall v. McLeod*, 2 Metc. (Ky.) 98; *Johnson v. Stayton*, 5 Harr. (Del.) 448; *Garrett v. Jackson*, 20 Penn. St. 331; *Finch v. Marstin*, 24 N. H. 440; *Pierce v. Selleck*, 18 Conn. 321; *Golding v. Williams*, Dudley's S. C. 92; *Watt v. Trapp*, 2 Rich. (S. C.) 186.

A way of necessity exists where land is granted which is either wholly surrounded by land of the grantor, or partially by such land, and elsewhere by land of strangers. In such a case if there be no other way to the land, the law presumes that it was the intention of the parties that the grantee should have access to it over the land of the grantor, and he has a way across such last-mentioned land in order to make his grant available. *Brown v. Berry*, 6 Coldw. (Tenn.) 98; *Thomas v. Bertram*, 4 Bush (Ky.) 817; *Pettin-gill v. Porter*, 3 Allen (Mass.), 1; *Wissler v. Hershey*, 28 Penn. St. 333; *McTavish v. Carroll*, 7 Md. 352; *Kimball v. Cocheco R. R. Co.*, 27 N. H. 448; *Simmons v. Sines*, 4 Keyes, 153.

If the grantee of land has a way of access to the land granted, without crossing the grantor's land, a way of necessity will not exist. *Screen v. Gregoris*, 8 Rich. (S. C.)

ownership of which it is appendant, and the use of such owner and his servants and agents will regulate the right in those cases where an express grant cannot be produced (b).

(b) *Cowling v. Higginson*, 4 M. & W. 245.

158; *McDonald v. Lindall*, 8 Rawle, 492; *Ogden v. Grove*, 88 Penn. St. 487; *Turnbull v. Rivers*, 8 McCord, 181.

That the way which the grantee has is more inconvenient than to cross the grantor's land does not change the rule. 1b. But see *Pettingill v. Porter*, 8 Allen (Mass.), 1, as to a case where it would require unreasonable labor and expense to make such other way.

A grantor who sells and conveys land which entirely surrounds a parcel which he retains, will have a right of way by necessity over the lands so sold. *Brigham v. Smith*, 4 Gray (Mass.), 297.

But if land is bounded on one side by a highway, and on all other sides by the lands of other persons, and the owner sells the land next to the highway, he will have no right of way by necessity over this parcel so sold, if he has a right of way by prescription over the lands of one of such other owners by which he may reach the highway. *Leonard v. Leonard*, 2 Allen (Mass.), 548. So a lease of a portion of building, reserving a part of it to which there is access without going through the leased portion, will not give the lessor any implied right of way to the reserved part by going through the rented portion. *Ramires v. McCormick*, 4 Cal. 245.

A right of way by necessity is limited to the necessity, and it ceases whenever from any cause such necessity ceases to exist. *Abbott v. Stewartstown*, 47 N. H. 258; *Baker v. Crosby*, 9 Gray (Mass.), 421; *Viall v. Carpenter*, 14 id. 126; *New York Life Ins. & Trust Co. v. Milnor*, 1 Barb. Ch. 352; *Peirce v. Selleck*, 18 Conn. 321.

When a right of way by necessity is inconsistent with a grant, it will not exist, as in a case where land is conveyed for a specific purpose, and a way across it would defeat that purpose. *Seeley v. Bishop*, 19 Conn. 134. An owner of land who has a right of way for himself, his tenants and occupants across the lands of another person, may, by a sale of the timber on his land, transfer to the buyer the right to use that way for the removal of the timber. *Bartlett v. Prescott*, 41 N. H. 493.

If the owner of the servient tenement, over which a right of way exists, acquires the fee simple title to the dominant tenement, the right of way is extinguished; but if he acquires a life estate, as an estate for life, it is not extinguished. *Pearce v. McOlenaghan*, 5 Rich. 178. A right of way, appurtenant to land, over and upon adjoining land, is not extinguished by the vesting of both estates in the same person as a mortgagee until both mortgages are foreclosed. *Ritger v. Parker*, 8 Cush. (Mass.) 145.

A right of way may be deemed abandoned when the facts are such as to show an intention to abandon it, as by fencing up and ploughing the road, etc. *Crain v. Fox*, 16 Barb. 184. But this is not so where the use is discontinued merely for the reason that the party has a more convenient way, even though fenced up for seven years. *Hayford v. Spokesfield*, 100 Mass. 491.

Proof of mere non-user of a way created by deed, for a period less than twenty years, without proof of adverse enjoyment by the owner of the land, is not sufficient proof of an abandonment of the right. *Bannon v. Angier*, 2 Allen (Mass.), 128.

A right of way acquired by deed can never be lost by non-user; to be thus lost it must have been acquired by use. *Smyles v. Hastings*, 22 N. Y. (8 Smith) 217, 324; 24 Barb. 44. See also *Arnold v. Stevens*, 24 Pick. 106.

But evidence of an executed oral agreement between the owners of the dominant and the servient tenements to discontinue an old way and substitute a different one is competent evidence of a surrender of the old right of way. *Pope v. Devereux*, 5 Gray (Mass.), 409; *Lawton v. Tyson*, 12 Rich. Law (S. C.), 188.

The grantee who has such a right of way is bound to keep it in repair, and if it becomes impassable, he is not entitled to pass over other lands of the grantor. *Holmes v. Seely*, 19 Wend. 507; *Miller v. Bristol*, 12 Pick. 550. Where there is a right of way over land, the owner of it may use it in any manner he pleases, if it does not interfere with the right of way. *Atkins v. Borden*, 2 Metc. (Mass.) 457.

The right of lateral support to land by the adjacent land of a different owner is an easement which exists as a natural accessory of the soil, and may be extended to a house if properly acquired. If a man digs upon his own ground to such an extent that the land or an ancient house of his neighbour falls, he is liable to an action or a suit in equity to restrain him (c). (211) There may also *be an easement by which the owner of the servient tenement is bound to keep in repair a fence or [*44] party wall (e). (212)

The easement which remains to be considered is that by which a nuisance may be legalised. Thus if a man carry on a trade which causes offensive noises, smells, smoke, or other similar annoyances to his neighbours, he may, where such an easement has been duly acquired, be free from liability for the consequences; but the conditions under which easements are acquired must be strictly complied with (f); (213) and, moreover, the trade must be a lawful one, and calculated to be for the public benefit, and

(c) *Wilde v. Minsterley*, 2 Roll. Abr. 564; *Harris v. Ryding*, 5 M. & W. 60; *Hunt v. Peake*, John. 705; *Bibby v. Carter*, 4 H. & N. 153. See also *Backhouse v. Bonomi*, 9 H. L. Ca. 503; *Caledonian Railway Co. v. Sprot*, 2 Macq. 448; and *Caledonian Railway Co. v. Belhaven*, 8 Macq. 56; *Elliot v. North Eastern Railway Co.*, 10 H. L. 338. If the house be of recent erection, since the pressure of the house necessarily increases the liability of the ground upon which it is placed falling in, there would be no such action; *Wyatt v. Harrison*, 3 B. & Ad. 871; *Partridge v. Scott*, 3 M. & W. 220; *Stansell v. Jolland*, 1 Selw. N. P. 487; *Dodd v. Holms*, 1 Ad. & Ell. 493; *Nicklin v. Williams*, 10 Exch. 259.

(e) *Sury v. Pigot*, Poph. 166, s. c. Noy. 84; 3 Bulstr. 339; *Boyle v. Tamlyn*, 6 B. & C. 329, 337; *Matte v. Hawkins*, 5 Taunt. 20; *Cubitt v. Porter*, 8 B. & C. 257; *Bradlee v. Christ's Hospital*, 4 M. & Gr. 714, 716.

(f) *Stockport Waterworks v. Potter*, 8 H. & C. 800, s. c. 31 L. J. Exch. 9; *Aldred's case*, 9 Rep. 59 a; *Bradley v. Gill*, 1 Lutw. 69.

(211) The owners of adjoining lands may claim as a legal right the lateral support of the lands of each other while the land is in its natural state, and not burdened by the weight of buildings or other structures. And while each owner may dig upon his own land as he pleases, he is still prohibited by law from digging so near to his neighbor's lands, that they shall fall into the pit or excavation made by him. *Farrand v. Marshall*, 21 Barb. 409; *Austin v. Hudson River R. R. Co.*, 25 N. Y. (11 Smith) 334, 345; *McGuire v. Grant*, 1 Dutch. 356, 368; *Poley v. Wyeth*, 2 Allen (Mass.), 181; *Beard v. Murphy*, 37 Vt. 101.

But if an additional weight, such as a wall or a building, is erected upon lands, and it causes the land to slide or fall into an excavation made in the adjoining lands, when this would not have been the case if the lands were in their natural state, it is held by several cases that no action lies against the adjoining owner for properly digging upon his own soil. *ib.*; *Thurston v. Hancock*, 12 Mass. 226; *Lasala v. Holbrook*, 4 Paige, 169; *Richardson v. Vermont Central R. R. Co.*, 25 Vt. 465; *Charles v. Rankin*, 22 Mo. 566, 571; *Farrand v. Marshall*, 19 Barb. 880.

If, however, the owner of two lots of land conveys one of them upon which a house is standing, he cannot dig upon the other lot in such manner as to affect the house, because in that case it is entitled to the support of the latter lot. *McGuire v. Grant*, 1 Dutch. 356, 365; *United States v. Appleton*, 1 Sumn. 492, 500; *Eno v. Del Vecchio*, 4 Duer, 53.

(212) The right to support from a party wall is well settled in this country. *Eno v. Del Vecchio*, 4 Duer, 53; 6 id. 17; *Evans v. Jayne*, 23 Penn. St. 36; *Brondage v. Warner*, 2 Hill, 145; *Partridge v. Gilbert*, 15 N. Y. (1 Smith) 601.

(213) A right of way to take wood from a wood lot does not authorize the use of the land for other purposes after the wood has been taken off. *Atwater v. Bodfish*, 11 Gray (Mass.) 153. So the right to corrupt a stream to a limited extent does not authorize one to corrupt it in a different manner, or to a greater extent. *Holeman v. Bowling Spring Co.*, 1 McCarter, 346.

And the use of a water-way for the purpose of taking goods to a tavern does not authorize the use of the way for other occupants of the land and for other purposes than the occupancy of the tavern. *Bower v. Hill*, 2 Bing. (N. C.) 839.

must be carried on in a proper and reasonable manner (*g*), and in a proper place (*h*). The existence of nuisances in the neighbourhood which have been legalised by prescription, does not justify an additional nuisance even of the same kind (*i*). But a slight change in the character of a nuisance arising from improvements of mode of manufacture and in the ordinary course of business, but not increasing the nuisance, will not cause the right to be lost (*k*).

[* 45] * There are some other rights connected with the enjoyment of property not unlike easements, though distinguishable from them in this, that they all fall under the general right of an owner of property to enjoy that property without interference by others. Thus the support of the surface of land by subjacent minerals belonging to a different owner is not to be considered as an easement of the surface; yet if the mine-owner should work his mines so that the surface should sink, there would arise a cause of action or suit in respect of the subsidence (*l*), and this notwithstanding that the mines were worked skillfully (*m*). If a house falls in consequence of the improper and irregular pulling down of a neighbouring house, there would be a cause of action (*n*), although in the absence of express grant there is no liability on the part of the neighbouring owner to afford the lateral support of his building (*o*).

Easements of the various kinds we have described may, when acquired, be lost or extinguished in various ways, which may here be shortly indicated. Of course a formal release by the deed of the owner of the dominant tenement will effectually put an end of all claims upon the servient tenement. Also acts of parliament, such as enclosure acts, may obviously deal with these as with all *other rights, and so end them. On these [*46] modes of extinguishment no comment is required.

But, inasmuch as most easements are an infringement of the first principles of property as regards the servient tenements, the law is not slow to re-establish that right of property in its integrity, and therefore deduces from indirect circumstances the determination of the infringement. If, therefore, the owner of the dominant tenement ceases to take advantage of his rights, and the intention to abandon them can be inferred, the law declares that they cannot afterwards be resumed (*p*).

(*g*) Com. Dig. tit. *Action on the case for Nuisance*, C.; Vin. Abr. tit. *Nuisance*; *Cole v. Barlow*, 4 C. B. N. S. 434; *Stockport Waterworks v. Potter*, 8 H. & C. 800, s. c. 81 L. J. Exch. 9.

(*h*) If the character of the place changes after the easement is acquired through houses being built, the easement would of course remain.

(*i*) *St. Helen's Smelting Co. v. Tipping*, 11 H. L. Ca. 642.

(*k*) *Baxendale v. M' Murray*, L. R. 2 Ch. 790. (*l*) *Harris v. Ryding*, 5 M. & W. 60; see *Backhouse v. Bonomi*, 9 H. L. 503; *Wakefield v. Duke of Buccleugh*, L. R. 4 Eq. 613; *Caledonian Railway v. Sprot*, 2 Macq. 449; *Nichol v. Edwards*, 10 Exch. 259. In a grant there might be a reservation of right to cause subsidence of surface soil; *Roughtham v. Wilson*, 8 H. L. Ca. 384; overruling some of the dicta in *Hilton v. Lord Grangeville*, 5 Q. B. 701; and see *Bell v. Wilson*, L. R. 1 Ch. 303.

(*m*) *Humphries v. Brogden*, 12 Q. B. 739; *Smart v. Morton*, 5 E. & B. 80.

(*n*) *Walters v. Pfeil*, Mood. & Malk. 362.

(*o*) *Peyton v. Mayor of London*, 9 B. & C. 725; *Chadwick v. Trower*, 6 Bing. N. C. 1; *Massey v. Goyder*, 4 Car. & P. 161; *Solomon v. Vintners' Co.*, 4 H. & N. 585. As to where several houses requiring mutual support have been built by the same owner, see *Richards v. Rose*, 9 Exch. 218.

(*p*) *Liggins v. Inge*, 7 Bing. 682; *Luttrell's case*, 4 Rep. 86; *Lawrence v. Obee*, 3 Camp. 514; *Moore v. Rawson*, 3 B. & C. 332; *Stokes v. Singers*, 8 El. & B. 31. The intention to abandon must be clearly established: see *Hale v. Oldroyd*, 14 M. & W. 789; *Lovell v. Smith*, 3 C. B. N. S. 120; *Ward v. Ward*, 7 Exch. 838; and see *R. v. Chorley*, 12 Q. B. 515; *Crossley v. Lightowler*, L. R. 3 Eq. 279, s. c. on appeal, 2 Ch. Ap. 478; which case was very fully argued, both before the vice-chancellor and on appeal.

So, also, if the owner of the dominant tenement makes alterations therein, so that the easement cannot be enjoyed in the same way as previously, but necessarily imposes a greater burden upon the servient tenement, the easement will be lost (*g*); or if he allows an act to be done adverse to the easement, thereby indicating an abandonment of his right, it will be at an end (*r*).

From similar principles it follows that where an easement of an artificial character is imposed upon the servient tenement for the convenience of the dominant tenement, the possession of both by one owner puts an end to the easement (*s*), so that it will not revive on the *severance of the possession (*t*); because, during such unity of possession the enjoyment of the [* 47] easement has again become a part of the ownership of the servient tenement, and "one who hath an interest as owner of the land cannot have a particular interest in the same land also." Unity of possession does not, however, destroy an easement such as a watercourse which exists by nature (*u*), or one which is of absolute necessity (*v*); nor in any case unless the interests in the two tenements are equal (*x*).

III. The word rent or render, *reditus*, signifies a compensation or return given for the possession of an hereditament (*y*). The following requisites are necessary to constitute a good legal rent. It must be a profit.
 III. Rent. It is usually money, though not necessarily so, for spurs, capons, horses, corn, pepper, and other matters may be, and in old times frequently were, rendered by way of rent (*z*). It may also consist of services
 Its character- or manual operations, as to plough so many acres of ground, to istica. render military service, which the law in ancient times looked upon as profits. In modern times, however, these services have, for obvious reasons, fallen into disuse.

The profit, of whatever nature, must be certain, or capable of being reduced to certainty by either party. It must issue periodically, but not necessarily every year, for it may be validly reserved every second, third, or *fourth year (*a*), though, as it is to be produced out of the natural profits of [* 48] lands and tenements (*b*), and paid as a recompense for being permitted to hold or enjoy them, and as such natural profits in most cases (*c*) arise, or are renewed annually, it ought therefore to be reserved yearly. It must issue out of the thing granted, and not be part of the land itself, or even of the annual produce of the land, as the vesture or herbage; this requisite distinguishes a

(*g*) *Iuttrell's case*, 4 Rep. 86; *Cherrington v. Abney*, 2 Vern. 646; *Martin v. Goble*, 1 Camp. 320. See *Tapling v. Jones*, 11 H. L. 290, where the rule stated in the text is fully recognized, although some apparent applications of it in the previous cases of *Renshaw v. Bean*, 18 Q. B. 112; *Hutchinson v. Copestake*, 9 C. B. N. S. 863; *Weatherley v. Ross*, 1 H. & M. 849, were overruled.

(*r*) *Carr v. Foster*, 3 Q. B. 581.

(*s*) Bract. lib. 4, 221; *Hendon and Crouche's case*, 36 Eliz. Rot. 1832; *Dyer*, 295; *Sury v. Pigot*, Poph. 166, s. c. Noy, 84; 3 Bulstr. 339.

(*t*) *Whalley v. Thompson*, 1 Bos. & Pul. 371; *Pheasey v. Vicary*, 16 M. & W. 484.

(*u*) *Sury v. Pigot*, *ubi sup.*

(*v*) *Jordan v. Atwood*, 1 Roll. Abr. 939; *Pheasey v. Vicary*, 16 M. & W. 484.

(*x*) *Thomas v. Thomas*, 1 Cr. M. & R. 41; *R. v. Inhabitants of Hermitage*, Carth. 239; *Canham v. Fisk*, 2 Cr. & J. 126.

(*y*) Co. Litt. 144.

(*z*) *Ib.* 142. Where it is intended that the rent should be nominal, but that a leasehold tenancy should be created, it is usual at the present day for the rent reserved by the lessor to be a peppercorn.

(*a*) Co. Litt. 47.

(*b*) *Clun's case*, 10 Rep. 127.

(*c*) Not in all cases, e. g., plantations of wood do not yield profit annually, but are usually cut at intervals of a few years. *Browning v. Beeston*, Plowd. 181; Co. Litt. 142.

reservation of rent from an exception in the grant, which is always of part of the thing granted (*d*). An exception to this exists in the case of mines, quarries, &c., where the rent or royalty consists commonly of a fixed proportion of the ore raised or stone gotten, which, it is to be observed, is a part of the land itself (*e*).

Lastly, with some few exceptions, the thing granted, subject to a reservation of rent, must be lands and tenements corporeal, to which the grantor or owner of the rent may have recourse to distrain. A rent cannot be reserved out of an advowson, a common, an office, a franchise, or other incorporeal hereditament (*f*), nor out of personal chattels (*g*). An attempt to create a rent of [*49] any of these *things may create by way of contract a valid burden upon their possessor, so that he may be liable to pay the annuity as a debt, yet it in no way affects the property so as to continue a burden upon it in the hands of an alienee without notice of the contract: it is no legal rent in contemplation of law, and the ordinary legal remedy of distress does not apply.

The exceptions referred to are as follows: a rent may be reserved out of a reversion or remainder to which rent is incident (*h*); this, though incorporeal, will become corporeal, and then the remedy of distress will apply, so as to recover all arrears. A rent also may be reserved out of the herbage of land, because the cattle upon the land may be distrained (*i*). Again, tithes may be granted subject to a rent; this arises from statutory enactment (*k*). Lastly, the crown is subject to no restriction as to the reservation of rent, having by its prerogative power to distrain upon all lands of its lessee (*l*).

There were at common law three kinds of rents: rent-service, rent-charge, rent-seek (*m*). Statutory changes in the law and the disuse of feudal customs have rendered this division of rents of small practical importance. Different kinds of rent. It is nevertheless necessary for some purposes, and at least interesting, to have some knowledge of their distinctions, which are as follows:

Rent-service. Rent-service is that which is due from a tenant who holds his lands upon condition of fealty (or taking the feudal oath of fidelity) and payment of a certain rent, and either with or without the performance of other services. If, for instance, a tenant of a manor holds his land upon the condition of rendering to the lord of the manor the services customary in the manor, and such as ploughing the lord's land and paying 5*s.* rent, such a [*50] *rent is a rent-service. (214) It is closely connected with the feudal system of tenure, which we shall hereafter discuss. Rent-service there-

(*d*) Co. Litt. 142; see also *Wickham v. Hawker*, 7 M. & W. 68; *Doe d. Douglas v. Lock*, 2 A. & E. 705; *Durham and Sunderland Railway Co. v. Walker*, 2 Q. B. 940; *Pannell v. Mill*, 3 C. B. 625.

(*e*) *Campbell v. Leach*, Amb. 740; *Buckley v. Kenyon*, 10 East, 198; *R. v. Earl of Pomfret*, 5 M. & S. 189; *R. v. Inhabitants of St. Austell*, 5 B. & Al. 698; *R. v. Westbrook*, 10 Q. B. 178.

(*f*) Co. Litt. 144; *Jewel's case*, 5 Rep. 3, a. See as to this case, *Bally v. Wells*, 3 Wils. 25; *Doubitofte v. Curteene*, Cro. Jac. 452.

(*g*) *Spencer's case*, 5 Rep. 176; *Newman v. Arderton*, 2 B. & P. New B. 224; where a

landlord was allowed to distrain for the rent of furnished lodgings, but upon the principle that though in reality the rent might be increased by the existence of the furniture, yet in law it issued out of the house and not the furniture. *Doubitofte v. Curteene*, Cro. Jac. 452; *Farewell v. Dickenson*, 6 B. & C. 251.

(*h*) Co. Litt. 47, 142.

(*i*) Co. Litt. 47.

(*k*) 5 Geo. 8, c. 17; and see 6 & 7 Will. 4, c. 71; *Tasker v. Bullman*, 3 Exch. 351.

(*l*) Co. Litt. 47, 4 New Abr. 192; *Gilb. Rents*, 26.

(*m*) Litt. s. 218.

(214) See *Van Rensselaer v. Hays*, 19 N. Y. (5 Smith) 68; *Cruger v. McLaury*, 41 N. Y. (2 Hand) 219, 227, n.; *Central Bank of Troy v. Heydorn*, 48 N. Y. (3 Sick.) 260.

fore includes, in addition to the usual rent of the nature of tribute, some corporal service, now to a great extent fallen into disuse. But there are a few cases where this corporal service has remained as the most substantial part of the rent. Thus, some lands are held by the service of keeping up a grindstone for the convenience of a manor, and paying a peppercorn rent (*n*), or cleansing the parish church (*o*), or ringing the church bells at stated hours (*p*). The most remarkable characteristic which the common law attached to rent-service was, that in case it should be in arrear on the day it ought to be paid, the lord or reversioner had the right of distraining, even though no contract to that effect existed between the parties. Of this power of distress we shall say more hereafter.

It follows from what has just been said, that the reservation of rent-service must be made, if to any person by name or description, to the owner of the reversion; if it be attempted to be made to a stranger, the liability to pay on the part of the grantee would, if existent at all, rest on contract only, unless the execution of the grantee of the deed of grant can be construed as creating a charge upon the land by him (*q*), and then a rent-charge and not rent-service will be created. If the reservation be of a rent *simpliciter* without saying to whom, it is a good reservation (*r*).

By the common law a lease might be granted and rent-service reserved by parol, without any written document (*s*). This being found to lead to many disputes as to the conditions of the tenancy, the Statute of Frauds was passed (*t*), which enacted that all leases and other interests there specified, not put in writing and signed by the parties thereto or their agents thereunto lawfully authorised in writing, should have the effect of leases at will only, but it excepted leases for terms not exceeding three years from the making thereof, and upon which the rent reserved amounted to two-thirds at least of the full value of the land. Under this act there still continued much litigation, principally in determining whether a given instrument operated as a present demise or merely as an agreement for a lease (*u*). With the view of putting an end to this, an act (*x*) has been recently passed, by which all leases which are required by law to be in writing are rendered void at law unless made by deed. The effect of these acts then is that now all instruments, whether they would otherwise be held to operate as demises or not, create no tenancy at law, and therefore give rise to none of the legal incidents of tenancy unless they fall within the exception contained in the second section of the Statute of Frauds. But an instrument thus void as a lease will now, it seems, be construed as an agreement and specifically enforced as such in a court of equity (*y*); and even courts of law will endeavour

(*n*) *Doe d. Robinson v. Hinde*, 2 M. & Rob. 44.

(*o*) *Doe d. Edney v. Benham*, 7 Q. B. 976, 981.

(*p*) *Doe d. Edney v. Billel*, *ib.*

(*q*) Hob. 130.

(*r*) *Whitlock's case*, 5 Rep. 71; where this is described as the surest way, at least when the lease is made under a power.

(*s*) Litt. s. 214; *Pascos v. Pascos*, 3 Bing. N. C. 898.

(*t*) 29 Car. 2, c. 3, ss. 1, 2.

(*u*) See the cases collected in Bythewood's *Conv. Leases*, c. 2, 3rd ed.; the law upon this

subject is now, as will be seen, of slight importance, except in the rare cases where such a question arises in reference to a tenancy for not more than three years, and in those cases where the instrument in question is a deed.

(*x*) 8 & 9 Vict. c. 106, s. 3, which repealed 7 & 8 Vict. c. 76, s. 4, an enactment made with a similar intention, but inaccurately framed with reference to the existing law; see *Stratton v. Pettit*, 16 C. B. 420.

(*y*) *Parker v. Tansell*, 2 De G. & J. 559; see also *Cowen v. Phillips*, 33 Beav. 18, in which case the term does not appear.

to construe it in a similar manner, so as to give a remedy by action for breach [*52] of the agreement (z). Moreover, if a *tenancy be created by occupation and payment of rent taken and made under a lease invalid by the statute, a court of law will still admit the document for the purpose of showing the conditions of the tenancy from year to year, which the law would imply as existing (a). The statute does not therefore take away all rights under the instruments against which it was directed, but rather tends to settle the mode in which such rights should be enforced.

We may here notice that the interest of the grantee of lands under a grant by which rent-service is reserved must be less than a fee simple. The statute commonly called *Quia Emptores* (18 Ed. 1) enacted in substance that no tenure should thenceforward be created upon an alienation in fee (b), and consequently in order that there can be any tenure, the estate granted must be such as to leave a reversionary interest in the grantor; and it is to this reversion that in law rent-service is considered as incident (c), and therefore the rent must be reserved to the grantor, i. e. the reversioner (d).

A rent-charge is a rent unaccompanied by any corporal service or personal relation between the tenant of the land and the owner of the charge, who need not be and usually is not the owner of any reversionary interest in the land expectant upon the determination of the tenant's interest.

Rent-charge. The power of distress is however incident to it, *but is made so by contract. Thus, if a man grant land absolutely, subject only to a perpetual rent, and in the deed of grant there is a covenant or clause giving the owner of the rent power of distress in case of the rent being in arrear, then this is a valid rent-charge (e); or if an owner of land grant a rent to issue out of it, whether for years or for any more lasting interest, and superadd to the grant a clause of distress, this would be to create a rent-charge.

Rent-seck, *reditus siccus*, or barren rent, is a rent, not like rent-service made incident to any reversionary interest in the lands, but payable like rent-charge by contract, and is distinguished from rent-charge by the absence from the contract of any clause of distress. Consequently, unless the old writ of assize could be brought which required seisin to be acquired by the receipt of some portion of the rent, there was formerly no remedy for recovering the rent except by action for damage upon the contract. A statute, however, has been passed (f) giving to rent-seck the same remedy by distress as exists in the case of rents reserved upon lease, i. e. rent-services. Rent-service and rent-seck can only be created *inter vivos* and by deed. A rent-charge may be created by will or deed.

(a) *Tress v. Savage*, 4 E. & B. 36; *Bond v. Roeling*, 1 B. & S. 371; s. c. 30 L. J. Q. B. 227; *Rollason v. Leon*, 31 L. J. Exch. 96; *Tidey v. Mollett*, 33 L. J. C. P. 235.

(b) *Lee v. Smith*, 9 Exch. 663.

(c) *Fœffatus teneat terram illam de capitali domino*, see Co. Litt. 140; and as to the creation of tenures since the statute by a non obstante, *Delacherois v. Delacherois*, 11 H. L. 62.

(d) Whether the assignment of rent by a reversioner in a lease carries the reversion, *quære*; *Taylor v. Martindale*, 1 Y. & C. C. 658. The converse is of course true that the assignment of the reversion carries the rent.

(e) Though, as will be seen, a reservation

of rent to a stranger in a deed executed by the grantee would create a rent-charge, and by virtue of the Statute of Uses may do so, even if it be not so executed. See *Gilbertson v. Richards*, 4 H. & N. 277; 5 ib. 453.

(f) This is a very common mode of dealing with building land, particularly in many towns in Lancashire. A large part of Manchester is built upon lands subject to perpetual rent-charges. See as to the creation of rent charges, the case above cited, *Gilbertson v. Richards*, 4 H. & N. 277; 5 ib. 453.

(g) 5 Geo. 2, c. 28, s. 5. The statute gives the remedy in question for all such rents as had been paid for three years before the passing of the act, or have been created since.

There are a few varieties of the above classes of rents, to which particular names have been given. Thus, certain established rents of freeholders and ancient copyholders of a manor, which cannot be varied or departed from, are called rents of assize (*g*). Those of the freeholders are *frequently called chief rents, *reditus capitales*, and both are indifferently described as quit rents (*h*), *quieti reditus*; because thereby the tenant goes quit and free of all [*54] other services. When these payments were reserved in silver or white money, they were anciently called white-rents, or blanch-farms, *reditus albi*, in contradistinction to rents reserved in work, grain, or baser money, which were called *reditus nigri*, or black mail. Rack-rent is only a rent of the full value of the tenement, or near it. A fee farm rent seems to be a name given to a perpetual rent-charge, though there is some controversy as to the exact meaning of the word. Lord Coke's definition is a rent-charge of at least one-fourth part of the value of the land (*i*).

It may be useful here, although somewhat in anticipation of the subject, so far to notice an annuity as to distinguish it from a rent-charge, with which it is frequently confounded. An annuity is a sum of money payable by contract at fixed regularly recurring epochs, which are usually determined by reference to the civil year, although the intervals between them need not be in every case years, they may either be greater or less than a year (*k*). It is chargeable only upon the person of the grantor, unlike a rent-charge, which always issues out of specific land. It is of course incorporeal in its nature, and may, in a limited sense, be described as an hereditament, because the law permits it to be limited to a man *and his heirs, or to a man and the heirs of his body, so that it in that case descends, upon death and [*55] intestacy, to the person who would succeed to land limited in the same manner, and it is forfeitable for treason (*l*), and moreover, like incorporeal hereditaments strictly so called, it can only be granted or transferred by deed (*m*), though the contract to grant an annuity will be binding and enforced against the estate of the proposed grantor (*n*).

But notwithstanding these peculiarities, by which an annuity in some cases resembles an hereditament, it must be considered as being personal property (*o*). It "concerneth no land, nor savoureth of the realty" (*p*), and cannot be entailed like land, and the effect of a limitation to a man and the heirs of his body in the case of an annuity, is to give him a conditional interest, which becomes absolute on the birth of an heir-apparent, so that he can then aliene

(*g*) 2 Inst. 19.

(*h*) These names are very commonly used colloquially to describe perpetual rent-charges, such as those mentioned in a preceding note. In old deeds of conveyance, and the common forms of old conveyancing books, the language frequently implies the existence of these rents, although no trace is to be found of any manor within whose limits the land lies. Such words ought to be, and in modern practice always are, omitted.

(*i*) Co. Litt. 143; see Mr. Hargrave's note thereon; *Mad. Firm. Burg.* 8; *Spelm. Gloss. voc. Feodi-firma*, 2 Inst. 44; *Bradbury v. Wright*, Dougl. 624, 627; *Rivis v. Watson*, 5 M. & W. 255, 261; *Delacherois v. Delacherois*, 11 H. L. 62.

(*k*) *Dyer*, 24, 344; *Roll. Abr. Annuity*; in

Co. Litt. 144, the definition is "a yearly payment, &c."

(*l*) 7 Rep. 85.

(*m*) Co. Litt. 144 b; *Re Locke*, 2 D. & Ry. 608.

(*n*) *Nield v. Smith*, 14 Ves. 491; as to the remedies which the grantee or his representative may have for an annuity, see *Cupit v. Jackson*, 18 Price, 731.

(*o*) *Aubin v. Daly*, 4 B. & Al. 59; *Taylor v. Martindale*, 12 Sim. 158, where the question arose whether an annuity passed under a will made prior to the Wills Act, and insufficiently attested to pass real estate; see also *Ramsay v. Thorngate*, 16 Sim. 575.

(*p*) Co. Litt. 20; see *Earl of Stafford v. Buckley*, 2 Ves. S. 171; *Radburn v. Jervis*, 3 Beav. 450, 461.

at pleasure (*q*). It was formerly doubted whether an annuity was assignable, even though assigns were mentioned in the grant, the argument being that it was a mere personal contract, and therefore a chose in action. The contrary, however, has long been established as the law (*r*).

[*56] *We have seen that rent is something given in return for the use and enjoyment of the land demised: the tenant is presumably enabled to pay it by means of the profits of the land, when it consists of money or provisions; when it consists of personal services, he is presumably supported by the profits of the land, so as to be capable of rendering the services. The law in ancient times founded upon this theory the rule that rent did not, like interest upon a debt, accrue *de die in diem*, but that even when it consisted of money or provisions, it was a single entire thing payable on the day fixed (*s*). When the rent consisted of personal services, a similar rule was adopted that the lord had no claim in respect of them till the appointed day. In the latter case the rule is fair, and is not calculated to work injustice, but in the case of the rent consisting of money, many difficulties leading to much injustice arose from this rule. By the occurrence of various events it obviously may often happen that several persons may reasonably claim to be entitled to share the rent. Thus, if a tenant for life of lands subject to a lease for years, died between two rent days it would be clearly fair that his executors should receive a proportion of the rent, yet by the common law, even if he died on the morning of rent day, they were entitled to nothing, but the remainderman, by virtue of his interest when the rent actually became due, received the whole (*t*). The same result arose whether the lease was granted by the tenant in fee or by a tenant for life with a power of leasing. Where a lease was granted by a tenant for life, without a power of leasing, so that the interest under the lease expired at the death of the lessor, and the lessor died between two rent days, then the lessee paid nothing in *respect of the period which had elapsed [57] since the previous rent day, because the executors of the tenant for life could not claim it, and the remainderman had no interest in the land during the lease (*u*). A similar rule against apportionment was adopted as to annuities (*x*), with some exceptions (*y*).

In order to remedy some of the evils we have referred to, the statute 11 Geo. 2, c. 19, s. 15 was passed, which enacted that where any tenant for life should die before or on the day on which rent was received or made payable, upon any demise of lands which determined on the death of

(*q*) The same conditional interest as that which, before the statute of Westminster 2 (13 Ed. 1, c. 1) would be conferred by a similar limitation of land, as to which see *post*, the chapter on Estate Tail; Co. Litt. 19; *Turner v. Turner*, 2 Ambler, 782; *Earl of Stafford v. Buckley*, 2 Ves. 8. 171.

(*r*) See Hargrave's note to Co. Litt. 144 b; and as to the old remedies for recovery of the annuity by writ of annuity, see Co. Litt. 144.

(*s*) Therefore if a landlord during a current period did anything to disentitle his demanding the rent on the proper rent day, he lost all the rent; *Hall v. Burgess*, 5 B. & C. 882; *Grimman v. Legge*, 8 ib. 824.

(*t*) *Southern v. Reliance*, 1 P. W. 178; *Straford v. Wentworth*, Prec. Chanc. 555; s. c. 1 P. W. 180, 9 Mod. 21; and see 1 Swanst. 845 n.

(*u*) *Jenner v. Morgan*, 1 P. W. 392; *Hay v. Palmer*, 2 P. W. 502; and see Williams, Exors., pt. ii. bk. iii. c. 1, s. 2, for a statement of other cases.

(*x*) *Pearley v. Smith*, 3 Atk. 261; *Hay v. Palmer*, 2 P. W. 502; *Howell v. Hanforth*, 2 W. Bl. 1016.

(*y*) *Clun's case*, 10 Rep. 127; *Howell v. Hanforth*, 2 W. Bl. 1016, where it was said that if the annuity was for the support of an infant, or of a married woman living apart from her husband, the law would apportion it in the case of death between the days of payment; see *Ex parte Smyth*, 1 Swanst. 849; *St. Aubyn v. St. Aubyn*, 1 Dr. & S. 611; *Wheeler v. Tootel*, L. R. 3 Eq. 571.

such tenant for life (*z*), the executors should be able to recover a due proportion of the rent in respect of the time during which such tenant for life should have lived (*a*). The operation of this statute was extended by judicial interpretation somewhat beyond what its terms seemed strictly to include (*b*); but even so, many cases *involving a mischief similar to that aimed at by the [* 58] statute, remained without a remedy. With the view of removing doubts upon its construction and extending the benefit of it, another act (*c*) has been recently passed, by which it is enacted (*d*) that rents reserved and made payable upon any lease "which have been and which shall be made, and which leases or demises determined or shall determine on the death of the person making the same (although such person was not strictly tenant for life thereof), or on the death of the life or lives for which such person was entitled to such hereditaments," should be deemed to be within the provisions of the former act (*e*). It is further enacted (*f*) that all rent-service reserved by any lease (*g*) granted by a tenant in fee, or for life, or by any lease granted under any power (and which leases shall have been granted after the passing of the act (*h*)), *and all [* 59] rents-charge and other rents, annuities, pensions, moduses, compositions, and all other payments of every description in the United Kingdom of Great Britain and Ireland (*i*), made payable or coming due at fixed periods (*k*), under any instrument (*l*) that shall be executed after the passing of the

(*e*) This does not extend to tenant *pur autre vie*; *Wykham v. Wykham*, 3 Taunt. 881; *Mills v. Trumper*, 17 W. R. 428; reversing s. c. L. R. 1 Eq. 671.

(*a*) See *Ex parte Smyth*, 1 Swanst. 387, where rent paid by yearly tenants to whom the land had been demised by the tenant for life was apportioned, on the ground that the tenancies expired on the death of the tenant for life; *Harrop v. Wilson*, 34 Beav. 166. In *Brown v. Candler*, 9 L. J. O. S. 212, Lord Brougham held that a case somewhat similar to *Ex parte Smyth* did not come within the act. Probably (though the report does not show this) the yearly tenancies were created by the settler, and not by the tenant for life, in which case they would not expire at her death, and there would be no apportionment.

(*b*) See *Whitfield v. Pindar*, cited 2 Bro. C. C. 662, 8 Ves. 811, where the representatives of a tenant in tail obtained the benefit of the act upon a lease not binding on the issue in tail; so *Paget v. Gee*, Burn's Just. 1. p. 481; *Amb. 198*; 3 Swanst. 694 (tenant in tail after possibility extinct); *Vernon v. Vernon*, 2 Bro. 659 (also tenant in tail); *Hawkins v. Kelly*, 8 Ves. 811 (rector); *Aynsley v. Wordsworth*, 2 V. & B. 885 (rector); *Wykham v. Wykham*, 3 Taunt. 881; *Clarkson v. Scarborough*, 1 Swanst. 354; *Symons v. Symons*, 6 Mad. 207; *Keoil v. Davies*, 15 Sim. 466.

(*c*) 4 W. 4, c. 22.

(*d*) Sect. 1.

(*e*) See *Oldershaw v. Holt*, 12 A. & E. 590, 596, where it is pointed out that a lease for the life of the lessee granted by a tenant in fee is a *casus omissus*.

(*f*) Sect. 2.

(*g*) It has been held that the letting must be by lease, and not by parol, in order to

bring the case within the act; *Re Markby*, 4 M. & C. 484; *Cattley v. Arnold*, 28 L. J. Ch. 852. But it would seem that such letting would create a periodical payment, which might fall within the second part of the section; see *Plummer v. Whiteley*, John. 585; *Wardroper v. Outfield*, 33 L. J. Ch. 605.

(*h*) The act received the royal assent on the 16th June, 1834. With reference to this part of the section it is settled that the act applies to all rent-service reserved by leases made subsequently to the act, even if made under powers created prior to it, and that the date of the settlement creating the life interest in such rents is immaterial. *Lock v. De Burgh*, 4 De G. & Sm. 470; *Plummer v. Whiteley*, John. 585; *Wardroper v. Outfield*, 33 L. J. Ch. 605 (in which V. C. Kindersley explained and qualified his previous judgment in *Fletcher v. Moore*, 26 L. J. Ch. 580); *Llewellyn v. Rous*, L. R. 2 Eq. 27. As to the second part of the clause relating to rent-charges, annuities, etc., it is also settled that the "instrument" there referred to is that creating the life interest, and not creating the obligation to pay the periodical payment. *Knight v. Boughton*, 12 Beav. 812; *Wardroper v. Outfield*, 33 L. J. Ch. 605; *Llewellyn v. Rous*, L. R. 2 Eq. 27.

(*i*) Including Scotland. *Fordyce v. Bridges*, 1 H. L. 1.

(*k*) As to the meaning and effect of these words, see *St. Aubyn v. St. Aubyn*, 1 Dr. & S. 611; *Llewellyn v. Rous*, L. R. 2 Eq. 27. They may include dividends in public companies when declared at stated intervals, see *Carter v. Taggart*, 16 Sim. 447; *Hartley v. Allen*, 27 L. J. Ch. 621; *Re Maxwell's Trusts*, 1 N. R. 549.

(*l*) Sup. n. (*h*.)

act (*m*), or (being a will or testamentary instrument) that shall come into operation after the passing of the act, shall be apportioned so and in such manner that on the death (*n*) of any person interested in the rent or other periodical payment (*o*), or in the estate fund office *or benefice from which the [60] same shall be derived, "or on the determination by any other means whatsoever of the interest of such person," he or she or his or her executors shall be entitled to a part of the rent or other periodical payment, proportionate to the time which shall have elapsed between the last payment and the day of the death or other determination (*p*). The section then provides the mode in which such proportionate part is to be recovered.

The provisions of the act have been extended by statute to rent-charge payable in lieu of tithes under the Tithes Commutation Act (*q*). It will be observed that apportionment under the act 4 Will. 4, c. 22, as to some of the cases falling under section 2, applies only to periodical payments which have been settled by deed or will since the passing of that act. The previous law, therefore, still often applies where the instrument of settlement took effect before that date (*r*). The operation of the statute may (*s*) be excluded by express (*t*) stipulation.

* We have so far been considering the cases in which an equitable [61] adjustment of rights requires an apportionment of a rent of an annuity in respect of periods of time. But in the case of a rent issuing out of or charged upon lands, it is obvious that analogous cases requiring an adjustment of proportionate parts of the rent, may arise upon a severance of ownership of particular parts of the land subject to the rent. Where a rent is charged upon a piece of land the whole rent may be distrained for out of any part of the

(*m*) As to the questions arising on these words, see *Michell v. Michell*, 4 Beav. 549; *Re Longworth's estate*, 1 K. & J. 1; *Ex parte Bishop of London*, 3 N. R. 246; *Re Lawton's estate*, L. R. 8 Eq. 469; *Peers v. Sneyd*, 17 Beav. 151. As to cases of apportionment not coming strictly within the act, see *Lord Lonsborough v. Somerville*, 19 Beav. 295; *Scholefield v. Redfern*, 2 Dr. & S. 173; *Bulkeley v. Stephens*, 3 N. R. 105; *Freman v. Whitbread*, L. R. 1 Eq. 266, where the question is discussed whether, on a change of investment of a trust fund when stock is sold out, a tenant for life is entitled to a share of the purchase money proportioned to the time which has elapsed since the preceding dividend was paid. The result of these is that such apportionment will only be made in very special circumstances.

(*n*) The act has been held not to apply so as to apportion rents between the real and personal representatives of a tenant in fee. *Browne v. Amyot*, 8 Hare, 178; *Beer v. Beer*, 12 C. B. 60; *Re Chulow's estates*, 3 K. & J. 689; it would seem to apply (if the leases be granted since it was passed) between the personal representatives of a tenant in tail, and the remaindermen in tail; and see *Kevill v. Davies*, 15 Sim. 466, in which case, however, the grounds of the decision are not stated.

(*o*) The act has been held by V.-C. Kindersley in *Trimmer v. Danby*, 23 L. J. Ch. 979, to apply to an annuity which terminates on

the death of the annuitant. The phraseology of the act is obscure on the point whether the periodical payment ceases with the death, but that case is, as the Vice-Chancellor remarks, so clearly within the mischief contemplated by the act, that such a construction is the natural one. See, however, *R. v. Lords of the Treasury*, 16 Q. B. 357.

(*p*) The determination by "other means" does not extend to the case of eviction of a tenant by the landlord in the interval between two quarter days, see *Slack v. Sharpe*, 8 A. & E. 366; *Oldershaw v. Holt*, 12 A. & E. 590. Whether it would do so on the eviction by a paramount title, see 1 Roll. Abr. 235; *Stevenson v. Lambard*, 2 East, 575. If a tenant be evicted from part of the premises by his landlord, a suspension of the whole rent during the continuance of the eviction will take place; *Morison v. Chadwick*, 7 C. B. 266; *Newton v. Allen*, 1 Q. B. 518.

(*q*) 6 & 7 Will. 4, c. 71, see s. 86.

(*r*) See as to this, in addition to the cases previously cited, *Kevill v. Davies*, 15 Sim. 466; *Norris v. Harrison*, 2 Mad. 268; *Anderson v. Dwyer*, 1 Sch. & Let. 301; *Sheppard v. Wilson*, 4 Hare, 892; *Botherby v. Woolley*, 5 Tyrwh. 522; *Shipperdson v. Tower*, 8 Jur. 485; *Warden v. Ashburner*, 2 De G. & S. 366; *Re Lawton estates*, L. R. 8 Eq. 469.

(*s*) Sect. 3.

(*t*) But not by implication from the context; *Tyrrell v. Clark*, 2 Dr. 86.

land and the owner of the rent is in no way restricted in the selection. It follows from this that where the lands become divided among several owners, so that different parts belong to different individuals, there could be no apportionment of the rent so as to render the separate parts liable only to their proportionate rent (*u*), without the consent of the owner of the rent (*x*). But by the common law this could not be effected even with the consent of the owner of the rent, because it was long considered that a rent was one entire indivisible thing; so if he released part of the lands he must be deemed to release all (*y*). Consequently there was no satisfactory means of apportioning the rent upon particular parts, so as to render them liable only for their apportioned parts (*z*).

To obviate this difficulty a statute (*a*) has been passed, which enacted (*b*) that the release of a part of the hereditaments charged should not extinguish the whole rent-charge, but should only operate to bar the right to recover * the rent out of the hereditaments released, without prejudice, nevertheless, to the rights of all persons interested in the hereditaments [*62] remaining unreleased, and not concurring in or confirming the same (*c*). It is presumed that this would extend to enable a release to be made of part of the lands from a proportionate part of the rent, and of the remainder of the lands from the residue, thus effecting a complete and satisfactory apportionment.

Where an owner of a rent-service purchases, or acquires by descent or devise, part of the land out of which the rent issues, by the common law the owner of the remainder of the lands is released from an apportioned part of the rent (*d*). In the case of a rent-charge, if part of the lands descend to the owner of the rent-charge, there also is an apportionment (*e*); but, on the other hand, if he purchase or accept by devise part of the lands, the whole rent-charge is thereby extinguished (*f*). To those cases, however, where as above mentioned a rent-service would be if possible apportioned, there is the exception that if it consist of personal services to the lord which by their nature are incapable of apportionment, or if it consists of rendering yearly "a horse, a golden spear, or a clover, gilliflower or such like," then the rent is entirely extinguished upon any part of the lands becoming the property of the lord (*g*).

Unless, indeed, the services be for the benefit of the *public, as to repair a bridge, or keep a beacon, or for the advancement of justice, in which case the liability for the whole rent continues charged upon the land [*63] remaining in the hands of the tenant (*h*). Where a tenant has been evicted

(*u*) *Gamon v. Vernon*, 2 Lev. 231; *Stevenson v. Lambard*, 2 East, 580; 1 Roll. Abr. 235; *Curtis v. Spitty*, 1 Scott, 787.

(*x*) This, though necessarily the case, often leads to great difficulties in dealing with lands comprised in a lease.

(*y*) 18 Vin. Abr. 504; Co. Litt. 148 a; and see 8 Vin. Abr. 10.

(*z*) See *Butler v. Monings*, Noy, 5; *Deus v. Jefferies*, Cro. Eliz. 852; Shep. Touch. by Prest. 845; *Walmesley v. Cooper*, 11 A. & E. 216.

(*a*) 22 & 23 Vict. c. 85.

(*b*) Sect. 10.

(*c*) This saving is probably only declaratory of what the law would have been even if it had been omitted, since the owner of part of lands charged, if obliged to pay the whole

rent, is entitled to demand proportionate contribution from the owner of the remainder; this right ought of course to be unaffected by any contract between the latter and the owner of the rent.

(*d*) Litt. 222.

(*e*) *Ib.* 224; Gilb. Rents, 156; see also *Wotton v. Shirt*, Cro. Eliz. 742; *Campbell's case*, 1 Roll. Ab. 237.

(*f*) Co. Litt. 147 b; *Dennett v. Pass*, 1 Bing. N. C. 898; this case seems not to have been dealt with by Lord St. Leonards' Act above cited. It would seem, however, equally to require that an apportionment should be made.

(*g*) Litt. 222; *Talbot's case*, 8 Rep. 104.

(*h*) Co. Litt. 149 a; Gilb. 166.

from part of the lands the rent will be apportioned, and he will be released *pro tanto* (*i*), and it is said (*k*) the same result would hold if the tenant lose the land through the act of God, as if part be washed away by the sea.

Previously to the statute above mentioned, the legislature had provided for the apportionment of rents where part of the land is taken for the purposes of a railway or other similar public company (*l*), or for building a church (*m*).

It may be mentioned that in these cases equity anticipated the recent statutory changes of the law. Where the rent-charge was granted out of an equitable estate, no release of part ever affected the right to the remainder.

At common law, if the reversion to which a rent-service was incident became partitioned upon a descent or devise to several persons, the rent was apportioned (*n*), and this was also the case upon a conveyance of the reversion in part of the lands, subject to the necessity of attornment or recognition of title under the conveyance by the tenant (*o*). Attornment is now by statute (*p*) rendered unnecessary, and therefore the owner of a rent-service, of whatever kind, is at liberty to devise or convey it to several persons at pleasure, and the devisees or assignees may make several distresses. Modern cases have extended the same power of disposition to owners of rent-charges (*q*). (215)

*With reference to the payment of rent, if no particular place is mentioned in the reservation or grant, the regular place for the payment is upon the land subject to it (*r*); (216) but in the case of the king the payment must be either to his officers at the exchequer or to his

Payment of
rent.

- (*s*) *Stevenson v. Lambard*, 2 East, 575; 2 Rep. 119, 120b; *Ardo v. Watkins*, Cro. Eliz. Roll. Abr. 489; Co. Litt. 148 b; see *Jew v. Thirkwell*, 1 Ca. Ch. 81. 637.
 (*k*) 1 Roll. Abr. 286. (o) Co. Litt. 150.
 (*l*) See the Lands Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 18, s. 119. (p) 14 Anne, c. 16.
 (*m*) See 17 & 18 Vict. c. 82. (q) *Rivis v. Watson*, 5 M. & W. 255.
 (*n*) Co. Litt. 148 a, 215 a; *Dumport's case*, 4 (r) Co. Litt. 201. In order to take advantage of a condition of re-entry, the demand must be made a convenient time before sunset; see cases cited 1 Saund. 287.

(215) A tenant's obligation to pay rent may be apportioned; for, since rent is incident to the reversion, whenever that is severed, either by the act of the parties or by act of law, the rent will follow the reversion, and become payable to the assignees or owners of the respective portions of it. *Nellis v. Lathrop*, 22 Wend. 121; *Daniels v. Richardson*, 22 Pick. 569; *Crosby v. Loop*, 13 Ill. 625, 627.

Where tenants in common of land subject to a rent-charge, upon a partition, interchange conveyances of the respective parcels, subject, in terms, to the claims of the lessor, an apportionment of the rent is effected if the lessor concurs in the arrangement. *Van Rensselaer v. Chadwick*, 23 N. Y. (8 Smith) 82.

The release by the lessor, in such a case, to one of the tenants of the parcel partitioned to him, only extinguishes the rent as to the parcel so released; and the other parcel remains liable to its due proportion. *ib.*

Where lands are sold at a foreclosure sale the purchaser will not be entitled to the rent which accrues between the time of his purchase and the delivery of the deed to him in pursuance of such sale. *Cheney v. Woodruff*, 45 N. Y. (6 Hand) 98.

(216) When, by the terms of the lease, rent *in kind* is payable at such a place in a market town as the lessor shall appoint, and he has made no appointment, it is the duty of the lessee to seek the lessor, ascertain the place of payment, and there deliver the rent. If the landlord cannot be found, a delivery anywhere within the market town is sufficient. And whether payable in money or in kind, if no place is specified, a tender of either upon the land is good, and prevents a forfeiture. *Van Rensselaer v. Jones*, 5 Denio, 449, 453; *Walter v. Dewey*, 16 Johns. 222; *Hunter v. Le Conte*, 6 Cow. 728; *Lush v. Druse*, 4 Wend. 313.

receiver in the country (*s*). The rent is demandable at sunset on the day fixed for payment (*t*), though it would seem that it cannot be enforced till after midnight (*u*). The exact hour when it is due was formerly, before the apportionment statutes to which we have referred were passed, of considerable importance (*x*); it is now of little importance except in those cases which do not come within those statutes.

Upon paying the rent a tenant may make all proper deductions, such, for instance, as rates and taxes paid by him in obedience to the law, yet ultimately payable by the landlord (*y*).

Having said so much as to the general nature of a rent and rent-charge, we are here led to digress somewhat in order to dwell for a short time upon a particular species of rent-charge, which from the interest attaching to its origin and history, and from certain peculiarities attending it, requires special notice. We refer to the rent now universally payable in lieu of tithes.

Tithes formerly constituted a separate species of incorporeal hereditament, being the right to the tenth part of the produce of man's industry, which used to be rendered in kind; the tenth of the produce of a hayfield, or one in every ten lambs belonged to the tithe owner. Obviously, assuming the right to exist, it was detrimental to the interests of all persons concerned that the actual things themselves should be given, except at least in a very primitive state of society, where men combined in their own persons both the characters of producer and consumer. Consequently many partial inroads upon the practice of payment in kind have long been established. Even local acts of parliament have been by no means uncommon, under which a corn rent, *i. e.*, a rent consisting of so many bushels of corn or their market value, or an ordinary money rent became payable in lieu of tithes in the parishes, for which the acts were passed. In other places there were what were called real compositions, *i. e.*, agreements between the owners of the lands and the parsons or vicars to whom the tithes belonged made with the consent of the ordinary; and again there were established in many places customs under which the tithes were paid in some particular manner, called customs *de modo decimandi* (*z*).

There were formerly numerous questions fruitful in litigation as to what constituted a good real composition or a good modus. The change of the law has rendered all the learning on these points obsolete. Suffice it here to say, that to support a real composition, it was necessary either to produce the deed creating it, or to show the existence of a deed dated later than the commencement of legal memory, *i. e.*, the first year of Richard I. (*a*), and prior to the year 13 Eliz., in which year a statute was passed disallowing them for the

(*s*) *Boroughes's case*, 4 Rep. 78.

(*t*) Co. Litt. 302; 1 Anders. 258.

(*u*) *Duppa v. Mayo*, 1 Saund. 275, 287, 288 n. (17); 2 Mad. 268.

(*z*) *Rockingham v. Penrice*, 1 P. W. 177; Williams, Ex. 774.

(*g*) Such as land tax, 88 Geo. 3, c. 5, s. 17; tithe rent-charge, 6 & 7 Will. 4, c. 71, s. 80; Income tax, 5 & 6 Vict. c. 35; Metropolitan Main Drainage Rates, 18 & 19 Vict. c. 120, s. 217.

(*e*) Where lands were in the possession of the king, or of spiritual persons or corporations, there was, also, a *præscriptio de non*

decimando. Thus a vicar paid no tithes to a rector for his glebe, for *ecclesia decimas non solvit ecclesia*. 1 Roll. Abr. 658; Selden on Tithes, 76.

(*a*) *Ante*, vol. i. p. 69. If the modus was "rank," *i. e.* of such a large amount that it could not be supposed to have been paid in the reign of Richard I., it was held bad; *Startup v. Doderidge*, 11 Mod. 60; *Pyke v. Dowling*, 2 W. Bl. 1257. See a recent discussion upon a similar question in a case of a customary fee on a marriage, *Bryant v. Foot*, L. R. 8 Q. B. 497; and as to a customary toll, *Lawrence v. Hitch*, *Id.* 521.

[*66] future to be made (b), *and to support a modus it was necessary to show that the custom had universally existed, i. e., before the commencement of the reign of Richard I., because a modus presumes a lost grant made before the memory of man. Moreover the modus was held to be bad if it did not comply with certain rules (c).

Provision has been now made for the commutation of all tithes, real compositions, and modus into rent varying only with the average price of corn. This Commutation of tithes. has been accomplished by numerous acts, the principal of which was passed in the year 1836 (d). Under these acts the amount payable by each parish to the tithe owner has been ascertained, and stated as the value of a fixed number of imperial bushels of wheat, barley, and oats, and in order to determine the money payable, a return is annually made by the controller of corn, which return states the average price of wheat, barley, and oats, during the preceding seven years (e); upon this basis all tithes are now paid. The whole amount payable by the parish is also apportioned upon the various parcels of land throughout the parish, due provision being made for the respective rights of landowners, both with regard to the nature of the land, and also to their existing right to total or partial exemption at the time of the [*67] *apportionment. Moreover provision is made for re-arranging the apportionment as occasion shall require (f). Under the operation of these acts all lands in a parish where the apportionment has been duly made, are absolutely discharged from the payment of all tithes (g), and instead of the tithes, the rent-charge issuing out of the lands, in accordance with the apportionment, is payable to the tithe owner.

Although the whole state of circumstances is changed, still, since the rights and liabilities which now subsist have their origin in the ancient form of tithes, it is not uninteresting briefly to trace their history, and this indeed is necessary in order fully to understand the peculiarities still attending the right and the mode in which it is now enjoyed.

We have seen (h) that our information as to the division of parishes is somewhat scanty; the history of the origin of tithes, which though intimately connected with that of parishes, dates from a still earlier period, is History of tithes. equally involved in obscurity, or even more so. A reasonable account of them, and one probably not materially different from the true one, is that they were at first voluntary offerings made by the owners of property for the purpose of supporting ecclesiastical institutions. The influence which the clergy exercised over men's minds would probably be exerted to the utmost in urging

(b) 13 Elis. c. 10.

(c) Thus a modus must be certain and invariable, (1 Keb. 602) for the benefit of the parson (1 Roll. Abr. 649), it must be something different from the thing compounded for; *Sheppard v. Penrose*, 1 Lev. 179; and it must be as durable as the tithes which it replaced, i. e. an inheritance certain; *Carlston v. Brightwell*, 2 P. Wms. 462. See, also, *Gryman v. Louisa*, Cro. Elis. 446; *Hill v. Vaux*, Salk. 656. These rules are all grounded upon this, that there must be nothing in the nature of the case inconsistent with the possibility of the modus having been paid in the same

manner in the reign of Richard I. See *Mirehouse*, 180 to 186.

(d) 6 & 7 Will. 4, c. 71; amended and extended by the following—7 Will. 4 and 1 Vict. c. 69; 1 & 2 Vict. c. 64; 2 & 3 Vict. c. 62; 3 & 4 Vict. c. 15; 5 Vict. c. 7; 5 & 6 Vict. c. 54; 10 & 11 Vict. c. 105; 23 & 24 Vict. c. 93. The last was passed for the purpose of converting corn-rents payable under local acts into rents similar to the general tithe rent.

(e) 6 & 7 Vict. c. 71, sects. 56, 57.

(f) See sects. 11—17.

(g) 6 & 7 Will. 4, c. 71, s. 67. See *Trimmer v. Walsh*, L. R. 2 H. L. E. & I. 208.

(h) *Ante*, vol. i. pp. 732—185.

the fulfilment of the moral duty of maintaining those who gave up their lives to the public good, and by their profession divested themselves of the ordinary means of obtaining a livelihood; and the example of the Jews was doubtless much pressed, so that the amount of the contributions was determined by that example. Long custom having established a sort of right to claim tithes, they came to be recognized by the municipal law. In a canon or *ecclesiastical decree made in a synod in A. D. 786, their payment is strongly [*68] enjoined. Afterwards in two of the kingdoms of the heptarchy, Mercia and Northumberland, the sanction of the conventions of estates was given to their demand. Other mention of them in the Saxon laws can occasionally be found(i).

The voluntary nature of tithes continued, however, for some time afterwards to the extent, as before-mentioned (k), of their not being appropriated to any particular church. Some relics of these arbitrary appropriations remain to the present day, in those cases where portions of tithes in one parish are due to the parson of a neighbouring parish, and where the ownership of tithes is vested in corporations and persons other than the parson. Many, through a feeling of caprice, or perhaps the more effective incentive of a superstitious desire to have masses said for their souls, paid their tithes to a monastery or other religious house, either already in existence or then founded. From this source tithes afterwards came to be possessed by laymen. For upon the dissolution of the monasteries by Henry VIII., their lands and other possessions, including of course the tithes, became vested in the king (l), who shortly afterwards granted them to various persons, the letters patent granting them being confirmed by statute (m). From this period tithes, when held by a layman (n), have been treated in all respects like landed property, and are subject to all its incidents (o). *But they continued entirely distinct from the land out of which they issued, even though owned by the same person; the [*69] property in the tithes could not even in that case, until recently, merge in that of the land, and a conveyance of the land with its appurtenances would not pass the tithes (p). Moreover, tithes have invariably descended to the ordinary heir-at-law, even where the land from which they issued was subject to any peculiar customs of inheritance, such as those of gavelkind or borough English, of which we shall see more hereafter (q).

By the commutation acts, provisions have been made under which tithes, when possessed by the owner of the land, may be extinguished (r). But except where tithes have thus been separated from their original ecclesiastical

(i) See Seld. c. 6; Wilkins, p. 51.

(k) *Ante*, vol. I. p. 182.

(l) By 27 Hen. 8, c. 28.

(m) 31 Hen. 8, c. 13 and 32 Hen. 8, c. 28; the latter statute gave lay owners the same remedies in the ecclesiastical courts as were formerly enjoyed by spiritual owners. It also directed that the same assurances should be used in reference to tithes as had been employed for lands, and gave title owners power to apply to the temporal courts to compel payment of tithes.

(n) When in the hands of lay owners, they are said to be "impropriated," the lay owner being called the impropriator.

(o) Co. Litt. 6, 150 a; *R. v. Ellis*, 3 Price,

323, where it was held that tithes were "tenements."

(p) 6 Bac. Abr. 756; *Phillips v. Jones*, 3 Bos. & P. 362; *Chapman v. Gutcombe*, 2 N. C. 516.

(q) *Doe v. Bishop of Llandaff*, 2 B. & P. N. R. 491. Gavel-kind lands in Kent descend to all the sons equally. Borough English lands, which are occasionally found in the north, descend to the younger son in priority to the elder. See *Post*, c. 6.

(r) 6 & 7 Will. 4, c. 71, s. 71; 7 Will. 4 & 1 Vict. c. 69, s. 12; 1 & 2 Vict. c. 64, s. 2; and as to charges on tithes, 1 & 2 Vict. c. 62; and as to equitable owners, 9 & 10 Vict. c. 78, s. 19.

destination, they are universally admitted to be due as of common right to the parson of the parish in which the land lies (*s*).

Tithes in their ancient form were divided into two main classes, predial and personal. A third class called mixed, *i. e.*, intermediate between the others, has usually been added, but the tithes included in it cannot, as will be seen, be distinguished from predial tithes by any well founded difference. Predial tithes (*t*) were such as grew out of the soil, *e. g.*, corn and other grain, hay, hops, and underwood (*u*), either spon-

[*70] taneously or through the agency of *human labour; but in estimating them no allowance was ever made in respect of any expense or labour attending their production. Mixed tithes were those which arose

Mixed tithes. remotely and not immediately from the land, such as the produce and increase of animals fed upon the land, *e. g.*, milk, wool, calves, lambs, pigs, &c., where the animals derive much of their value from the nurture and care bestowed upon them by man. Animals *feræ naturæ*, such as deer in a park or rabbits in a warren, though substantially profitable, were never titheable at common law, although in particular places even some of these were made so by custom (*x*). It will be seen that there is but slight difference between predial and mixed tithes, at least in modern days when the culture of land involves as much science and labour as the care of beasts or sheep.

Personal tithes were, however, quite distinct; they were taken from the profits arising from the labour and industry of man other than agricultural. In very early times they must have been of no inconsiderable importance; indeed, in the sixteenth century, this must still have been the case, for we find that by 2 & 3 Ed. 6, c. 13, it is enacted that every person exercising merchandise, &c. or other art or faculty, who had within forty years *preceding paid personal tithes, should pay for his personal [*71] tithes one-tenth part of his clear gains, his charges and expenses, according to his estate, condition, or degree, to be therein allowed and deducted. This statute would at first seem to include the income arising from all trades and professions, and this was the view formerly held (*y*); but it has long become so far obsolete that this kind of tithe has long been nowhere paid except in the case of sea fisheries (*z*) and corn mills (*a*), and, very rarely,

(*s*) Where land is extra-parochial, tithes are due to the king or his grantees, *ante*, vol. 1. p. 184; *Bannister v. Wright*, Gwill. 601; *A.-G. v. Lord Eardley*, 8 Price, 89.

(*t*) So called from *prædium*, the word adopted by the canon law as the common appellation of arable, meadow, and pasture land.

(*u*) A peculiar case of predial tithes is that of agistments or the pasturage of cattle, which is titheable, since the grass, if cut when full grown, would have been so. It is predial because it arises directly from the land (*Scarr v. Trin. Coll.* Gwill. 1445; *s. c.* 3 Anst. 768; 1 Wils. 170.) It was payable, however, only in respect of cattle which do not otherwise render a profit to the parson; and is not payable for milch cows, or horses used in husbandry, or even for pleasure, unless they be also employed for a profitable purpose other than the cultivation of the soil (*Thorp v. Bendlowes*, Gwill. 899); nor is it payable out of meadow lands which have

already paid tithe of hay, although afterwards used as pasturage (*Ayd v. Flower*, Gwill. 618). As to those tithes whose increase is not annual, but at intervals greater than a year, such as underwood, see *Chichester v. Sheldon*, Turn. & R. 245; *Loxon v. Pryze*, 4 Myl. & Cr. 600.

(*x*) Com. Dig. Dismes, H. 4, 16; *Cropper v. Andrews*, Gwill. 427; *Davies v. Huddleston*, Cro. Car. 389.

(*y*) See *Chamberlaine v. Newte*, 7 Bro. P. C. 3; 2 Eag. & Y. 240; 2 Price, 295; 2 Burns' Eccl. Law, 474.

(*z*) "Tithe of fish taken in the sea is only due by custom, *Holland v. Heale*, Noy, 108; *Anon. Cro. Car. 264*," per C. B. Parker, in *Williams v. Baron*, Gwill. 981; and see *Kely-nack v. Gwains*, 2 Bro. P. C. 446; *Wolredge v. Henna*, 2 Wood's Cases, 50.

(*a*) 1 Eagle on Tithes, 377 *et seq.*; *Thomas v. Price*, Gwill. 871, and cases there cited. Mills more ancient than the 9 Edw. 2, A.D. 1315, are by the statute *Articuli cleri*, c. 5, impliedly

river fisheries (*b*). Moreover these are now in any case only to be payable where there is a custom to pay them. The important distinction between personal and other tithes was that the former consist only of the tenth of the clear profits after deducting all expenses, but the latter consist of a tenth of the produce without any such deduction.

We may here notice that special custom has in certain places rendered titheable some things which are not so of common right; for instance, stone, slate, or lime from quarries, and tin, lead, coal, and other products of mines (*c*). But as to what things were titheable, we must refer our readers to the works of those authors who have specially treated the subject (*d*). The Commutation *Acts apply to all these tithes, as well as those upon fisheries and corn [*72] mills (*e*).

Another division of tithes more interesting to us at the present day is that into great and small tithes. The former comprehended those tithes which ordinarily would be of the greater value, such as those of corn, hay, wood; Another division into great and small tithes. the latter those of the lesser vegetables, such as hops, potatoes, turnips, herbs, flax, apples, and other fruit, clover (when not made into hay), madder, woad, &c. This division was, according to the nature of the vegetable, and not the quantity of it in any particular parish (*f*). It depended, however, not upon what would be a satisfactory classification to a naturalist, but arose solely by custom. The catalogue of articles constituting the two classes need not here be given, but the distinction is important, because in those parishes where there is a rector and an incumbent vicar the great tithes were usually payable to the rector, and the small tithes to the vicar. When monasteries and other spiritual corporations acquired the property in parsonages, and consequently tithes, it was usual for them to delegate the duty of ministering in the parish to some priest, and it was for his support as their vicar that they set apart the small tithes. Afterwards, sundry statutes were passed for the purpose of securing a sufficient endowment, at the discretion of the ordinary, out of that of the parsonage or rectory. The rector is *prima facie* entitled to all tithes, both great and small; and payment to the rector is a sufficient discharge against the vicar, who in order to claim them must produce an *endowment or give such evidence as will be accepted as proving it by prescription, for the court will not presume any thing, in the [*73] absence of an endowment, in favour of the vicar against the rector (*z*). No other person than a rector or vicar, such as a curate, has in general any claim to tithes (*a*).

discharged of tithes, and this exemption extends to the mill when rebuilt if the site be unaltered, and no new stones added; *Talbot v. May*, 3 Atk. 17; Gwill. 782; *Manby v. Taylor*, 3 Ves. & B. 71; *Newcome v. Mathew*, 5 Sim. 248.

(*b*) *Mirehouse*, 98; *Dawes v. Huddleston*, Cro. Car. 839; as to fish in a pond, *Nicholas v. Elliott*, Gwill. 1581.

(*c*) 2 Inst. 651.

(*d*) Full information may be obtained from the works of *Mirehouse*, *Bacon's Abridgment*, *Tit. Tithes*, 1 Roll. Abr. *et seq.*; *Eagle v. Rayner*, and for examples of the customs in a large number of parishes, as well as of the general rules of common law, *Wood's Ex-*

chequer Cases on Tithes may be consulted, and *Gwillim's cases*.

(*e*) 6 & 7 Will. 4, c. 71, s. 90; 2 & 3 Vict. c. 62, s. 9.

(*f*) See *Smith v. Wyatt*, Gwill. 777, where Lord Hardwicke held that potatoes, though grown in large quantities, were nevertheless a small tithe. *Privy* tithes are generally synonymous with small tithes. See *Clee v. Hall*, 1 West. 148.

(*z*) *Renouids v. Green*, 2 Bulstr. 27; *Chapman v. Smith*, 2 Ves. Sen. 505, 511; *Greene v. Austen*, Yelv. 86; s. c. Gwill. 226; *Carle v. Ball*, 3 Atk. 496; *Mirehouse*, 11.

(*a*) *Mirehouse*, 20.

Since the division of great and small tithes is now well established, and the latter are considered as belonging to the vicar, if he produces evidence of an endowment, the *onus probandi* in respect of any article claimed by the rector, if ordinarily a small tithe, is thrown upon him; so that he must show that some different arrangement to the usual one had been, or by necessary presumption must have been made, in the distribution of tithes in his parish, subsequent to the endowment and prior to the disabling statute of Elizabeth (*b*). On the other hand, usage will be readily accepted as a proof in favour of the extension of the original endowment to some article not ordinarily a vicar's tithe (*c*).

Under the Commutation Acts the respective rights of the owners of great and small tithes were of course duly preserved, and proportional rent charges substituted.

Returning from this digression on the subject of tithes to the subject of rents in general, we come next to consider the remedies which their owner possesses in case of nonpayment. These are of two sorts; first, Remedies for non-payment of those which are provided by the contract, and, secondly, those rent. which are conferred by law independently of contract.

*In all modern leases and deeds creating rent or a rent charge, there [*74] is inserted a covenant on the part of the lessee or the owner of the land, subject to the charge to pay the rent, from which covenant arises a right to sue for the rent, which right of action there may also be classed the right which arises from the implied contract to pay for the use and occupation of the premises (*d*). These causes of action need no further remark here.

But, besides, there is usually inserted in leases a provision, that if default be made in payment of the rent, the lessor may re-enter upon the land, oust the tenant, and resume the possession and estate which he had before the lease. The severe penalty which a stringent application of this provision would inflict upon the tenant is not favoured by the law. The Court of Chancery first took upon itself to relieve a tenant from the penalty, even a long time after his being ejected, upon the terms of paying the rent due and interest thereon, together with all costs. This remedy has recently been also given to courts of law; but now the tenant must, whether in equity or at law, apply for relief within six months from the execution under the ejectment being executed (*e*).

Of the many characteristics of rents, the peculiar remedy of distress which the law gives is amongst the most interesting, and at the same time most important. Distress.

A distress (*f*), *districcio*, is the taking of a personal chattel out of the possession of the wrongdoer into the custody of the party injured, to procure a satisfaction for the wrong committed.

A distress may be levied for nonpayment of rent fixed, and due under an actual demise, or for nonperformance of a duty; cattle also may be distrained

(b) 18 Eliz. c. 10; 14 Eliz. cc. 11 & 14; 18 Eliz. c. 11, and 48 Eliz. c. 29; *Awdrey v. Smallcombe*, Gwill. 1526.

(c) Hardr. 828; *Renoulds v. Green*, 2 Bulstr. 27; *Ryan v. Booth*, 2 Price, 250; *Manby v. Curtis*, *ib.* 284; *Cunliffe v. Taylor*, *ib.* 329; forty years usage has been considered sufficient, *Parsons v. Bellamy*, 4 Price, 198; *Goole v. Jordan*, Gwill. 648; *Goole v. Jordan*,

Bunb. 144; *Manby v. Lodge*, 9 Price, 231; *Mirehouse*, 15, 17.

(d) As to suing upon these different grounds, see Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76).

(e) See 15 & 16 Vict. c. 76, s. 210; 23 & 24 Vict. c. 126.

(f) The thing taken by this process, as well as the process itself, is in our modern law books called a distress.

damage-feasant, that *is, doing damage, or trespassing, upon a man's land. The first-mentioned remedy is intended for the benefit of land- [*75] lords, to prevent tenants from secreting or withdrawing effects to the landlord's prejudice; and also — it would seem — because landlords are peculiarly exposed to imposition by reason of the enjoyment of the demised property, sometimes for a lengthened period, having necessarily preceded the accruing of any liability to pay for it. The latter remedy arises from the necessity of the thing, as it might otherwise be impossible at a future time to ascertain whose cattle they were that committed the trespass or damage.

As the law relating to distress contains points of considerable nicety, we shall consider it with some minuteness, inquiring, 1st, for what injuries a distress may be taken; 2ndly, what things may be distrained; and 3rdly, the manner of taking, disposing of, and avoiding a distress.

1st. (1.) The most usual ground for making a distress is nonpayment of rent. (217) It has already been observed that distresses were incident by the

1st. For what a distress may be made.

common law to every rent-service, and by particular reservation to rent-charges also; but not to rent-seck, till the statute 4 Geo. 2, c. 28 (g), afforded for it the same remedy. So that now it holds generally that a distress may be taken for any kind of rent in arrear or detained beyond the day of payment, though by stat. 3 & 4 Will. 4, c. 27, s. 42, (h), it is enacted that no arrears of rent, or damages in respect of such arrears shall be recovered by distress, but within six years next after the same respectively shall have become due, or next after an acknowledgment of the same in writing shall have been given to the person entitled thereto, or his agent, signed by the person to whom the same was payable or his agent (i). (2.) For neglecting *to do suit to the lord's court (k), or other certain personal service (l), the lord may distrain, of common right. (3.) For an [*76] amercement in a court-leet a distress may be had of common right; but not for an amercement in a court-baron, without a special prescription to warrant it (m). (4.) Another injury for which, as above intimated, a distress may be taken, is where a man finds beasts of a stranger wandering in his grounds, damage-feasant; that is, doing him hurt or damage, by treading down his grass, or the like, in which case the owner of the soil may distrain them till satisfaction be made him for the injury he has thereby sustained. (5.) For various penalties inflicted by act of parliament, a remedy by distress and sale is

(g) Sect. 5.

(k) Bro. Abr. tit. Distress, 15.

(h) See, also, sect. 2.

(l) Co. Litt. 96.

(i) The personal representatives of a lessor may distrain for rent in arrear in his lifetime, 3 & 4 Will. 4, c. 42, s. 37, and see s. 38.

(m) Brownl. 36.

(217) The English remedy by distress for rent was very generally adopted by the several States as a part of the common law. But the tendency of modern legislation is in the direction of abolishing or limiting the remedy, because it gives landlords an undue advantage over other creditors in the collection of debts. In New York the statutes authorizing distress for rent have been repealed. Laws 1846, ch. 274. See Taylor's Landlord and Tenant, § 558.

Where the remedy by distress for rent exists there are some important rules to be observed. There can be no distress unless there has been a demise at a certain fixed rent, either in money, produce or services, payable at a time certain, or unless the amount, if not fixed, is capable of being reduced to a certainty by calculation. *Valentine v. Jackson*, 9 Wend. 303; *Wells v. Hornish*, 8 Penn. 30; *Reeves v. McKenzie*, 1 Bailey, 500; *Jacks v. Smith*, 1 Bay. 315.

given (n); for the particulars of which we must have recourse to the statutes themselves: remarking only, that such distresses are partly analogous to the ancient distress at common law, as being replevable and the like; and partly resemble the common law process of execution, by seizing and selling the goods of the debtor under a writ of *fieri facias*, of which we shall hereafter speak.

The following remarks will, for the most part, be restricted to the case of a distress for nonpayment of rent where the relation of landlord and tenant (o) subsists between the parties respectively distraining and distrained upon, and there is a reversion in the distrainor.

2ndly; as to the things which may be distrained, (218) two general rules may *imprimis* be laid down, and a distinction must be taken. (1.) All chattels personal are liable to be distrained, unless particularly protected or exempted. Instead therefore of mentioning what things are distrainable, it will be easier to recount those which are not so,

2ndly. What things may be distrained.

[*77] with the reason of their particular *exemption (p). (2.) Goods and chattels upon the premises demised belonging to a stranger are distrainable, for otherwise a door would be opened to infinite frauds upon the landlord, and a stranger has his remedy over if by default of the tenant his chattels are distrained. A landlord accordingly may distrain upon the goods of an underlessee being upon the demised premises, although as between lessor and underlessee there is no privity. (3.) Also a distinction as regards the liability of goods to seizure must here be noticed between the case where a distress is put in (concerning which alone we now inquire), and that where an execution is levied. Should a judgment creditor of the tenant levy an execution upon his goods, the sheriff will be justified in seizing such goods and chattels only as belong to the tenant, and cannot lawfully seize those of a third person upon the premises. .

In the case just put, if rent be due to the landlord, he should proceed (as will presently be shown at greater length) under the stat. 8 Ann. c. 14, s. 1, and, on demand made to the sheriff, will entitle himself to arrears not exceeding one year's rent, which may be levied in addition to the execution money upon the tenant's goods. The County Court Act (19 & 20 Vict. c. 108) contains a provision (sect. 75) analogous to that of the statute of Anne. It enacts that where goods in a tenement for which rent is due are taken in execution

(n) See Paley on Conv., 5th ed., pp. 297 *et seq.* (p) As to which see generally Co. Litt. 47; *Simpson v. Hartopp*, Willes, 512.

(o) See *Yeoman v. Ellison*, L. R. 2 C. P. 681.

(218) When property is liable to be distrained for rent, the general rule in this country is, that all the movable goods and chattels found upon the premises may be taken, whether they are the goods of the tenant, the under-tenant or those of a third person. *Spencer v. McGowen*, 18 Wend. 256; *Kessler v. McConachy*, 1 Rawle, 435; *Howard v. Ramsay*, 7 Harr. & J. 113; *Davis v. Payne*, 4 Rand. 332; *Reeves v. McKenzie*, 1 Bailey, 497; *Stevens v. Lodge*, 7 Blackf. 594; *Hoskins v. Paul*, 4 Halst. 113; *Triebler v. Knabe*, 12 Md. 491.

The statutes of many of the States provide for the exemption of specified articles of a certain value from levy and sale on execution or by distress for rent.

So too, by the common law, many things were exempt from distress. Among these are articles sent to a person to be worked upon or worked up by him in the exercising of his trade, or to be deposited or sold as by sending them to an auctioneer or a commission merchant. *Simpson v. Hartopp*, Willes, 512; 1 Smith's Lead. Cas. 526 (727); *Hoskins v. Paul*, 4 Halst. 113; *Connah v. Hale*, 23 Wend. 462; *Briggs v. Large*, 30 Penn. St. (6 Casey) 287; *Owen v. Boyle*, 22 Me. 47.

under the warrant of a county court, the landlord may claim the rent due to him by delivering a notice to the bailiff making the levy, and such bailiff shall then, in making the levy, distrain also for the rent so claimed (*q*).

Generally speaking then, whatsoever goods and chattels a landlord finds upon the demised premises, whether they in fact belong to the tenant or to a stranger, are *distrainable by him for rent. With regard, however, to a stranger's beasts which are found on the tenant's land, the following [*78] points are to be noticed. If they are put in by consent of the owner of the beasts, they are distrainable immediately afterwards for rent in arrear by the landlord (*r*). So also if a stranger's cattle break the fences, and commit a trespass by coming on the land, they are distrainable immediately by the lessor for his tenant's rent, as a punishment to the owner of the beasts for the wrong committed through his negligence (*s*). But if the lands were not sufficiently fenced so as to keep out cattle, the landlord cannot distrain them, till they have been levant and couchant (*levantes et cubantes*), on the land; that is, have been lying down and rising up on the premises for a night and a day, without pursuit made by the owner of them (*t*); and then the law presumes, that the owner may have notice whither his cattle have strayed, and it is his own negligence not to have taken them away. Yet, if the lessor or his tenant were bound to repair the fences and did not, and thereby the cattle escaped into their grounds, without the negligence or default of the owner; in this case, though the cattle may have been levant and couchant, yet they are not distrainable for rent, till actual notice has been given to the owner that they are there, and he neglects to remove them (*u*): for the law will not suffer the landlord to take advantage of his own or his tenant's wrong (*x*).

From the operation of the ordinary rule that a distress may be levied upon all goods being upon the demised *premises, certain things have been [*79] for special reasons excepted:—

1. At common law things affixed to the freehold, and which thus become part of it, cannot be distrained for rent (1), because that cannot be a pledge which cannot be restored *in statu quo* to the owner, and a part of the freehold is not severable from it without some detriment being caused to the thing itself in its removal. (2) Because what is fixed to the freehold is part of the thing demised, and the nature of the remedy by distress is not to resume part of the thing itself for the rent, but only to take those things which are brought upon the premises by way of satisfaction for it. (3) A third reason assigned is that the freehold itself would be injured by the removal of that which is affixed

(*q*) See *Beard v. Knight*, 8 E. & B. 865.

(*r*) Cro. Eliz. 549.

Except where the cattle are on their way to a distant market, and are put in to rest for the night, in which case they are said to be privileged for the public benefit. *Tate v. Glead*, 2 Wms. Saund. 290, n. (7)

(*s*) Co. Litt. 47.

(*t*) Gilb. Distress, by Hunt, 3rd. ed. 47.

(*u*) Lutw. 1580.

(*x*) In all cases if the owner of the cattle make fresh pursuit, and immediately endeavour to bring them back, they are not distrainable. *Reynolds v. Oakley*, Hob. 265.

"There is a difference between a lord distraining within his seignory, and a landlord distraining for rent reserved on his own

lease; for the lord has nothing to do with the land or the fences, and so it is not material to him whether the fences are repaired or not; but it is otherwise of a landlord, for he himself ought to repair, or to provide that his tenants repair them, else he would take advantage of his own wrong." But "if the cattle escape into the land without any defect of the fences, or where the tenant of the land in which they are distrained is not bound to repair the fences, through the defect of which the cattle escape and are distrained, it is immaterial to the lord or landlord whether they are levant and couchant or not." *Pool v. Longueville*, 2 Saund. 289; see also *Singleton v. Williamson*, 7 H. & N. 410.

to it. Such things, therefore, as caldrons, windows, doors, and chimney-pieces, are not distrainable, for they savour of the realty. (219) For this reason also corn growing could not be distrained: till the stat. 11 Geo. 2, c. 19, s. 8, empowered landlords to distrain corn, grass, or other products of the earth, and to cut and gather them when ripe. So charters concerning land are not distrainable, because in contemplation of law they are parcel of the freehold. Questions of this kind often arise in reference to machinery; and in any such case the difficulty usually lies in determining whether the machinery when fixed [*80] was parcel of the freehold. Now this is a question of fact depending principally on two *considerations; first, the mode of annexation to the soil or fabric of the house, and the extent to which the chattel is united thereto, as whether it can easily and safely be removed without injury to itself or to the building. Secondly, the question depends on the object and purpose of the annexation, whether it was for the permanent and substantial improvement of the dwelling, or merely for a temporary purpose, or the more complete enjoyment and use of the thing annexed as a chattel (y).

2. Things sent or delivered to a person exercising a particular trade, to be kept, carried, wrought or manufactured in the way of his trade; for instance goods pledged with a pawnbroker (z), or on the premises of an auctioneer for sale (a), a horse standing in a blacksmith's shop, materials sent to a weaver to be wove, to a fuller to be cleaned and dyed, or cloth to a tailor to be made up, privileged for the sake of trade and commerce, which could not be carried on if such things, under such circumstances, could be distrained for rent due from the person in whose custody they are. Such things are privileged on the ground of public policy, to encourage a feeling of confidence in those who would bail their goods for skill to be exercised upon them, and are supposed in common presumption not to belong to the owner of the house, but to his customers. (220) If the goods are sent to the premises for the purpose of being dealt with in the way of the party's trade, and are to remain upon the premises until that purpose is answered and no longer, they are not distrainable, but if they are sent thither for the purpose of remaining there merely at the will of the owner, no work having to be done upon them, they will be distrainable, and the party claiming exemption is bound clearly to show that he is within [*81] one or other of the *acknowledged exceptions to the rule, which allows all such things as are on the demised premises to be distrained (b).

3. Goods at an inn whilst on the premises cannot be distrained (c). (221)

(y) *Hellawell v. Eastwood*, 6 Exch. 295; (a) *Brown v. Arundell*, 10 C. B. 54.
Bishop v. Elliott, 11 Exch. 113; 10 *Id.* 496; (b) *Parsons v. Gingell*, 4 C. B. 545; *Smith*
Haslitt v. Burt, 18 C. B. 893. v. *Dearlove*, 6 *Id.* 132.
(z) *Swire v. Leach*, 18 C. B. N. S. 479. (c) *Crosier v. Tomkinson*, 2 Ld. Ken. 439.

(219) Things which are affixed to the freehold, although belonging to the tenant, cannot be distrained so long as they remain affixed to the premises. *Reynolds v. Shuler*, 5 Cow. 328; *Darby v. Harris*, 1 Q. B. 895.

(220) The American cases are in harmony with the text. *Hoskins v. Paul*, 4 Halst. 118; *Connah v. Hale*, 23 Wend. 463; *Briggs v. Large*, 30 Penn. St. 287; *Himely v. Wyatt*, 1 Bay. 102; *Owen v. Boyle*, 22 Me. 47; *Brown v. Sims*, 17 S. & R. 138.

(221) Horses and carriages standing temporarily at an inn cannot be distrained for rent. Co. Litt. 47, 7. So of a horse placed in the hands of a livery stable keeper in the way of his business. *Youngblood v. Lowry*, 2 McCord, 89. So of cattle on the demised premises when they were there to be pastured for hire. *Cadwalader v. Tindall*, 20 Penn. St. 422.

4. The implements of a man's trade or profession, as the axe of a carpenter, the books of a scholar, and the like, are privileged from distress for rent, if they be in actual use at the time, or if there be any other sufficient distress on the premises, but not otherwise (*d*). They are said to be thus privileged *sub modo* for the sake of the public, because the taking them away would disable the owner from serving the commonwealth in his station (*e*). (222)

5. Beasts of the plough (*averia carucae*) and sheep, which improve the land, are also privileged if there be other sufficient distress upon the premises (*f*). And perhaps the true reason, why these and the tools of a man's trade were privileged at the common law, was because the distress was originally intended to compel the payment of the rent, not as a satisfaction for its non-payment: and therefore, to deprive the party of the instruments and means of paying it, would counteract the very end of the distress (*g*).

6. A thing which is in the custody of any person and being actually used by him, cannot be distrained, because the peace would be endangered if a distress under such circumstances were allowed; therefore a horse whilst a *man is riding him, or an axe in a man's hand cannot be distrained for [*82] rent (*h*).

7. Nothing is distrainable for rent, which may not be rendered again in as good plight as when it was distrained: for which reason milk, fruit, and the like, cannot be distrained, a distress at common law being only in the nature of a pledge or security, to be restored in the same plight when the debt is paid. (223) So, anciently, sheaves or shocks of corn could not be distrained, because some damage must needs accrue in their removal, but a cart loaded with corn might; as that could be safely restored. But now by statute 2 Will. & M. sess. 1, c. 5, corn in sheaves or cocks, or loose in the straw, or hay in barns or ricks, or otherwise, may be distrained as well as other chattels (*i*), but produce which has been sold by the sheriff under an agreement by the purchaser that it shall be used and expended on the land cannot be distrained (*k*).

8. As every thing distrained is presumed to be the property of the wrongdoer, it will follow that such things wherein no man can have an absolute and valuable property (as cats and animals *feræ naturæ* (*l*)) cannot be distrained. (224) Yet if deer (which are *feræ naturæ*) are kept in a private inclosure for the pur-

(*d*) *Simpson v. Hartopp*, Willes, 512.

(*e*) In *Nargatt v. Nias*, 1 E. & E. 439, a question arose as to the form of action appropriate for taking tools of trade, there being on the premises other goods of sufficient value which might be distrained. And Lord Campbell there said that the prohibition against distraining such things is by force of the ancient common law of England (Co. Litt. 47 a), and was not introduced by any statute.

(*f*) *Keen v. Priest*, 4 H. & N. 236; 51 Hen. 3, st. 4.

(*g*) *Per* Lord Mansfield, *Hutchins v. Chambers*, 1 Burr. 588.

(*h*) Co. Litt. 47 a.

See *Storey v. Robinson*, 6 T. R. 138; *Field v. Adames*, 12 Ad. & E. 649; which were cases of distress damage feasant.

(*i*) See also stat. 4 Geo. 2, c. 28, s. 5, as to rent-seck.

(*k*) Stat. 56 Geo. 3, c. 50, s. 6.

(*l*) Dogs, it would seem, are distrainable, Woodf., L. & T. 9th ed. 402.

(222) See the note to *Simpson v. Hartopp*, 1 Smith's Lead. Cas. 526 (727).

(223) Cocks and sheaves of corn are not distrainable because they cannot be removed and returned without injury or loss. *Given v. Blann*, 8 Blackf. 64. So of green hides which have been placed in a vat to be tanned, since they cannot be removed without injury or putrefaction. *Bond v. Ward*, 7 Mass. 123; so of the carcasses of slaughtered animals. *Morley v. Pincombe*, 2 Exch. 101.

(224) Dogs are regarded as property and are distrainable. See note to *Simpson v. Hartopp*, 1 Smith's Lead. Cas. 526 (727); Taylor's Land. and Ten., § 591.

pose of sale or profit, this so far changes their nature, by reducing them to a kind of stock or merchandise, that they may be distrained for rent (*m*).

9. Goods which are in the custody of the law are in general not distrainable for rent, for it would be a contradiction in terms to say—that what the law had laid hands upon could by legal process be removed out of its grasp. (225)

[*83] *Hence goods which have been taken in execution cannot be distrained for rent. In this particular case, however, the statute 8 Anne, c. 14 (*n*), already briefly noticed, applies to entitle the landlord of premises whereon an execution is levied to one year's rent (if so much be in arrear) before removal of the goods seized by the sheriff. Where indeed the demised premises are let at a weekly rent, or for any other term less than a year, the right of the landlord to claim for rent in arrear is restricted (*o*). Also, by stat. 14 & 15 Vict. c. 25, s. 2, crops seized and sold under a writ of execution, so long as they remain on the land, are, in default of other sufficient distress, liable to the landlord for rent which may become due to him after such seizure and sale, and to the remedy by distress for recovery of such rent.

The rule which obtained at common law exempting from distress chattels in *custodia legis* has further been relaxed by various statutory provisions below cited (*p*).

3rdly. Let us consider how a distress may be taken, disposed of, or avoided. In the first place, then, a distress for rent in arrear must be made by day (*q*).

And, when a person intends to make it, he must, by himself or his bailiff, armed with a distress warrant, enter on the demised premises and make a seizure, formerly during the continuance of the lease, but now (*r*), if the tenant holds over, the landlord may distrain within six months after the determination of the lease; provided his own title or interest, as well as the tenant's possession, continue at the time of the distress (*s*). (226) *A lessor not finding sufficient distress on the premises, [84] formerly could resort no where else, and therefore tenants, who were knavish, made it a practice to convey away their goods and stock fraudulently from the houses or lands demised, in order to cheat their landlords. (227) But

(*m*) *Davies v. Powell*, Willes, 46.

(*n*) Sect. 1.

(*o*) Stat. 7 & 8 Vict. c. 96, s. 67.

(*p*) See, in regard to process issuing from the County Court, 19 & 20 Vict. c. 108, s. 75; from the Court of Admiralty, 24 & 25 Vict. c. 10, s. 16. See also as to the case of Bankruptcy, 13 & 18 Vict. c. 106, s. 129, & 33 Vict. c. 71, s. 34; and in reference to the wind-

ing up of a company, 25 & 26 Vict. c. 89, s. 163.

(*q*) Co. Litt. 142.

(*r*) Stat. 8 Anne, c. 14, ss. 6, 7.

(*s*) Rent is not due until the last minute of the natural day on which it is reserved, and therefore a distress for it cannot be made on that day. (Mr. Hargrave's note 6 to Co. Litt. 47 b.)

(225) It is a well-settled rule in the law of this country that goods in the custody of the law cannot be distrained. Property in the hands of a sheriff, by virtue of a replevin process, is not distrainable. *Miliken v. Selge*, 6 Hill, 623. So of property rightfully in the hands of a receiver. *Noe v. Gibson*, 7 Paige, 513.

(226) A distress cannot be taken until the next day after the rent becomes due, as the tenant is entitled to the whole of the last day during which he may pay the rent. *Gano v. Hart*, Hardin (Ky.), 297.

(227) At common law a distress can only be made upon some part of the demised premises out of which the rent issues. *Burr v. Van Buskirk*, 3 Cow. 263, 269; *Pemberton v. Van Rensselaer*, 1 Wend. 307, 309; *Brown v. Duncan*, Harper, 338. Goods fraudulently removed from the town, for the purpose of avoiding a distress for rent, may be pursued by an officer having a valid distress warrant, and the goods may be seized under such warrant. *Christman v. Floyd*, 9 Wend. 340.

now the landlord may distrain any goods of his tenant, carried off the premises clandestinely, wherever he finds them within thirty days after, unless they have been *bona fide* sold for a valuable consideration: and all persons privy to, or assisting in such fraudulent conveyance, forfeit double value to the landlord (*t*). The landlord may also distrain the beasts of his tenant, feeding upon any commons or wastes, appendant, or appurtenant to the demised premises. The landlord cannot lawfully break open a house, to make a distress, for that is a breach of the peace (*u*). But, being in the house, he may break open an inner door (*x*); and he may, with the assistance of a peace-officer, break open in the day time any place, whither the goods have been fraudulently removed and locked up to prevent a distress; oath being first made, in case it be a dwelling-house, of a reasonable ground to suspect that such goods are concealed therein (*y*).

Where a man is entitled to distrain for rent, he ought to distrain for the whole at once, not for part at one time, and part at another. (228) But if he distrains for the whole, and there is not sufficient on the premises, or he happens to mistake the value of the thing distrained, and *so takes an insufficient distress, he may take a second distress to complete his [*85] remedy (*z*).

A distress must be proportioned to the thing distrained for. By the statute of Marlbridge, 52 Hen. 3, c. 4, if any man take a great or unreasonable distress, for rent in arrear, he shall be heavily amerced by the same. As if the landlord distrains two oxen for twelve-pence rent; the taking of both is an unreasonable distress; though if there were no other distress nearer the value to be found, he might reasonably have distrained one of them (*a*). The remedy for an excessive distress is by action on the case (*b*) founded upon the statute of Marlbridge; an action of trespass is not maintainable upon this account, there being no injury at the common law (*c*).

When the distress has been taken and notice of it given and an appraisalment made in compliance with the statute (*d*), the next consideration is the disposal of it, if the rent should still remain unpaid. The things distrained must at common law in the first place be carried to some pound, and there be impounded by the taker. But, in their way thither, they may be rescued by the owner, in case the distress was taken without cause, or contrary to law: as if no rent be due; if they were taken upon the highway, or the like; in these cases the tenant

(*t*) Stat. 11 Geo. 2, c. 19.

(*u*) A landlord who enters on his tenant's premises to distrain, is justified in opening an outer door in the ordinary way in which other persons can do it, when it is left so as to be accessible to all who have occasion to go into the premises (*Ryan v. Shilcock*, 7 Exch. 72), but he cannot break open an open door of a stable, although not within the curtilage, to levy a distress. (*Brown v. Glenn*, 16 Q. B. 254.) See further as to the

mode of entry to distrain, *Hancock v. Austin*, 14 C. B. N. S. 634; *Nash v. Lucas*, L. R. 2 Q. B. 590.

(*x*) Co. Litt. 161.

(*y*) Stat. 11 Geo. 2, c. 19, s. 7.

(*z*) See *Bagge v. Mawby*, 8 Exch. 641.

(*a*) 2 Inst. 107; Bro. Abr. t. Assize, 291; Prerogative, 98.

(*b*) See *Chandler v. Doulton*, 3 H. & C. 553.

(*c*) *Hutchins v. Chambers*, 1 Burr. 590.

(*d*) 2 Will. & M. sess. 1, c. 5, s. 2.

(228) All the arrears of rent which may have accrued during the tenancy may be included in one proceeding, even though the rent of several years may be in arrear. *Sherwood v. Phillips*, 13 Wend. 479. But where there is an expiration of the term, and the lease is not continued but a new one is executed at a different rent, and this lease is extended for another year, a distress for the last year will not authorize the landlord to distrain for the rent which fell due under the first lease. *Webber v. Shearman*, 2 Denio, 362.

may lawfully make rescue (*e*). But if they be once impounded, even though taken without any cause, the owner may not break the pound and take them out; for they are then in the custody of the law (*f*).

A pound (*parcus*, which signifies any enclosure) is either pound-overt, that is, open overhead; or pound-covert, that is, close. By the statute 1 & 2 Ph. &

[*86] M. *c. 12, s. 1, no distress of cattle can be driven out of the hundred where it is taken, unless to a pound-overt within the same shire; and within three miles of the place where it was taken. This is for the benefit of the tenant, that he may know where to find and replevy the distress. And by statute 11 Geo. 2, c. 19, which was made for the benefit of landlords as well as tenants, a person distraining for rent may turn any part of the premises, upon which a distress is taken, into a pound, *pro hac vice*, for the securing of such distress. If live animals were distrained and impounded in a common pound-overt, their owner was at common law bound to take notice of it at his peril; but if in any special pound-overt, so constituted for this particular purpose, the distrainer was required to give notice to the owner: and, in both these cases, the owner, and not the distrainer, was bound to provide the beasts with food and necessities. But if they were put in a pound-covert, as in a stable or the like, the landlord or distrainer had to feed and sustain them (*g*). Now, however, under two recent statutes (*h*), horses, cattle, and sheep distrained must be supplied with food by the distrainer, or if confined without sufficient food and water for more than twelve hours, may be supplied therewith by any person at the cost of the owner, and the distress may even be sold for reimbursement of the expenses thus incurred.

The mode of impounding crops when distrained under 11 Geo. 2, c. 19, is provided for by s. 8 of that statute, and household goods, or other dead chattels, which are liable to be stolen or damaged by weather, ought to be impounded in a pound-covert, else the distrainer must answer for the consequences.

When impounded, the goods were formerly, as was before observed, only in the nature of a pledge or security to compel the performance of satisfaction; and upon this [*87] *account it was held (*i*), that the distrainer is not at liberty to work or use a distrained beast. And thus the law still continues with regard to beasts taken damage-feasant, and distresses for suit or services; which must remain impounded, till the owner makes satisfaction; or contests the right of distraining, by replevying the chattels. To replevy (*replegiare*, that is, to take back the pledge) was, when a person distrained upon applied to the sheriff or his officers, and had the distress returned into his own possession; upon giving good security to try the right of taking it in a suit of law, and, if that were determined against him, to return the cattle or goods once more into the hands of the distrainer. This is called a replevin, of which more will be said hereafter (*k*). At present I shall only observe, that as a distress is at common law in nature of a security for the rent, a replevin answers the same end to the distrainer as the distress itself; since the party replevying gives security to return the distress if the right be determined against him.

A distress, though it put the owner to inconvenience, and was therefore a

(*e*) Co. Litt. 160, 161.

(*f*) *Ib.* 47. See 6 & 7 Vict. c. 80.

(*g*) Co. Litt. 47.

(*h*) 12 & 13 Vict. c. 92, amended by 17 & 18 Vict. c. 60.

(*i*) Cro. Jac. 148.

(*k*) Vol. iii. c. 10.

punishment to him, yet, if he continued obstinate, and would make no satisfaction or payment, afforded at common law no remedy at all to the distrainor. Though for a debt due to the crown, unless paid within forty days, the distress was always saleable (*l*). And for an amercement imposed at a court leet, the lord may also sell the distress (*m*); partly because, being the king's court of record, its process partakes of the royal prerogative (*n*); but principally because it is in the nature of an execution to levy a legal debt. And so, in the case of a statutory distress, which is also in the nature of an execution, the power of sale is likewise usually given to effectuate and complete the remedy. And in like manner, by several acts of parliament (*o*), in all cases of distress *for rent, if the tenant or owner do not, within five days (*p*) [*88] after the distress is taken, and notice of the cause thereof given him, replevy the same with sufficient security, the distrainor, with the sheriff or constable, shall cause the same to be appraised by two sworn appraisers, and sell the same towards satisfaction of the rent and charges; rendering the overplus, if any, to the owner himself (*q*). And by this means a full and entire satisfaction may now be had for rent in arrear by distress, a remedy originally given at common law; and sale consequent thereon, which is added by act of parliament.

Before quitting this subject I must observe that two points were long ago decided (*r*) which had an important bearing upon the law of distress—1st, that where an entry upon premises is permitted or an authority is given by the law an abuse of it by the party to whom it is thus given will render him a trespasser *ab initio*. If a landlord who distrains for rent works or kills the distress, the law adjudges that the wrong-doer entered for the express purpose of doing the tortious act, and because the act which demonstrates the original intention is a trespass he shall be a trespasser *ab initio*. The 2nd point decided was that a mere non-feasance cannot have the retrospective operation just indicated, for this reason, that a bare non-feasance is not a trespass. If therefore a landlord distrains for rent, and thereupon the lessee tenders him the rent in arrear, and requires the goods distrained to be delivered up to him, a refusal on the part of the landlord thus to deliver them, will not make him a trespasser *ab initio*. Though here a distinction must be taken between a tender made before and one made after the impounding of the goods, [*89] *if the tender be made and refused before the goods are impounded, there will be vested in the tenant a right of action, whereas a tender made after the impounding is too late (*s*).

It is clear that this doctrine of trespass *ab initio*, if strictly applied, must bear extremely hard on landlords who, having entered lawfully to distrain, would by committing any subsequent abuse of the legal power conferred and thus exercised become liable in trespass for the original entry and subsequent continuance upon the premises on which the distress was levied. Therefore, by the statute 11 Geo. 2, c. 19, s. 19, it was provided that where any distress shall be made for any rent justly due, and any irregularity or unlawful act shall be

(*l*) Bro. Abr. tit. Distress, 71.

(*m*) 8 Rep. 41.

(*n*) Bro. Abr. tit. Distress, 71.

(*o*) See stats. 2 Will. & M. sess. 1, c. 5; 4 Geo. 2, c. 28; 11 Geo. 2, c. 19.

(*p*) Five days, that is five times twenty-four hours, must elapse before sale (*Harper v. Taswell*, 6 C. & P. 166); and the tenant

may replevy after that time in case the distress is not sold. (*Jacobs v. King*, 5 Taunt. 541.)

(*q*) See *Evans v. Wright*, 2 H. & N. 527. *The Six Carpenters' Case*, 8 Rep. 290.

(*r*) Compare *Loring v. Warburton*, E. B. & E. 507, with *Glynn v. Thomas*, 11 Exch. 870.

afterwards done by the party distraining or his agent, the distress shall not be deemed unlawful nor the distrainor be deemed a trespasser *ab initio*, but damages may be recovered by action for the wrong done. By this statute accordingly in the particular case of landlord and tenant, the hardship flowing from the doctrine as to trespass *ab initio* was removed. The 1st and 2nd sections of the statute just cited are material in reference to the remedies of a landlord against his tenant. By them is provided a very stringent remedy in case of the fraudulent removal of goods by a tenant. If goods of the tenant are fraudulently conveyed away from the demised premises, they are made liable to a distress within the period of thirty days to whatever place they may be removed — liability thus attaching to the particular goods themselves and not merely attaching to them so long as they continue the goods of the tenant. Sec. 2 provides, however, that no landlord shall take or seize goods as a distress which have been *bona fide* sold for valuable consideration to persons not privy to the fraud. This 2nd section consequently operates in defeasance of *the [* 90] provisions of the 1st, and takes all goods thus sold out of its operation.

Let us suppose that a party having possession of goods fraudulently removed by a tenant holds them innocently as a bailee or as a donee, without having given value for them. In this case the liability of goods to distress will continue, so that the close or house of the person in whose possession they are may be entered, and his locks even may be broken without any previous request, in order to effect a recaption of the goods. And though this may seem hard upon the individual: we must remember — that goods fraudulently removed under the circumstances supposed are not usually secreted in a man's close or house without his privy or consent — that it might be very difficult for a landlord within the time allowed for the distress to put himself in a position to prove the privy to the fraud of the person actually in possession of the goods, — and that if notice were required the remedy of the landlord might in practice be entirely defeated (u).

IV. An advowson is the perpetual right of presentation to a church, or ecclesiastical benefice. Advowson, *advocatio*, signifies in *clientelam recipere*, the taking into protection; and therefore is synonymous with patronage, *patronatus*: and he who has the right of advowson is called the patron of the church. For, when lords of manors first built churches on their own demesnes, and appointed the tithes of those manors to be paid to the officiating ministers, which before were given to the clergy in common (as was formerly mentioned (x)), the lord, who thus built a church, and endowed it with glebe or land, had of common right a power annexed of nominating such minister as he pleased (provided he were canonically qualified) to officiate in that church of which he was *the [* 91] founder, endower, maintainer, or, in one word, the patron (y).

This instance of an advowson well illustrates the nature of an incorporeal hereditament. It is not itself the bodily possession of the church and its appendages, but it is a right to give another man a title to such bodily possession. The advowson is the object of neither the sight

(u) *Williams v. Roberts*, 7 Exch. 618; building and endowing the church, appears also to have been allowed in the Roman empire. Nov. 20, t. 12, c. 2; Nov. 118. c. 23.

(x) Vol. I. p. 181.

(y) This origin of the *jus patronatus*, by

nor the touch; and yet it perpetually exists in the mind's eye, and in contemplation of law. It cannot be delivered from man to man by any visible bodily transfer, nor can corporeal possession be had of it. If the patron takes corporeal possession of the church, the church-yard, the glebe, or the like, he intrudes on another man's property, for to these the parson has an exclusive right. The patronage can therefore pass from one owner to another only by operation of law, or by deed of grant, which is a kind of invisible mental transfer: and being so vested it lies dormant and unnoticed, till occasion calls it forth, when it produces a visible corporeal fruit, by entitling some clerk, whom the patron shall please to nominate, to enter, and receive bodily possession of the lands and tenements of the church.

Advowsons are either advowsons appendant, or advowsons in gross. Lords of manors being originally the only founders, and of course the only patrons of churches (z), the right of patronage or presentation, so long as
Are appendant, it continues annexed to the possession of the manor, as some have done from the foundation of the church to this day, is called an advowson appendant (a): and it will pass or be conveyed, together with the manor, as incident and appendant thereto, by a grant of the manor only, without adding any other words (b). But where the property of *the
or in gross. advowson has been once separated from the property of the [*92] manor by legal conveyance, it is called an advowson in gross, or at large, and never can be appendant any more; but is for the future annexed to the person of its owner, and not to his manor or lands (c), unless indeed the separation was only of a temporary character, as if made by a person having only a partial interest (as for years or for life) in the manor, or being made by the owner in fee is only for a term of years or for life (d). An advowson may however be conveyed by a lord of a manor with part of the land of the manor, without parting with the whole manor, in which case it remains appendant to the land with which it was conveyed, so as to pass by a subsequent conveyance of that land although not named, with this exception however, that it does not where the crown is the grantor (e).

Advowsons are of three kinds — donative, presentative, and collative. It is probable that all were originally of the first kind, of which there are now but few. An advowson is donative when the patron, whether the
Donative advowson. king or a subject, has the right to confer the church and all the temporalities by investiture, without the necessity of any presentation to or institution by the bishop. The only restriction upon the choice of the clerk is that he must have received ordination (f). Moreover, beyond such compulsion as is produced by ecclesiastical censure, the *patron is under no necessity to fill the church when vacant, but he can take the property to his own [*93]

(e) Co. Litt. 119.

(a) *Ib.* 121.

(b) *Ib.* 807.

(c) *Ib.* 120; *Fulmerston v. Steward*, Plowd. 103; *Ive's case*, 5 Rep. 11; *Arthington v. Bishop of Chester*, 1 H. Bl. 428.

See 2 Woodd. 64. "Grant is properly of things incorporeal, which cannot pass without deed," 1 Inst. 9.

(d) Burn. Eccles. Law, Advowson, s. 3; *Sir Moyle Finch's case*, 6 Rep. 62b, 64b;

Bishop of Meath v. Winchester, 3 Scott, 561; *Rooper v. Harrison*, 2 K. & J. 86.

(e) Harg. Co. Litt. 121, 6 a; *Att.-Gen. v. Sitwell*, 1 Y. & C. 559.

(f) As to ordination, see 13 & 14 Car. 2, c. 4, s. 14; 44 Geo. 3, c. 43; and as to the requisites which must be complied with by the clerk, see 13 Eliz. c. 12, ss. 1, 3; 13 & 14 Car. 2, c. 12, ss. 1, 3; 13 & 14 Car. 2, c. 4, s. 6; 1 W. & M. c. 8, s. 7; 1 Geo. 1, c. 13, s. 2; 9 Geo. 2, c. 26; 6 Geo. 3, c. 53.

use (g). The ordinary has no jurisdiction over the incumbent except for personal offences (h). As might be expected, the church was greatly dissatisfied with such a condition of impotence, and great struggles were made to abolish the custom of investiture by the patron only (i); and in the reign of Henry the Second the method of institution by the bishop appears to have been first practised. At length the practice grew up of presenting the proposed clerk to the bishop, previously to his institution; this would be necessary when the donee of the living was a layman, and in that case the bishop could exercise the unquestioned right of rejecting him, and by the beginning of the 14th century (k) the Pope and the bishops had succeeded in establishing their power of refusal in most cases, even where the clerk was already in holy orders, and about the same time the doctrine of lapse was introduced, entitling the ordinary to collate a clerk to the benefice if the patron neglected to present one within six months after the vacancy occurred. So that ultimately, in parochial churches at least, the practice of presentation to the bishop became almost universal. Some churches however survived this innovation, and particularly those which were closely connected with great family mansions. In these the bishop or ordinary is said to have power as to the parson, but not as to the place (l).

Moreover, some were in later times created by special license of the crown; the few donative advowsons which now remain are mostly of this kind (m). By
 Presentative [*94] far the *greater part of all advowsons now belong to the
 advowson. second class called presentative, which, as will appear from what has been said, are where the patron has a right to present a clerk to the bishop, and subject to the bishop finding him canonically qualified, to require that he be instituted and inducted into the church.

A donative advowson, not specially created so by letters patent, becomes as the law now stands presentative, if the patron once waives the peculiar right of investiture which he possesses. If he once presents to the bishop, and his clerk is admitted and instituted, the right of investiture is lost (n). And if a donative advowson receive augmentation from Queen Anne's bounty under the act 1 Geo. 1, st. 2, c. 10, it loses its special character and becomes presentative.

Since an advowson may, like land, be held for various interests of different duration, as for years, or for life, or for ever, the person who would, if it were land, be entitled to the actual possession of the land, at the time the church falls vacant, has the right to present to the church for that turn; when the advowson belongs to several persons in common, as for instance coparceners, they present in turn, the eldest first (o), if they be joint tenants they must concur in

(g) *Fairchild v. Gaire*, Yelv. 61; 2 Roll. Rep.

(h) Co. Litt. 344; *Walter v. Gunner*, 1 Hag. 319; *Colefatt v. Newcomb*, Ld. Raym. 1205.

(i) See a letter from Pope Alexander III. to Becket, inveighing against the *prava consuetudo*, as he calls investiture. Decretal, l. 8, t. 7, c. 8.

(k) Selden, History of Tithes, c. 12, ss. 2, 5.

(l) 3 Salk. 189.

(m) See Co. Litt. 144 a, and *Mirehouse v. Rennell*, a case in which a vast amount of learning upon the subject of advowsons was displayed, both in the numerous arguments and the various judgments reported in D. P.,

1 Cl. & F. 527; 7 Bli. N. S. 241; in K. B., sub nom. *Rennell v. Bishop of Lincoln*, 7 B. & Cr. 113; 9 D. & Ry. 817, in C. P. (the decision of which was reversed), 3 Bing. 223 & 8 Bing. 490.

(n) Co. Litt. 344; *Fairchild v. Gayre*, Cro. Jac. 63, S. C. Yelv. 61; *E. v. Lord Foley*, 2 C. B. 664. If the advowson be donative by letters patent and not by prescription, the rule does not seem to apply, *Ladd v. Widdows*, 2 Salk. 541, S. C. Holt, 259; see 8 id. 140.

(o) Co. Litt. 166 b; *Gully v. Bishop of Exeter*, 10 B. & C. 584; *Bishop of Salisbury v. Philips*, Ld. Raym. 535; *Richards v. Earl of Macclesfield*, 4 L. J. N. S. Ch. 153.

each presentation, otherwise the bishop may present. This right of presentation may before the vacancy occurs be sold, but not when the church is *void (*p*). So that if an advowson be sold when the church is vacant, the presentation will not pass, although the sale is good as to the [*95] advowson (*q*). If the patron die whilst the church is vacant, then, although the advowson goes to the heir or devisee, the presentation is considered as a chattel and goes to the personal representative (*r*); if, however, the patron is himself incumbent, so that the vacancy is occasioned by his own death, the presentation goes to the heir or devisee (*s*). An advowson being of a valuable species of property, may of course be mortgaged, but inasmuch as the presentations are not matters that can be brought into account, the mortgagee is bound in equity to present the mortgagor's nominee; and this rule holds even where there is an express contract that the mortgagee shall present (*t*), but of course the parties may contract that the mortgagee should have the power of selling the presentation before the vacancy occurs, and under the present law of mortgages (*u*) a mortgagee may, whether authorised by his deed or not, sell the advowson. Similarly, the trustee of a bankrupt patron may sell an advowson, but if the church be vacant the bankrupt may *present for that [*96] turn (*x*). Again, a guardian only takes that part of an infant's estate for which he can account, therefore he cannot present, but the infant himself presents to a vacant living (*y*). An advowson seems always to have been assets for payment of the specialty debts, and now is so for all debts of a deceased patron (*z*), and under the modern law (*a*) a creditor of a living patron might until recently obtain satisfaction of his debt out of an advowson, whether he may now do so seems open to some doubt.

When an incumbent of a church is raised to a bishopric the crown has the right of presenting for that turn (*b*).

(*p*) 31 Eliz. c. 6. We shall hereafter notice more at length the law against simony as part of the law of forfeiture. The sale may be made even when the incumbent is *in extremis*. See *Fox v. Bishop of Chester*, 6 Bing. 1, where the law of advowsons was much considered.

(*q*) *Baker v. Rogers*, Cro. Eliz. 788; *Wolforstan v. Bishop of Lincoln*, 2 Wils. 174; *Greenwood v. Bishop of London*, 5 Taunt. 724.

(*r*) *Mirehouse v. Rennell*, 4 Cl. & Fin. 537; 7 Bligh. N. S. 241, *et ubi sup.*

(*s*) *Holt v. Bishop of Winchester*, 3 Lev. 47; *Harris v. Austen*, 3 Bulst. 47; 2 Roll. Rep. 214. See *Martin v. Martin*, 12 Sim. 579, where the patron being incumbent devised his real estate, including the advowson, to trustees, upon trusts, to maintain children, sell, &c. It was held that this devise could not carry the presentation, which could neither be sold nor applied for maintenance of children; and compare 1 Leon. 205.

(*t*) *Jory v. Cox*, Prec. Ch. 71; *Amlhurst v. Dawling*, 2 Vern. 401; *Mackenzie v. Robinson*, 3 Atk. 559. A presentation by the mortgagee will however be good, unless the mortgagor sets it aside within six months. (18 Ed. 1, c. 5.)

(*u*) 23 & 24 Vict. c. 145, *quære* whether this would authorize a sale of a next presentation.

(*x*) *Mirehouse*, 156; 12 & 13 Vict. c. 106, s. 147.

(*y*) Co. Litt. 17 b. 89 a; *Bishop of Lincoln v. Wolforstan*, 3 Burr. 1504; *Shopland v. Royder*, Cro. Jac. 95.

(*z*) Co. Litt. 17 b. 374 b; *Robinson v. Tonge*, 3 P. Wms. 398, 401; 1 Bro. P. C. 114; *Westfaling v. Westfaling*, 3 Atk. 460; 8 & 4 Will. 4, c. 105.

(*a*) 1 & 2 Vict. c. 110, s. 13. Since an advowson cannot be extended under a writ of elegit (which, under the act just cited, s. 11, only affects "lands, tenements, rectories, tithes, rents, and hereditaments," omitting the word 'advowsons,' and under the ancient statute Westminster the 2nd, 13 Edw. 1, c. 18, an advowson was not extendible, *Robinson v. Tonge*, 3 P. Wms. 398, 400, Co. Litt. 374); and since, under the late act, 27 & 28 Vict. c. 112, no charge is created until the "lands" are delivered in execution, in which act land seems to include advowsons (see s. 2), it appears to follow that advowsons have regained their former immunity as against the judgment debts of a living patron.

(*b*) *Basset v. Gee*, Cro. Eliz. 790; *Wentworth v. Wright*, Ib. 526; *Woodley v. Bishop of Exeter*, Cro. Jac. 691. The prerogative does not extend to donative advowsons, *Grocers' Co. v. Archbishop of Canterbury*, 2 W. Bl. 770; *Bishop of London v. Att.-Gen.* Show. P. C. 164. See 3 & 4 Will. 4, c. 27, s. 31.

Some restrictions have been by law placed upon the rights of patrons to present. Thus, though a Roman catholic may be owner of an advowson, he may not present on a vacancy, the right to which in such a case belongs to the universities of Oxford and Cambridge (*c*). But no such restriction has been laid upon a Jew who may *present (*d*). A similar restriction was laid [*97] upon municipal corporations, who have been by act of parliament directed to sell such advowsons as they possessed (*e*).

Collative advowsons are where the patron is the bishop of the diocese in which the living lies. Presentation and institution are in such a case replaced by the single act of collation (*f*).

Formerly, when advowsons were attached to monasteries or other ecclesiastical institutions, it was, as we have seen (*g*), customary for them to appoint vicars to the churches; the right of nomination to these vicarages constituted another advowson, which on the dissolution of monasteries came into the hands of private individuals (*h*). There is no difference in the law relating to advowsons of rectories and those of vicarages; the like may be said of those vicarages; which were before 31 & 32 Vict. c. 117, called perpetual curacies.

V. Corodies are a right of sustenance, or to receive certain allotments of victual and provision for one's maintenance, in lieu of which a pension or sum of money is sometimes substituted. And these may be reckoned

V. Corodies. another species of incorporeal hereditaments; though not chargeable on, or issuing from, any corporeal inheritance, but only charged on the person of the owner in respect of such his inheritance. But, like other incorporeal hereditaments, they are transferable only by deed (*i*). They are only found in connection with ecclesiastical, collegiate, or other similar corporations or institutions, and partake of an eleemosynary character.

*VI. Annuities are of much the same nature as corodies, except that [*98] they have their origin in the grant of temporal persons, whilst the former are always due from spiritual incorporations. We have

VI. Annuities. already (*k*) had occasion to point out much of their nature in distinguishing them from rent-charge, with which they are often confounded, the two names being commonly, though inaccurately, used interchangeably. The primary requisite to a good annuity is the fixity of the intervals at which it is payable. Thus, a covenant with A. and his heirs to find a priest to serve a chapel every holyday, or to pay 5*l*. for every default, is no annuity on account of the uncertainty of the payment (*l*). The annuity is to be considered as consisting merely of definite sums payable at specified epochs, and so is distinguishable from payments in the nature of interest. Upon this principle, until provision was made by statute for obviating the evils attending the rule (*m*),

(*c*) By 1 W. & M. c. 26. See also 3 Jac. 1, c. 5; 12 Ann. st. 2, c. 14; 11 Geo. 2, c. 17; 10 Geo. 4, c. 16, s. 16; *Edwards v. Bishop of Exeter*, 7 Scott, 652; see *Edwards v. Bishop of Exeter*, 5 Bing. N. C. 652.

(*d*) Per Lord Lyndhurst, in *Mirehouse v. Rennell*, 7 Bligh. 322.

(*e*) 5 & 6 Will. 4, c. 6, explained by 1 & 2 Vict. c. 81. See *Hins v. Reynolds*, 2 Scott, N. R. 394.

(*f*) *Mirehouse*, Advows. 40; Co. Litt. 344 b; 2 Inst. 358.

(*g*) *Ante*, p. 72; it may be noticed that sinecure rectories are abolished 3 & 4 Vict. c. 113, s. 48.

(*h*) Finch. L. 162.

(*i*) *Ib.* 12 Hen. 4, 17.

(*k*) *Ante*, p. 54.

(*l*) Dyer, 24; Roll. Ab. Annuity.

(*m*) 4 & 5 Will. 4, c. 22. See *ante*, p. 59.

it was held that if a man entitled to an annuity for his life died the day before the day of a payment becoming due, his executors could not claim any part of the sum which would have accrued (*n*). The characteristic of an annuity at common law was that there was a special writ by which it could be recovered (*o*); the modern form of securing its payment is by bond or covenant, the action upon which may be had without prejudice to any security which the annuitant may have, which was not the case with the ancient and now obsolete writ. As we have said that since an annuity may be limited to a man and his heirs, it constitutes in some sort an hereditament, otherwise it has little about it in common with other hereditaments. It may be put an end to by the grantor obtaining his order of discharge in bankruptcy, the annuitant having merely *the right to prove in the bankruptcy for the value of the annuity (*p*). We may notice that an inflexible rule seems to have been established [*99] that no claim for interest on arrears of an annuity is allowed (*q*).

The practice of granting annuities is now far less frequent than it was in the early part of this century, when the rate of interest which could be legally made payable upon a loan was limited. At times when transactions of this kind were frequent there were several restrictions imposed by the legislature upon the grant of annuities, and amongst these it was requisite to enrol a memorial of the annuity in chancery in a prescribed form within thirty days after the execution of the grant (*r*). The litigation which arose out of this was found to be greater than the benefit, which the registration was supposed to afford, warranted, and accordingly all the legislative trammels in which annuities were involved were put an end to by a recent act (*s*). The only requisite which now exists to the validity of an annuity when granted by deed is a registration in the Court of Common Pleas at Westminster (*t*).

VII. Franchises are a seventh species. Franchise and liberty are used as synonymous terms: and their definition is (*u*), a royal privilege, or branch of the king's prerogative, subsisting in the hands of a subject. Being therefore derived from the crown, they must arise from the king's grant (*x*); or, in some cases (*y*), may be held by *prescription, which, as has been frequently said, presupposes a grant (*z*). We may [*100] here remark, that they may be vested in either natural persons or bodies

(*n*) 1 Swanst. 349 n.; *Winter v. Mouseley*, 2 B. & Al. 802.

(*o*) Litt. s. 219.

(*p*) 12 & 13 Vict. c. 106, s. 175.

(*q*) *Mansfield v. Ogle*, 4 De G. & J. 38; *Powell Trusts*, 10 Hare, 134; *Torre v. Brown*, 5 H. L. Ca. 555; *Booth v. Coulton*, 2 Giff. 514.

(*r*) See 53 Geo. 3, c. 141; 3 Geo. 4, c. 92; and 7 Geo. 4, c. 77.

(*s*) 17 & 18 Vict. c. 15, s. 12.

(*t*) 18 & 19 Vict. c. 15, s. 12. Annuities granted by will are exempt from the provisions of the act, s. 14.

(*u*) Finch. L. 164.

(*x*) They were formerly granted in great number until restrained by a declaration of Edw. 3, upon a petition presented by the commons in the parliament held 21 Edw. 3. See 2 Rot. Parl. 16.

(*y*) Such franchises as cannot be enjoyed without matter of record, cannot be claimed

by prescription; for a record cannot be presumed from such evidence. Such are rights to deodands and to the goods of felons, to make a corporation, to make a coroner, &c. Co. Litt. 114 a; 9 Rep. 276. The stat. 9 Geo. 3, c. 16, which limits the claim of the crown to sixty years, expressly excepts franchises and liberties. That act was passed in consequence of the litigation between Sir James Lowther and the Earl of Portland. The Honour of Penrith, with its appurtenances, were granted to the 1st Earl of Portland, who, and his successors, enjoyed as appurtenant to it, the castle of Carlisle and the forest of Inglewood, until Sir James Lowther, conceiving that these were not included in the grant, obtained a lease of them from the crown.

(*z*) See *Trotter v. Harris*, 2 Y. & J. 285; *R. v. Marsden*, 3 Burr. 1812.

politic; in one man or in many; but, as is obvious, the same identical franchise that has before been granted to one, cannot be bestowed on another, for that would prejudice the former grant (*a*).

To be a county palatine is a franchise vested in a number of persons. It is likewise a franchise for a number of persons to be incorporated, and subsist as a body politic; with a power to maintain perpetual succession and to do other corporate acts: and each individual member of such corporation is also said to have a franchise or freedom (*b*).

The following are the principal other franchises. To have a forest, chase, park, warren, or fishery endowed with royal privileges. To have a court or liberty of holding pleas and trying causes. To have the cognizance of pleas, or [**101*] the exclusive right to try causes within the jurisdiction of such a franchise. To have a bailiwick or liberty exempt from the sheriff, wherein the grantee only and his officers (*c*) may execute all process. To have a manor or lordship, or at least to have a lordship paramount. To hold a court leet (*d*). To have a fair or market, with the right of taking tolls either there or at other public places such as bridges. Lastly, to have waifs, wrecks, estrays, treasure-trove, royal fish, and forfeitures.

The privilege of hunting seems from the most ancient times to have been one of the most highly prized accompaniments of power and wealth. Amongst the ancient Germanic tribes it appears to have been frequently claimed by princes as their special right (*e*). In England, prior to the Norman conquest, hunting was esteemed as a princely diversion and exercise, but it does not appear that the Saxon kings ever claimed to put a restraint upon their subjects in this respect, and every freeholder had the full liberty of sporting on his own land, so long as he did not trespass upon royal territories (*f*). This right of appropriating animals or birds that a man may find upon his own lands, by taking or killing them, is a right similar to that of enjoying [**102*] other natural accessories of land, such as air or water, and except so far as controlled by statutes (*g*), it has continued to be the common law up to the present day (*h*).

(*a*) 2 Roll. Ab. 191; Keil. 196.

(*b*) Formerly the grant of charters incorporating companies was a common practice; since, however, the various Joint Stock Companies' Acts have been passed, this practice has fallen into disuse. The act under which companies for general purposes are now formed and incorporated is The Companies' Act, 1862, 25 & 26 Vict. c. 89, and the Amendment Act of 1867, 30 & 31 Vict. c. 131.

(*c*) See *Newland v. Cliffe*, 3 B. & A. 630; *Mounsey v. Dawson*, 6 A. & E. 752.

(*d*) A court-leet, though not uncommonly part of the manorial privileges, is not, like a court baron, necessarily incident to a manor. It is derived from the sheriff's tourn, and is a court of record, having the same jurisdiction within some particular precincts as the sheriff's tourn. It is a privilege created by grant from the crown to the lords of certain manors for the more easy administration of justice. *Colebrook v. Elliott*, 3 Burr. 1859.

(*e*) See *Cæsar*, De Bell. Gall. lib. 6, c. 20; Tacitus, Germ. c. 15 Heineccius, Elem. Jur. Germ. lib. 2, No. 82.

(*f*) See Laws of Canute, c. 77, and of

Edward the Confessor, c. 36, where we find "*sit quilibet homo dignus venatione sud in sylvis et in agris sibi propriis et in dominio suo: et absteineat omnis homo a venariis regis ubicunque pacem eis habere voluerit.*" Wilk. Leg. Sax. 146, and compare the Scandinavian law, stated in Stiernhood de jure Sueon. lib. i. c. 8. "*Cuique enim in proprio fundo quamlibet feram quoque modo venari permisum.*" See Manwood on Forests, pl. 3.

(*g*) As to the modern statutes concerning game, see *post*.

(*h*) *Case of Monopolies*, 11 Rep. 87; *Lord Dacre v. Tebb*, 2 Bl. Rep. 1151. See *Rigg v. Lonsdale*, 1 H. & N. 923; s. c. 11 Exch. 654. This opinion is contrary to that formerly held, that the Norman conquest swept away all ancient rights in this respect, and substituted the doctrine that the right of pursuing or taking all beasts of chase or venery, and such other animals as were accounted game, was then assumed as belonging only to the king, and such persons as were authorised by him. Mr. Christian has, however, pointed out the improbability of this theory, and we follow his authority.

In the progress of time, as husbandry advanced, wild animals were to a considerable extent driven out of lands which belonged to private persons and were under cultivation, into waste lands and woods. These for the most part not being held by any person, were deemed to belong to the crown, and thus royal forests existed in Saxon times. The practice of the first Norman kings of creating immense forests extending over the lands of private persons, was a novelty in England, and as is well known, was one of the greatest grievances which the English people suffered as a result of the conquest. The claim was made by William and his successors to the sole right of hunting throughout the realm (*i*), and they introduced for the purpose of protecting their forests the cruel laws called forest laws, under which the most barbarous punishments were inflicted for transgressing against the rights so claimed (*k*). The cruel and insupportable hardships which these forest laws created to the subject, occasioned our ancestors to be as zealous for their reformation, as for the relaxation of the feudal rigours, and *the other exactions introduced by the Norman family; and accordingly we find the immunities of *carta de foresta* as warmly contended for, and extorted from the king with as much difficulty, as those of *magna carta* itself. By this charter, confirmed in parliament (*l*), all the lands that had been afforested by Henry II., Richard I., and John, except the proper demesnes of the crown, were disafforested and freed from the forest laws, so far as extended to the owners. They remained however subject to that law with respect to the rest of the world, and acquired the name of purlieus (*m*). Many regulations were also made by the same statute in reference to those royal forests which were allowed to remain, greatly mitigating the rigour of the forest law, particularly (*n*) killing the king's deer was made no longer a capital offence, but only punished by a fine, imprisonment, or abjuration of the realm. And by a variety of subsequent statutes, together with the long acquiescence of the crown without exerting these laws, this prerogative is now become no longer a grievance to the subject. They may be considered as never having taken root so as to constitute part of the law of the land, and to have fallen together with the arbitrary and tyrannous power which first introduced and alone supported them.

It is worthy of remark that the same king who in later times attempted to establish the absolute irresponsibility of monarchy, also endeavoured to restore the jurisdiction of courts of Eyre to their former authority. Courts were held by the chief justice of Eyre under the direction of Charles I., with a view of re-establishing the forestal rights of the crown, but the temper of those times was not calculated to permit such a proceeding, and it was abandoned (*o*).

*Although, according to the better opinion, it may be held that by law a man might always kill game on his own land, yet it is without [*104] question that it was an established principle of law that animals *feræ naturæ* while living could not be the property of a private individual, and consequently they were considered to be, if not the property of the crown, still under the

(i) "*Omnes ferarum venationem totius Angliæ sibi peculiarem vindicavit, et vix paucis nobilioribus ac familiaribus privilegium in propriis saltibus venandi permisit.*" Ordericus Vitalus, speaking of Henry I. *Rex Anglorum Johannes ad natale Domini fuit apud Bristolum et ibi capturam avium per totam Angliam interdixit.* Matt. Paris.

(k) See 2 Hallam, *Mid. Ages*, 426; 1 Reeve's *Hist. of English Law*, 201.

(l) 9 Hen. 3.; 25 Ed. 1, c. 1; 28 Ed. 1, c. 1.

(m) 4 Inst. 303, 304; *Com. Dig. Chase*, 1; *Manw. Purlieu*.

(n) C. 10.

(o) See 16 Chas. 1, c. 16; 2 Hall. *Const. Hist.* 13.

special protection of the royal authority (*p*). So that a private person might not take measures to appropriate them and restrain them of their natural liberty, in order to increase the enjoyment which he might derive from the chase (*q*).

The theory we have mentioned, when taken in connection with the much larger claims to the exclusive right of sporting set up by the Norman kings (who often were well able to make men, outwardly at all events, respect their pretensions), seems sufficient to account for the practice which certainly has existed of granting the franchises of forest, chase, park, and warren. It is unquestionable that they have been granted from the time of the conquest, and the form which these grants assumed, as might be expected, seems to proceed upon the idea that without such a grant the rights of a subject to sporting would be of small value (*r*).

The franchise of a forest, then, is a grant of the *assumed royal
[* 105] right to devote a certain territory to the keeping of wild beasts and fowls of forest, with the liberty of freely hunting and killing them, together with the right of protecting it by the aid of the forest law. There have been several cases where forests have been thus granted to lords (*s*). But commonly, when royal forests have been granted to subjects, the grant has not included the jurisdiction of forest law, in which case the forest in no respect differs from a chase, and trespassers must be proceeded against at common law (*t*). Beasts of forest are specially hart, hind, boar, wolf, and hare, but all beasts of venery are equally protected, since the right of forest has always included those of a chase, a park, and free warren.

A chase is a franchise of keeping certain kinds of wild animals within a particular district, with the exclusive right of hunting them; it is therefore similar to a forest in all respects, except that there are no laws
Chase. peculiar to it. Beasts of chase are buck, doe, fox, martin, and roe; the property of these is in the owner of the chase. A chase when belonging to a subject, must have been created by royal grant. But except in the early times of the Norman kings, a chase could not be created even by the sovereign over lands of a subject (*u*).

A park is an inclosed chase extending only over the grounds of the owner of the park. It differs from a chase in this respect, that a man cannot have a park over another man's grounds. It must also be
Park. [* 106] inclosed by *palings, wall or hedge (*x*) and it must also

(*p*) Bract. lib. 2, c. 24, says, *Habet enim (rex) de jure gentium in manu sua quæ de jure naturali deberunt esse communia, sicut feras bestias et aves non domesticas.*

(*q*) *Case of Monopolies*, 11 Rep. 87.

(*r*) In the charter of foundation of Battle Abbey are the following words: "*Warrennam propriam in ipsâ leugâ habeat ecclesia; et in omnibus maneriis suis.*" The following is the common form of a grant of warren. "*Quod ipse et hæredes sui imperpetuum habeant liberam warrennam in omnibus dominicis terris de N. in Com. E. dum tamen terras illas non sint infra metas forestarum nostrarum, ita quod nullus intret terras illas ad fugandum in eis, vel aliquid capiendum quod ad warrennam pertinet sine licentiâ et voluntate ipsius E. vel*

hæredum suorum sub forisfacturâ decem librarum." Cruise, Tit. xxvii. pl. 20.

(*s*) *Case of Leicester Forest*, 12 Rep. 22; Cro. Jac. 155; Manw. pl. 77, 88.

(*t*) Manw. pl. 67; 4 Inst. 314. As to the rights of owners of land within the limits of a forest, see 4 Inst. 297, 298. *Case of Leicester Forest*, 12 Rep. 22; s. c. Cro. Jac. 155; and as to the present incorporeal right which the crown has in a forest, *A. G. v. Hallett*, 1 Exch. 211; 5 Dowl. & L. P. C. 87.

(*u*) 4 Inst. 301; and see 81 Hen. 8, c. 5, an act passed for the purpose of making a chase about the palace at Hampton Court in which the rights of landowners were fully recognised and provided for.

(*x*) The primary signification of the word "park" is an inclosure.

contain beasts of park, such as buck, doe, &c., which must be in a wild state unreclaimed (y).

To constitute a park, therefore, there are three requisites, a grant from the crown, inclosure, and beasts of park, and if any of these be wanting, it is no park. By the statute Westminster 1, c. 20, severe punishments were inflicted upon trespassers in parks, but in other respects they are subject only to the common law.

A free warren is a franchise to have and keep certain wild beasts and fowls within the limits of a specified district, commonly those of a manor (z). The

Warren. owner of a free warren has an exclusive power of killing game, so far as his warren extends, and also of preserving the game by the medium of gamekeepers or warreners, who are justified in destroying any dogs or other animals which injure the game (a). It does not seem that the crown ever claimed the right of granting free warren to a man over the lands of another (b), but merely the right over his own lands. A man might have a free warren over the lands of another; if, for instance, a lord of a manor had free warren over the whole lands of the manor before there were any freeholders, on the creation of their estates he might retain the warren (c), or on a common conveyance of land a man might reserve the free warren (d).

The beasts of warren are hares and rabbits, the fowls are pheasants and partridges (e). The word warren now, *since the real or seeming [* 107] privileges conferred by a free warren have ceased to be of value, is commonly used merely to denote grounds set apart for breeding hares and rabbits.*

The franchise was doubtless invented to favour the idea of a royal protection to game, and also in order to facilitate the preservation of game, which effect it certainly produced; it seems not uncommonly to have been thought that without the grant of a free warren a person could not by common law justify sporting, even on his own land (f).

A free fishery or exclusive right of fishing in a public, i. e. a navigable (g) river, or an arm of the sea (h), is also a royal franchise, which is, like other

Free fishery. franchises when vested in a private person, held under a grant from the crown either express, or, when prescribed for, presumed.

The claim of royalty to this right seems to have been admitted in all countries where the feudal polity has prevailed (i), and was probably introduced into England by the Normans. The making grants of this right was prohibited for the future by king John's Magna Charta, and the rivers that had been fenced in his time were directed to be laid open, as well as the forests to be

(y) See *Ford v. Tynte*, 2 J. & H. 150, following *Morgan v. Abergavenny*, 8 C. B. 768.

(z) Spelman, Gloss. voc. Warrena, thinks that warrens were entirely new in England at the time of the Norman conquest.

(a) Keil. 149 b (temp. Edw. 3); *Wadhurst v. Dunne*, Cro. Jac. 45; and see 21 Edw. 1, st. 2. *De Malefactoribus in Parcis*; *Smith v. Kemp*, Salk. 637.

(b) Year Book, 34 Hen. 6, p. 28.

(c) *R. v. Talbot*, Cro. Car. 311; *Fowler v. Seagrave*, Bulst. 254.

(d) Bro. Ab. tit. "Warren," 3; *Dyer*. 30 b, pl. 209.

(e) Manw. For. pl. 20, Warren. *Duke of Devonshire v. Lodge*, 7 B. & Cr. 86, where it was decided that grouse were not fowls of warren.

(f) *Smith v. Kemp*, Salk. 637, where the rights of free warren and free fishery were discussed. Free warren being defined as "a liberty to hunt in one's own or another's ground, exclusive of all others."

(g) *Carter v. Murcott*, 4 Burr. 2162.

(h) 4 T. R. 439; 1 Camp. 312.

(i) See Seld. Mar. Claus. i. 24; *Dufresne*, v. 503; *Crug. de Jur. feod.* ii. 8, 15.

* See *Eurl Beauchamp v. Wynn*, L. R. Ch. 562.

disafforested (*k*). This opening was extended by the second (*l*) and third (*m*) charters of Henry III. to all rivers that were not in defence in the time of Henry II., and the defence of these was limited to the extent that existed in his time; so that a franchise of free fishery must be at least as old as the reign [*108] of Henry II. (*n*). It is to be observed that a navigable river *is a public highway, and this is the primary character which it bears, consequently the right of the crown and of those claiming under the crown is subject to the public right of passage (*o*), and so also the general right of fishing in a public river common to all subjects of the realm, must therefore be exercised only in such manner as will not prejudice the right of passage when the latter right is used in a reasonable manner (*p*).

The franchise of free fishery seems to be such as we have described: but the word free fishery has not been confined to fishing in public waters: and much discussion has taken place concerning it. It is certain that the rights and distinctions of free fishery, several fishery, and common of piscary, have been much confounded in our law books. C. J. Holt distinguished them by saying that he that had a several fishery must also be (or at least derive his right from) the owner of the soil, which was not requisite with a free fishery (*q*), and next that the owner of a free fishery has an exclusive right even against the owner of a soil, which was not the case with common of piscary (*r*). If in the learned judge's distinction between a free and a several fishery, he intends that a several fishery must have been created by grant express or presumed from [*109] the owner of the soil, this is probably correct. It is *now clear that a several fishery may be claimed by one over the soil of another, by grant or prescription (*s*), and it seems that trespass may be brought against any person infringing the right (*t*), although the old writs in cases of trespass against a several piscary seemed to state the several piscary in the owner's soil (*u*).

We may add that there are cases in which the opinion has been expressed that a free fishery is not necessarily exclusive (*x*), and that expression has been

(*k*) Cap. 47, edit. Oxon.

(*l*) Cap. 20.

(*m*) 9 Hen. 3, c. 16.

(*n*) See *Williams v. Wilcox*, 8 A. & E. 314.

(*o*) *Mayor of Colchester v. Brooke*, 7 Q. B. 339.

(*p*) See *Mayor of Colchester v. Brooke*, 7 Q. B. 339; *Young v. Hichens*, 6 Q. B. 606.

(*q*) Citing M. 17 Edw. 4, 16; P. 18 Edw. 4, 4; T. 10 Hen. 7, 24, 26; *Smith v. Kemp*, Salk. 637, in which last case C. J. Holt distinguishes three sorts of fisheries—1. *Separalis piscaria*, where he who had the fishery was owner of the soil; 2. *Libera piscaria*, which gave the property in the fish to the grantee; 3. *Communis piscaria*; and he disallowed the dictum of Lord Coke, 1 Inst. 122, "that man may prescribe to have *separalem piscariam* in such a water, and the owner of the soil shall not fish there; but if he claim to have *communem piscariam* or *liberam piscariam*, the owner of the soil shall fish there." See *Seymour v. Lord Courtenay*, 5 Burr. 2814, where the court declined to give an opinion on the point.

(*r*) See Hargrave's note to Co. Litt. 122 a, where this opinion is discussed.

(*s*) Bract. fo. 208 b; Co. Litt. 4 d, where it is said that if a man seised of a river *separalem piscariam*, the soil shall not pass, although it may be presumed in the case of a lost grant of a piscary that it included the land. See *Duke of Somerset v. Fogwell*, 5 B. & C. 875; and *Holford v. Bailey*, 13 Q. B. 426, where the declaration stated the plaintiff's claim to be the "sole and exclusive fishery" over the soil of P. F. This being proved by the verdict, it was held that these words were equivalent to "several fishery," and denoted the incorporeal right commonly so called.

(*t*) *Holford v. Bailey*, 13 Q. B. 426, where the declaration was thought to be in trespass, and not in case.

(*u*) See Hargrave's note to Co. Litt. 122.

(*x*) Co. Litt. 122 m. *Ante*, note (*q*); and see the cases cited in *Smith v. Kemp*, Salk. 637; and in addition the following, where these questions have been discussed: *Upton v. Dawkins*, 3 Mod. 97; *Peake v. Tucker*, cited in Carth. 286; *Child v. Greenhill*, Cro. Car. 554; *Pollexfen v. Crispin*, 1 Vent. 122; *Gipps v. Woollicot*, Skinn. 677.

extended to all streams, private as well as public (*y*). A certain amount of obscurity therefore, notwithstanding the explanation which has been given by the judges, remains as to the true use and meaning of these expressions.

Certain fisheries, however, have been deemed of sufficient importance to deserve the attention of the legislature, for the regulation of the mode in which they should be carried on, and the right which particular individuals may enjoy concerning them. The law relating to these, therefore, must be sought in the statute book.

*Salmon fishing is one of these. As early as the time of Edward I. an act was passed imposing a penalty for taking salmon at certain [*110] times in the year (*z*), and various acts have been passed from Salmon fisheries. time to time down to the present day. The whole law is now comprised in two very recent acts (*a*).

In recent times, herring fisheries have received similar attention (*b*), and Herring and other fisheries. lastly, oyster and mussel fisheries have been dealt with by the like supreme power (*c*).

The various franchises of holding courts which we have above enumerated have so far gone into disuse, and those few which remain have been so far remodelled and regulated by modern legislation (*d*), that it would Franchises of holding courts. be scarcely profitable to discuss them at length here. In ancient times it was different; before institution of justices of assize (*e*), few persons in the country could, by reason of the expense and delay attending the proceeding, resort to the King's Court at Westminster (*f*).

The right to exercise the judicial function was one *accompanied by considerable dignity and influence, and was consequently highly [*111] prized: the inconvenience attending the dependence of right upon local customs and rules, soon made the advantages of a uniform tribunal throughout the country apparent. This charge was also much promoted by the intellectual acuteness which distinguished Norman lawyers, leading them to the development of a system of law upon principles not unscientific, though not always tending to secure the freedom of the subject.

The franchise of holding a fair or market is one which is frequently annexed by grant from the crown to a manor: although it may be held by others than lords of manors. The value to the grantee consists in the Franchise of fairs and markets. tolls, which he is usually (*g*) entitled to demand. There are several restrictions upon the validity of such grants; thus it

(*y*) Fitz. N. Brev. 88, 9; Fitz. Abr. Ass. 422; 4 Edw. 4, 28; 17 Edw. 4, 6 b, 7 a; 7 Hen. 7, 13 b; *Child v. Greenhill*, Cro. Car. 554; *Pollexfen v. Cripin*, 1 Vent. 122; *Upton v. Dawkins*, 3 Mod. 97.

(*z*) 13 Edw. 1, st. 1, c. 47.

(*a*) The Salmon Fisheries Acts, 1861 and 1865; 24 & 25 Vict. c. 109; and 28 & 29 Vict. c. 121. S. 5 of the latter act gives power to one of her Majesty's Secretaries of State to determine from time to time what rivers and parts of rivers shall be subject to the acts. As to Scotland, see The Salmon Fisheries (Scotland) Act, 1862; 25 & 26 Vict. c. 97.

(*b*) See 23 & 24 Vict. c. 92; 24 & 25 Vict. c. 72; 28 Vict. c. 22; 30 & 31 Vict. c. 52.

(*c*) See The Oyster and Mussel Fisheries Act, 1866 (29 & 30 Vict. c. 85), which provides for the establishment of beds, with the exclu-

sive right of fishing thereon; and The Oyster Preservation Act, 1867 (30 & 31 Vict. c. 18), which relates to private oyster beds. Under these acts the oysters, &c., while still lying on their beds, are to be deemed to be in the possession of the owners of the beds, and when removed therefrom by any person, become the property of the owners of the beds.

(*d*) See *Hellawell v. Eastwood*, 6 Exch. 295.

(*e*) Which took place in the reign of Henry II. See Madox, History of the Exchequer, c. iii.; Lord Lyttelton's Hist. of Henry II. vol. ii. p. 206; Hallam's Hist. Mid. Ages, vol. iii. chap. 8, part 2.

(*f*) *Omnis causa terminetur comitatu, vel hundredo, vel halimoto socam habentium.* Leges Hen. 1, c. 9.

(*g*) 2 Inst. 19. *Heddy v. Waterhouse*, Cro. Eliz. 558.

must be shown that the market must not be prejudicial to neighbouring markets (*h*), otherwise it will be deemed a nuisance, and the patent under which it is claimed will be void (*i*). Again, the tolls demanded must be reasonable in amount (*k*), because franchises of this kind are to some extent restrictive of the ordinary rights of the public, though they are intended to be for the general benefit of the community. The grantee, therefore, must give to the public the full benefit intended for them, which would not be unless his demands be limited to reasonable amount (*l*). Sometimes the toll claimed is a fixed sum; in this case, if the claim rests upon prescription, and evidence of [* 112] user *is given, it must prove by inference the existence of the franchise before the time of legal memory (A.D. 1189); a difficulty then arises to determine whether the amount claimed is such that it could have been considered reasonable at that early date, regard being had to the difference of the value of money (*m*).

Upon the same principle owners of markets or fairs are bound to take care that everything be sold according to just weight and measure, and the grantee of a market under a grant from the crown has, without any words to that effect, a court of record called the court of Piepowders as incident to his market (*n*).

Where a market or fair has been granted in general terms, the grantee may at pleasure remove the market from one place to another within the limits of the grant (*o*), and after such a removal it would be a trespass for the public to enter upon the former site (*p*).

Recent legislation has dealt with the subject of markets, so as to prescribe [* 113] the modes in which for the future they *may be established and the restrictions to which they are to be subject (*q*).

VIII. Another species of right usually included amongst incorporeal hereditaments are certain offices. An office is a right to exercise a public or private employment, and to take the fees and emoluments belonging to it. They are either public or private; the former are those which

(*h*) *R. v. Buller*, 2 Vent. 344; 3 Lev. 222.

(*i*) 1 Roll. Abr. 140; Fitz. N. B. 184; *Yard v. Ford*, 2 Wms. Saund. 172. See, however, as to the necessity of those who claim to have been damnified, to actively assert their exclusive rights, *Holcroft v. Heel*, 1 Bos. & P. 40.

(*k*) See stat. West. 1 (3 Edw. 1, c. 81); 2 Inst. 219; Com. Dig. tit. "Toll" (E).

(*l*) *Tripp v. Frank*, 4 T. R. 666 (Ferry); *Bridgland v. Shapter*, 5 M. & W. 375 (Market); *Pim v. Currell*, 6 M. & W. 234 (Ferry); *Blissett v. Hart*, Willes, 510 (Ferry); *Laurence v. Hitch*, L. R. 3 Q. B. 521.

(*m*) In *Laurence v. Hitch*, L. R. 2 Q. B. 184, the Court of Q. B. (relying on a preceding case of *Bryant v. Foot*, *ib.* 161, where a claim for 18s. fee on a marriage was held bad, as it could not possibly have been paid in the time of Rich. I.), held, that a toll of 1s. per cart-load of vegetables brought to Cheltenham market was bad. This decision was reversed on appeal (3 Q. B. 521), on the ground that the claim appeared not to be a fixed, but only a reasonable amount, varying from time to time with the value of money.

The court of appeal also did not seem to think the toll 1s., even if fixed was unreasonable. *Bryant v. Foot* was affirmed on appeal, 3 Q. B. 497. See, also, on these points, *Jenkins v. Harvey*, 1 C. M. & R. 877; *Shephard v. Payne*, 12 C. B. N. S. 414; s. c. on appeal, 16 C. B. N. S. 132; *Mills v. Mayor of Colchester*, L. R. 2 C. P. 476; and as to the value of money in the 13th and 14th centuries, 51 Hen. 3, st. 1, and the Statute of Labourers, 25 Edw. 3, st. 1, cc. 1—3.

(*n*) See 2 Inst. 220; 4 *ib.* cc. 60, 61.

(*o*) *Dixon v. Robinson*, 3 Mod. 186; *Curwen v. Salkeld*, 3 East, 588. See also as to the respective rights of the owners of the soil and of the public, *De Rutzen v. Lloyd*, 5 Ad. & E. 456; *R. v. Starkey*, 7 Ad. & E. 95; *Tyson v. Smith*, 9 Ad. & E. 406; *Ellwood v. Bullok*, 6 Q. B. 383; *Ellis v. Corporation of Bridgnorth*, 2 J. & H. 67.

(*p*) *R. v. Cotterill*, 1 B. & Al. 67.

(*q*) See Markets and Fairs Clauses Act, 1847 (10 & 11 Vict. c. 14); Local Government Act, 1858 (21 & 22 Vict. c. 98); and The Public Health Act, 1848 (11 & 12 Vict. c. 63).

concern the general administration of justice, and the government of the kingdom or the collection of the public revenues, such as the judges of the courts of law or equity, the sheriffs or coroners of counties, the commissioners of inland revenue. The latter are those which relate to particular districts belonging to private individuals, such as stewards and bailiffs of manors. It is perhaps scarcely accurate to describe an office as a property, because even in the cases of those which are practically sinecures there are duties which are supposed to be performed by the holders, the refusal to perform which would cause a forfeiture (*r*); yet inasmuch as the tenure of many offices closely resembles and is connected with that of land (*s*), a man may have an estate in them either to him for life or to him and his heirs, or even for a term of years. Thus the office of Lord High Chamberlain is an hereditary office held by the heirs of John de Vere, earl of Oxford. That of Earl Marshal is now held by the duke of Norfolk in fee. By far the greater number, however, of offices are held for life.

Offices are also to be distinguished into two classes, according to the nature of the duties to be performed by the holders. One class is judicial requiring special *knowledge and qualities on the part of the holder, and offices of this class cannot be granted otherwise than for life, lest they should [* 114] vest in the representatives of the grantee (*t*); and, moreover, they cannot generally be granted in reversion, because, although at the time of the grant the grantee may be capable of performing the duties of the office, yet before the reversion should fall in he might become incapable (*u*), though it seems that in some cases where there has been a custom and usage to grant a judicial office in reversion such a grant may be supported (*x*).

Offices of the second class are called ministerial, requiring nothing more than ordinary diligence and skill for the fulfilment of their duties. The law permits offices of the latter kind to be dealt with very much like property (*y*), since the duties may be discharged by deputy (*z*). Those offices which are of a real nature, *i. e.* concern land, and are grantable in fee simple, may be entailed within the statute *de donis* (*a*), because they fall within the meaning of the word "tenement" (*b*). They may be held by a woman (*c*), and consequently by a tenant by the curtesy (*d*).

By the act 5 & 6 Edw. 6, c. 16, it is enacted that all persons who shall sell any offices shall lose all their right, interest, and estate in such office, and in the gift and nomination thereof; and that all persons who shall purchase such offices shall be disabled from occupying or *enjoying them, and all bargains for such a purpose shall be void. The statute, however, pro- [* 115] vides that acts done during the occupancy of the offending persons shall be valid. Much litigation has taken place as to what offices are within this statute,

(*r*) See, as to forfeiture, *Lord Shrewsbury's Case*, 9 Rep. 50, c.; *Vauz v. Jefferen*, Dyer, 114 b; *Nevil's Case*, 7 Rep. 34 b.

(*s*) For instance, the office of keeper of a royal park or chase.

(*t*) *Reynell's Case*, 9 Rep. 97; *Sutton's Case*, 6 Mod. 57; see *Savage's Case*, Dyer, 259.

(*u*) *Curle's Case*, 11 Rep. 2.

(*y*) *Young v. Stoell*, Cro. Car. 279; *Walker v. Lamb*, *ib.* 258; Co. Litt. 3 b; Hardr. 357.

(*z*) *Bellamy v. Burrough*, Fort. 97; *Howard v. Wood*, 2 Show. 21.

(*a*) See *R. v. Ferrand*, 3 B. & A. 260; *R. v.*

Gravesend, 2 B. & C. 802; *R. v. Roberts*, 3 A. & E. 771.

(*b*) As to which see *post*.

(*c*) 7 Rep. 336; 1 Roll. Abr. 838; Co. Litt. 20 a.

(*d*) Co. Litt. 29; 4 Inst. 311; *Lady Russell's Case*, Cro. Jac. 17.

(*e*) Co. Litt. 29; *Collins's Claims*, 5. As to tenancy by curtesy, see *post*. As to who may hold offices, see Co. Litt. 3 b; Jenk. 121; Bro. Abr. tit. "Office," pl. 48; Dyer, 150; *Sutton's Case*, Cro. Car. 65; *Young v. Stoell*, *ib.* 279.

the result seems to be that it includes all offices relating to the administration of justice whether civil or ecclesiastical, and to offices of trust relating to revenue and other similar offices (e).

IX. Dignities bear a near relation to offices. Of the nature of these we treated at large in a former book: it will therefore be here sufficient to mention them as a species of incorporeal hereditaments, wherein a man IX. Dignities. may have a property or estate (f).

[*116]

* CHAPTER IV.

THE FEUDAL SYSTEM.

A STUDENT of our constitution, who wished to form a clear conception of the progress which it has made during the last eight centuries, would find it difficult to comprehend many of its features, unless he were acquainted with the nature of the feudal system, a polity which in England, if possible, more than in other parts of Europe, has pervaded and influenced the institutions of the country. A student of the English law relating to the possession of land, would find it impossible to understand the principles upon which the structure rests without this previous knowledge (a). A brief account of the feudal system therefore, naturally finds a place in these commentaries before entering further into the law of real property.

At the same time, it is also observable that the tendency of modern thought is to disregard historical facts as grounds upon which to rest the foundation of law. The mind of the modern law-giver has lately been and is now solely intent upon the consideration of what is best for society as now constituted, and as it promises in future to become. Many changes, therefore, have been brought about, and more are even now impending, which bear such a revolutionary character, especially with reference to the possession and transmission of landed property, that the practical value of historical inquiries for the purpose of elucidating the present law is continually on the decrease.

*Although the feudal system cannot be thought to have existed in [*117] England in a complete state till long after it had been fully developed

(e) 8 Inst. 148; *Trevor's Case*, Cro. Jac. 269; *Woodward v. Fox*, 8 Lev. 289; *Ingram's Case*, Cro. Jac. 386. The 4th section specifies certain offices which are not to be included. The act is extended by 49 Geo. 3, c. 12, to other cases, by which act also Scotland and Ireland were included within its operation. See also 6 Geo. 4, cc. 82, 83; 11 Geo. 4, c. 20. It is well known that the sale of commissions in the army is permitted, they not being included in any of the above acts. They can only be dealt, however, subject to the regulations of the military authorities. See *Collyer v. Ful-*

lon, T. & R. 459. As to dealings with the proceeds of the sale, see *Buller v. Plunkett*, 1 J. & H. 441, followed by *Webster v. Webster*, 31 Beav. 393; and see also *Somerset v. Cox*, 33 L. J. Ch. 590; *Earl of Suffolk v. Cox*, 36 L. J. Ch. 591. As to half-pay and pensions, see 46 Geo. 3, c. 69, s. 7.

(f) See *R. v. Viscount Purbeck*, Shower P.C. 1, where the nature of a peerage was much discussed, and it was held that it could not be surrendered to the king by a fine.

(a) Spelm. Parl. 57; orig. c. 8.

in France and those countries in which it was first established, not indeed until it was transplanted by the Normans after their conquest (*b*), yet it took such deep root, under the rule of our first Norman kings, that many of its forms and theories were here extended beyond what existed anywhere else, and they in part remain to the present day, when their substance and spirit have long been extinct. Since, however, it is of exotic growth, we shall do well in tracing the origin and nature of its institutions, to bear in mind principally the history of those parts of Europe where it arose, which, speaking generally, were the countries subject to the dominion of Charlemagne (*c*). First, we may remark that although the Romans or provincial inhabitants of Gaul were not entirely dispossessed of their property upon the invasion of the barbaric nations of Germany, and, indeed, soon after the establishment of the Merovingian dynasty they seem to have in individual instances been admitted to high offices (*d*), and were moreover allowed to retain their own laws as regulating their own concerns; still the feudal system in no

way arises out of or agrees with the principles of Roman law. It has its origin in the conditions under which society existed, and land was held under the barbaric conquerors, the Franks, who with Clovis and his successors the Merovingian and Carlovingian monarchs at their head, overspread Europe. Again, we must notice that it was not derived by the Franks from their own ancient customs when inhabiting the wild forests of Germany. Originally these German races attached little importance to the possession of land, and the idea of permanent ownership by individuals was one strange to their minds (*e*). This might easily be the case where arable land was scarce, and the country for the most part a wilderness of forests. At the same time, it is also to be observed, that during the period succeeding the time of Tacitus, and prior to the invasion of Gaul by Clovis, they must have acquired some more settled principles of property, because either before or soon after that event we find the Salic laws, which contain a series of rules of property, including those of succession, well established. It is clear that when they took possession of the fertile regions which they had conquered they formed permanent settlements, and for that purpose made a partition of the lands amongst themselves, leaving a portion to those prior inhabitants whom they found in possession (*f*).

The lands so acquired by the Franks (with whose occupation, alone, we now have to do) were what were termed allodial (*g*), a description which in later times was opposed to feudal or beneficiary, meaning that they were *possessed in absolute ownership, subject to

(*b*) 1 Hall. Mid. Ages, 187, 11th ed. Mr. Hallam's chapter upon the feudal system constitutes the best treatise to which the reader can be referred, who wishes to see the subject discussed in a masterly manner, with full reference to the ancient authorities. Robertson's History of Charles V. may also be usefully consulted. Much of the information in this chapter is derived from Mr. Hallam's work.

(*c*) 1 Hall. Mid. Ages, 187.

(*d*) *Ib.* 149, and note iv.

(*e*) Caesar, De Bell. Gall. l. vi. c. 21, tells us that they allotted lands afresh every year, and Tacitus Germ. c. 26, says "*Arva per an-*

nos mutant." See Montesquieu, *Esprit des Loix*, lib. xxx. c. 3.

(*f*) This proportion seems to have differed in the different invasions of the Goths, the Burgundians, the Lombards, the Vandals, and the Franks. See Guizot, *Civilis. en France*, Lec. 32; Montesquieu, *Esp. des L.* lib. xxx. c. 9; 1 Hall. Mid. Ages, 275.

(*g*) Allodium is usually derived from the words *all* and *adh*, property [Du Cange, *voc. sors.*; Pontoppidan, *History of Norway*, 290, et alii]. M. Guizot derives it from *loos* lot, on the assumption that a partition was made of the lands in some regular way by which they were allotted. That there was some princi-

no burden except the performance of the universal duty of public defence. They passed to the children equally, or on failure of children, to the nearest kindred (*h*). From this descendible quality the word allodial was afterwards not uncommonly used synonymously with heritable (*i*). In the general distribution of lands, moreover, a very considerable share was reserved for the maintenance of the dignity of the crown. These lands, called the fiscal lands, were dispersed over different parts of the kingdom, and formed the only regular source of revenue which in those times the sovereigns possessed.

This original absolute ownership of large tracts of land by the crown is a fact of the highest importance, for from it depended a chain of consequences, which ended in the feudal system. It is obvious that when nearly the only kind of wealth which existed was land and its immediate products, the only rewards for past services and present fidelity which could be given by a monarch to his followers would consist in grants of land to be enjoyed by the grantee for such period as might be determined upon. And this in fact seems to have been the practice. The demesne lands of the crown, or the fisc, were granted

under the title of benefices to favoured subjects, or subjects whose fidelity it was of importance to secure, upon conditions creating a close relationship between the grantee and his lord (*k*). Originally they were in general granted *only for life, but in very early times they [*120] became hereditary, capable of being enjoyed in succession, so long as the conditions of their tenure were observed. Of these conditions there can be little doubt that an oath of fidelity and the render of military service constituted the most important.

When grants from the crown made in this manner became common, there naturally arose the custom of the great lords who owned large territories, either allodially or as hereditary benefices, granting portions of their land to others to be held of themselves upon a like species of nature. Even in the days of Pepin and Charlemagne (A. D. 750—800 circ.) this process of sub-infeudation was practised. At a later period it became universal. Indeed the constant private wars which existed rendered it of the same importance to a powerful baron, as to the crown itself, to have attached to him by a connection of more enduring kind than mere personal affection, a body of retainers ready to take arms at his word and follow him to the field. "Out of these ancient grants, now become for the most part hereditary, there grew up in the tenth century, both in name and reality, the system of feudal tenures (*l*)."

ple of allotment seems clear from the story of the vase of Soissons (1 Hall. 155), where Clovis having, on the occasion of distribution of plunder, begged for himself a precious vessel belonging to the church of Rheims, a soldier, contrary it would seem to the general wishes of the army, exclaimed, striking the vase with his battle-axe, "you shall have nothing here but what falls to your lot."

(*h*) *Leges Salicæ*, c. 62; as to these, see Guizot, *Civ. Lec.* 9, and Hall. *Mid. Ages*, Ch. 2, n. iii.

(*i*) "Allodial lands are commonly opposed to beneficiary or feudal, the former being strictly proprietary, while the latter depended upon a superior. In this sense the word is of continual recurrence in ancient histories, laws, and instruments. It sometimes, however, bears the sense of *inheritance* and this

seems to be its meaning in the famous 62nd chapter of the *Salic Laws*,—*De Alodis*. '*Alodium interdum opponitur comparato*,' says Du Cange, '*in formulis veteribus*.' Hence, in the charters of the eleventh century, hereditary fiefs are frequently termed *alodia*." (Hall. *Mid. Ages*, vol. 1, p. 97.)

(*k*) *Marculf. Form.* xii. and xiv. l. i.; 1 Hall. 159.

(*l*) 1 Hall. *Mid. Ages*, 161. The word feud has been variously derived. 1st, from *fee* or *feh*, signifying reward, *odh* property; 2nd, from the initial letters of the vassal's oath, "*Fidelis ero ubique domino vero meo*;" 3rd, from *emphyteusis* (by Sir F. Palgrave, *English Commonw.* ii. 208). See Hall. c. 2, n. x, where the derivations are commented on. The first seems to be the most probable.

But, besides the land so held by grant from the crown and by sub-infeudations, there was, as we have seen, a large portion held independently or allodially. This, in the course of time, became changed into feudal holdings by pressure of circumstances. The history of the period succeeding the establishment of the Frankish empire, contains little but a series of continual struggles for power between not only those who claimed succession to a *throne, [* 121] but those who with no better right than that of personal energy and territorial power, endeavoured to establish themselves in sovereign independence and with absolute dominion over their possessions. The Chronicles are full of wars internal and external, murders and outrages of every kind (*m*). We find the kings of the Merovingian dynasty gradually losing their power by subdivision amongst themselves, by personal incapacity, by the encroachments of their own great officers of state, until, after passing through the phase of being mere puppets, they are finally overthrown by a new dynasty. This, under Charlemagne, attains a high degree of despotic authority only to be degraded under his successors to the same or even a more abject state of prostration. Such was the condition of society, and in such circumstances it was but natural that the assumption of despotic power over others should not be confined to the central authority. Provincial governors, the counts (*n*), the dukes, and other nobles generally, constantly aimed at more or less absolute control over all with whom they came in contact. Thus it was inevitable that some dependency upon their powerful neighbours would arise on the part of all allodial proprietors of only moderate means. And remembering the subdivision of lands which took place on the death of each *owner, we see that allodial lands must be possessed principally in continually diminishing quantities. [* 122] Their possessors, therefore, must chiefly have been placed in circumstances which in peaceful times would render them industrious and happy yeomen, but, in the times of which we speak, little capable of effectually resisting the power arising from the combined resources of a baron's possessions.

These, therefore, "who had hitherto formed the strength of the state fell into a much worse condition. They were exposed to the rapacity of the counts, who, whether as magistrates or governors, or as overbearing lords, had it always in their power to harass them. Every district was exposed to continual hostilities; sometimes from a foreign country, more often from the owners of castles and fastnesses, which in the tenth century, under pretence of resisting Normans and Hungarians, served the purposes of private wars. Against such a system of rapine the military compact of lord and vassal was the only effectual shield: its essence was the reciprocity of service and protection. An insulated allodialist had no support, his fortunes were strangely changed since he claimed at least in right a share in the legislation of his country, and could compare with pride his patrimonial fields with the temporary benefices of the crown. Without law to redress his injuries, without the royal power to support his

(*m*). "It is a weary and unprofitable task to follow these changes in detail through scenes of tumult and bloodshed in which the eye meets with no sunshine, nor can rest upon any interesting spot. It would be difficult, as Gibbon justly said, to find anywhere more vice or less virtue." 1 Hall. Mid. Ages, 5.

(*n*) The country was, under the Franks, distributed into districts or counties, presided over by the graf, or comes, as the Romans

translated it. As to the duties of the graf, see the ancient collection of precedents by Marculfus (about A.D. 660), lib. i. 32. Dukes were of higher rank, presiding over several counties. It is needless, perhaps, to say that in England the names were imported (*ante*, vol. i. p. 138), with a somewhat modified meaning, since the Saxon forms of local government were by no means entirely abrogated by the Normans.

right, he had no course left but to compromise with oppression and subject himself in return for protection to a feudal lord. During the tenth and eleventh centuries it appears that allodial lands in France had chiefly become feudal—that is, they had been surrendered by their proprietors and received back again upon the feudal conditions: or, more frequently, perhaps, the owner had been compelled to acknowledge himself the man or vassal of a suzerain, and thus to confess an original grant which had never existed.” (o).

[* 123] *But this feudal polity, which was thus by degrees established over all the continent of Europe, seems not to have been received in this

part of our island, at least not universally and as a part of the national constitution, till the reign of William the Norman (p). Not but that it is reasonable to believe, from abundant traces in our history and laws, that even in the times of the Saxons, who

were a swarm from what sir William Temple calls the same northern hive, something similar to this was in use; yet not so extensively nor attended with all the rigour that was afterwards imported by the Normans. For the Saxons were firmly settled in this island, at least as early as the year 600: and as we have seen, it was not till upwards of three centuries after, that feuds arrived to their full vigour and maturity, even on the continent of Europe (q).

[* 124] *This introduction, however, of the feudal tenures into England by king William, does not seem to have been effected immediately after

the conquest, nor by the mere arbitrary will and power of the Conqueror; but to have been gradually established by the Norman barons, and others, in such forfeited lands as they received from the gift of the Conqueror, and afterwards universally consented to by the great council of the nation long after his title

(o) 1 Hall. Mid. Ages, 168.
(p) Spelm. Gloss. 218; Bract. l. 2, c. 16, s. 7.
(q) Crag. l. 1, t. 4. The received opinion is, that the feudal tenures existed among the Anglo-Saxons, though but partially, and in a less complete form than in France. Dalrymple traces their existence in the celebrated distinction between thain-land and reve-land. Land granted to the thains or lords was called thain-land; allodial, over which the king's officer or reve, afterwards called sheriff, had jurisdiction, was called reve-land. Again, land of the one kind being held by a charter, was at other times called boc-land, that is, book-land; land of the other kind, being held without writing and in the ancient manner, and mostly by the ancient inhabitants, was at other times called folkland. Unless, however, we resort, as Dalrymple has done, to the improbable supposition, that, contrary to the usual course of events, feudal land was sometimes converted into allodial, it would seem that the distinction was rather between land held of thains and land held of the Crown, and subject to the authority of his reves. Thus, it is a common return in Domesday Book, that “*Hæc terra fuit tempore Edwardi thain-land; et postea conversum in reve-land; et idem dicunt legati regis quod ipsa terra et census qui inde exit, furtim auferitur regi.*” (Domesd. tit. Hereford; Dalrymple on

Feuds, 14.) Other writers consider that the folk-land was a precarious tenure, similar to that which is said to have been the origin of our copyholds. (See Hall. Mid. Ages, vol. 2, p. 406; Elton, Tenures of Kent, 119.)

A summary of the evidence on this question will be found in the second volume of Mr. Hallum's work, which has been so often cited. “Whether,” says that antiquarian, in conclusion, “the law of feudal tenures can be said to have existed in England before the conquest must be left to every reader's determination. Perhaps any attempt to decide it positively would end in a verbal dispute. In tracing the history of every political institution three things are to be considered—the principle, the form, and the name. The last will probably not be found in any genuine Anglo-Saxon record; of the form, or the peculiar ceremonies and incidents of a regular fief, there is some, though not much, appearance. But they who reflect upon the dependence in which free and even noble tenants held their estates of other subjects, and upon the privileges of territorial jurisdiction, will, I think, perceive much of the intrinsic character of the feudal relation, though in a less mature and systematic shape than it assumed after the Norman conquest.” (Vol. 2, p. 800.)

was established. Indeed, from the slaughter of the English nobility at the battle of Hastings, and the fruitless insurrection of those who survived, such numerous forfeitures had accrued, that he was able to reward his Norman followers with very large and extensive possessions. The monkish historians, and such as have implicitly followed them, have represented him as having by right of the sword seized on all the lands of England, and dealt them out again to his own favourites. This supposition, grounded upon a mistaken sense of the word conquest, which, in its feudal acceptation, signifies no more than acquisition, has led many hasty writers into the belief, which upon examination is found to be untrue, that all Saxon proprietors were dispossessed by the Normans, or at least were allowed to retain their land only by new and special grant. However, certain it is, that the Normans now began to gain very large possessions in *England; and their regard for the feudal law under [*125] which they had long lived, together with the king's recommendation of his policy to the English, as the best way to put themselves on a military footing, and thereby to prevent any future attempts from the continent, were probably the reasons that prevailed to effect its establishment here by law. And, though the time of this great revolution in the tenure of land cannot be ascertained with exactness, yet there are circumstances that lead us to a probable conjecture concerning it. For we learn from the Saxon Chronicle (*r*), that in the nineteenth year of king William's reign an invasion was apprehended from Denmark; and the military constitution of the Saxons being then laid aside, and no other introduced in its stead, the kingdom was wholly defenceless; which occasioned the king to bring over a large army of Normans and Bretons, who were quartered upon every landholder, and greatly oppressed the people. This apparent weakness, together with the grievances occasioned by a foreign force, might co-operate with the king's remonstrances, and the better incline the nobility to listen to his proposals for putting them in a posture of defence. For, as soon as the danger was over, the king held a great council to inquire into the state of the nation (*s*); the immediate consequence of which was the compiling of the great survey called domesday-book (*t*), which was finished in the next year: and in *the latter end of that very year the king was attended by all his nobility at Sarum; where [*126] all the principal landholders submitted their lands to the yoke of military tenure, became the king's vassals, and did homage and fealty to his person (*u*). This may possibly have been the era of formally introducing the feudal tenures by law; and perhaps the very law, thus made at the council of Sarum, is that which is still extant (*x*), and couched in these remarkable words: "*Statuimus*

(*r*) A. D. 1065.

(*s*) *Rex tenuit magnum concilium, et graves sermones habuit cum suis proceribus de hac terra; quo modo incoleretur, et a quibus hominibus.* Chron. Sax. *Ibid.*

(*t*) See Sir H. Ellis's preface to Domesday Book, and the First Report of the House of Commons on Public Records, Append. The inquiry was made upon oath before the king's justices appointed to conduct it. Domesday Book is the ultimate criterion for determining what lands are ancient demesnes of the crown. It is also occasionally of importance in determining the parcels of manors, the pedigrees of families, the sites of ancient mills, the abbey lands belonging to religious

houses, and a variety of other circumstances incident to the proof of immemorial rights and obligations. (Phillips on Evidence, p. 579, 8th edition.)

(*u*) *Omnes praedia tenentes, quotquot essent notas melioris per totam Angliam, ejus homines facti sunt, et omnes se illi, subdidere, ejusque facti sunt vasalli, ac ei fidelitatis jura menta praestiterunt, se contra alios quoscunque illi fidos futuros.* Chron. Sax. A. D. 1066. A precedent of surrendering allodial property to the king and receiving it back as a fief, may be found in the ancient precedents of Marculfus, l. 1, form 18.

(*x*) Cap. 52; Wilk. 228.

ut omnes liberi homines fœdere et sacramento affirmant, quod intra et extra universum regnum Angliæ Wilhelmo regi domino suo fideles esse volunt; terras et honores illius omni fidelitate ubique servare cum eo, et contra inimicos et alienigenas defendere." The terms of this law (as sir Martin Wright has observed (y)) are plainly feudal: for, first, it requires the oath of fealty, which made in the sense of the feudists every man that took it a tenant or vassal: and, secondly, the tenants obliged themselves to defend their lord's territories and titles against all enemies foreign and domestic. But what clearly evinces the legal establishment of this system, is another law of the same collection (z), which exacts the performance of the military feudal services, as ordained by the general council. "*Omnes comites, et barones, et milites, et servientes, et universi liberi homines totius regni nostri prædicti, habeant et teneant se semper bene in armis et in equis, ut decet et oportet; et sint semper prompti et bene parati, ad servitium suum integrum nobis explendum et peragendum, cum opus* [*127] *fuerit; secundum quod nobis debent de feodis et *tenementis suis de jure facere, et sicut illis statuimus per commune concilium totius regni nostri prædicti.*"

The feudal system thus became established throughout the whole realm. Its acceptance was in appearance voluntary, or with the consent of a great council; but we may easily suppose that the act was voluntary only on the part of those Norman barons who were not only united in interest with the king, but accustomed in their own earlier history to the great military polity. To them the adoption of this system of tenure was at once a cause and a consequence of their power. By accepting grants from the king they acquired territorial wealth, and consequent personal power; by insisting upon the acceptance by others of fiefs held under themselves they insured their own safety and that of their society as then established. The conversion of allodial property into feuds, although it had never been done in the wholesale way in which it was then effected in England, had been sufficiently common in France and other countries to make its adoption seem a natural measure to the lords, and perhaps as the least of many evils to those upon whom it was forced (a).

In consequence of this change, it became a fundamental maxim and necessary principle (though in reality in perhaps most cases a mere fiction) of our

English tenures, "that the king is the universal lord and original proprietor of all the lands in his kingdom (b) : and that no man doth or can possess any part of it, but what has mediately or immediately been derived as a gift from him, to be held upon feudal services." For this being the real cause in pure,

original, proper feuds, those who adopted this system were obliged to act upon the same supposition, as a substruction and foundation of their polity, whatever might be the fact. And carrying this theory into practice, the Norman lawyers, skilled in all the niceties of feudal constitutions, and well understanding

the *import and extent of feudal terms, introduced not only the rigorous doctrines which prevailed in the duchy of Normandy, but also such fruits and dependencies, such hardships and services, as were never known to other nations (c); as if the English had, in fact as well as theory, owed every thing they possessed to the bounty of their sovereign lord.

(y) Tenures, 66.

(z) Cap. 58; Wilk. 228.

(a) Montesq. Esp. des L. lib. xxxl. c. 8.

(b) *Tuit fuit in luy, et vient de luy al commencement.* (M. 24 Edw. 3, 65; Co. Litt. 1.)

(c) Spelm. of Feuds, c. 28.

From this system the maxim is derived that the king is proprietor of all the lands.

Our ancestors therefore, who were by no means beneficiaries, but had barely consented to this fiction of tenure from the crown, as the basis of a military discipline, with reason looked upon these deductions as grievous impositions, and arbitrary conclusions from principles that, as to them, had no foundation in truth (*d*). However, this king, and his son William Rufus, kept up with a high hand all the rigours of the feudal doctrines: but their successor, Henry I., found it expedient, when he set up his pretensions to the crown, to promise a restitution of the laws of king Edward the Confessor, or ancient Saxon system; and accordingly, in the first year of his reign, granted a charter (*e*), whereby he gave up the greater grievances, but still reserved the fiction of feudal tenure, for the same military purposes which induced his father to introduce it. But this charter was gradually broken through, and the former grievances were revived and aggravated, by himself and succeeding princes; till, in the reign of king John, they became so intolerable, that they occasioned his barons, or principal feudatories, to rise up in arms against him; which at length produced the famous great charter at Runingmead, which, with some alterations, was confirmed by his son Henry III. And, though its immunities (especially as altered on its last edition by his son) (*f*) are very greatly short of those granted by Henry I., it was justly esteemed at the time a vast acquisition to English liberty. Indeed, by the farther alteration of tenures that has since happened, many *of these immunities may now appear, to a common observer, of much less consequence than they really were when granted: but this, properly considered, will show, not that the acquisitions under John were small, but that those under Charles were greater. And from hence also arises another inference; that the liberties of Englishmen are not (as some arbitrary writers would represent them) mere infringements of the king's prerogative, extorted from our princes by taking advantage of their weakness; but a restoration of that ancient constitution, of which our ancestors had been defrauded by the art and finesse of the Norman lawyers, rather than deprived by the force of the Norman arms (*g*).

(*d*) Wright, 81.

(*e*) LL. Hen. 1, c. 1.

(*f*) 9 Hen. 3.

(*g*) "It has been very common," says Mr. Hallam (History of the Middle Ages, ch. 2, part 2), "to seek for the origin of feuds, or at least for analogies to them, in the histories of various countries. But though it is of great importance to trace the similarity of customs in different parts of the world, because it guides us to the discovery of general theorems as to human society, yet we should be on our guard against seeming analogies, which vanish away when they are closely observed. It is easy to find partial resemblances to the feudal system. The relation of patron and client in the Roman republic is not unlike that of lord and vassal in respect of mutual fidelity; but it was not founded on the tenure of land or on military service. The veteran soldier, and, in later times, some barbarian allies of the emperors, received lands upon condition of public defence; but they were bound not to an individual lord, but the state. Such a resemblance to fiefs may be found in the Zemindaries of

Hindustan and the Timariots of Turkey. The clans of the Highlanders and Irish followed their chieftain into the field; but their tie was that of imagined kindred and respect for birth, not the spontaneous compact of vassalage. Much less can we extend the name of feud, though it is sometimes strangely misapplied, to the polity of Poland and Russia. All the Polish nobles were equal in rights, and independent of each other. All who were less than noble were in servitude. No government can be more opposite to the long gradations and mutual duties of the feudal system. The regular machinery and systematic establishment of feuds, in fact, may be considered as almost confined to the dominions of Charlemagne, and to those countries which afterwards derived it from thence." We have quoted the passage from the earlier editions of Mr. Hallam's work; in the later editions it is somewhat amplified.

In another place Mr. Hallam has himself pointed out an institution, which appears to have been much more closely analogous to the proper feud than any of those enumerated above. "This was usually called *com-*

[*130] *Having given this short history of their rise and progress, we will next consider the nature, doctrines, and principal laws of feuds; wherein we shall evidently trace the groundwork of many parts of our public polity, and also the origin of such of our own tenures, as were either abolished in the 17th century, or still remain in force.

The grand and fundamental maxim of all feudal tenure is this: that all lands were originally granted out by the sovereign, and are therefore holden either mediately or immediately of the crown. The grantor was called the proprietor, or lord; being he who retained the dominion or ultimate property of the feud or fee: and the grantee, who had only the use and possession according to the terms of the grant, was styled the

The nature, doctrine, and principal laws of feuds.

[*131] feudatory or vassal, *which was only another name for the tenant or holder of the lands; though on account of the prejudices which we have justly conceived against the doctrines that were afterwards grafted on this system, we now use the word vassal opprobriously, as synonymous with slave or bondman (h). The manner of the grant was by words of gratuitous

and pure donation, *dedi et concessi*; which were long the operative words in the infeudations or deeds of feoffment of more modern times. This was perfected by the ceremony of corporal investiture, or open and notorious delivery of possession in the presence of the other vassals; which perpetuated among them the era of the new acquisition, at a time when the art of writing was very little known: and therefore the evidence of property was reposed in the memory of the neighbouring owners; who, in case of a disputed title, were afterwards called upon to decide the difference, not only

commendation; and appears to have been founded on two very general principles, both of which the distracted state of society inculcated. The weak needed the protection of the powerful, and the government needed some security for public order. Even before the invasion of the Franks, Salvian, a writer of the fifth century, mentions the custom of obtaining the protection of the great by money, and blames their rapacity, though he allows the natural reasonableness of the practice. The disadvantageous condition of the less powerful freemen, which ended in the servitude of one part, and in the feudal vassalage of another, led such as fortunately still preserved their allodial property to insure its defence by a stipulated payment of money. Such payments, called *Salvamenta*, may be traced in extant charters, chiefly indeed of monasteries. In the case of private persons, it may be presumed, that this voluntary contract was frequently changed by the stronger party into a perfect feudal dependence. From this, however, I imagine it properly differed in being capable of dissolution at the inferior's pleasure, without incurring a forfeiture, as well as in having no relation to land. Homage, however, seems to have been incident to commendation as well as to vassalage. Military service was sometimes the condition of this engagement. It was the law of France, so late at least as the commencement of the third race of kings, that no man could take part in private wars, except in defence

of his own lord; and this is strongly supported by the analogy of our own Anglo-Saxon laws, where it is frequently repeated, that no man should continue without a lord."

(h) A satisfactory derivation of this word has long been wanting, which is entirely omitted in Spelman's Glossary. Meyer suggests one which is at least plausible:—"The word '*gesell*,'" he says, "in Dutch and German, signifies companion. Tacitus we know, has described the first rude appearances of the relation of lord and vassal, under the notion of companionship, but his terms *comites* and *comitatus* were necessarily abandoned for this purpose when they became applied, which was very early, to designate public officers and public charges, the governors of districts, and the districts themselves. But it is obvious that these must have been secondary meanings, that, before *comes* signified a count, or *comitatus* a county, they must have signified companion and companionship, and we know that the first counts were what we should now call vassals of the monarch. When, however, the secondary meaning superseded the first, it seems not improbable that the original term might be Latinised into *quasallus* or *vassalus*." (*Esprit, Origine, et Progrès des Institutions Judiciaires*, vol. i. p. 144.) As to the change of *g* into *v* or *w*, compare *guerre*, war; *garantier*, warrant; *garenne*, warren; but query whether the *g* in the Teutonic is ever changed into *v* in the Latinised form.

according to external proofs, adduced by the parties litigant, but also by the internal testimony of their own private knowledge.

Besides an oath of fealty, or profession of faith to the lord, which was the parent of our oath of allegiance, the *vassal or tenant upon investiture did usually homage to his lord; openly and humbly [* 132] kneeling, being ungirt, uncovered, and holding up his hands both together between those of the lord, who sate before him; and there professing, that "he did become his man, from that day forth, of life and limb and earthly honour:" and then he received a kiss from his lord (i). Which ceremony was denominated *homagium*, or manhood, by the feudists, from the stated form of words, *devenio vester homo* (k).

When the tenant had thus professed himself to be the man of his superior or lord, the next consideration was concerning the service, which, as such, he was bound to render, in recompense for the land that he held. This, in pure, proper, and original feuds, was only twofold; to follow, or do suit to, the lord in his courts in time of peace: and in his armies or warlike retinue, when necessity called him to the field. The lord was, in early times, the legislator and judge over all his feudatories: and therefore the vassals of the inferior lords were bound by *their fealty [* 133] to attend their domestic courts baron (l) (which were instituted in every manor or barony, for doing speedy and effectual justice to all the tenants), in order, as well to answer such complaints as might be alleged against themselves, as to form a jury or homage for the trial of their fellow-tenants: and upon this account, in all the feudal institutions, both here and on the continent, they are distinguished by the appellation of the peers of the court; *pares curtis*, or *pares curiæ*. In like manner the barons themselves, or lords of inferior districts, were denominated peers of the king's court, and were bound to attend him upon summons, to hear causes of greater consequence in the king's presence, and under the direction of his grand justiciary; till, in many countries, the power of that officer was broken and distributed into other courts of judicature, the peers of the king's court still reserving to themselves (in almost every feudal government) the right of appeal from those subordinate courts in the last resort. The military branch of service consisted in attending the lord to the wars, if called upon, with such a retinue, and for such a number

(i) Litt. s. 85.

(k) *Homagium per paragium* was unaccompanied by any feudal obligation, and distinguished from *homagium legium*, which carried with it an obligation of fidelity. The Dukes of Normandy rendered only *homagium per paragium* to the Kings of France, and received the like from the Dukes of Brittany. Littleton, s. 85, gives the following description of homage. "Homage is the most honourable service, and most humble service of reverence that a frank-tenant may do unto his lord. For when the tenant shall make homage to his lord, he shall be ungirt and his head uncovered, and his lord shall sit, and the tenant shall kneele before him on both his knees, and hold his hands jointly together between the hands of his lord, and shall say thus: 'I become your man from this day

forward, of life and limb and of earthly worship, and unto you shall be faithful, and bear you faith for the tenements that I claim to hold of you, saving the faith that I owe unto our sovereign lord the king;' and then the lord so sitting shall kiss him." Ss. 86, 87, 88, contain variations of the form of homage suited to the cases of ecclesiastics, and single and married women. As to fealty, the words of which were very similar to those of homage, see ss. 91, 92, 93, the ceremony was somewhat less formal, and might be done in the presence of the lord's steward or proxy, which was not the case with homage. The reservation of the faith owing to the king seems not to have been universal, or even general during the height of the feudal system. 1 Hall. Mid. Ages, 168.

(l) Feud. l. 2, t. 55.

of days as were stipulated at the first donation, in proportion to the quantity of the land (*m*).

[* 134] *We have seen how feuds came to be universally extended beyond the life of the first vassal, to his sons, or perhaps to such one of them as the lord should name; and in this case the form of the donation was strictly

Mode of observed: for if a feud was given to a man and his sons, all his descent. sons succeeded him in equal portions: and, as they died off, their

shares reverted to the lord, and did not descend to their children, or even to their surviving brothers, as not being specified in the donation (*n*). But when such a feud was given to a man and his heirs, in general terms, then a more extended rule of succession took place; and when the feudatory died, his male descendants *in infinitum* were admitted to the succession. When any such descendant, who thus had succeeded, died, his male descendants were also admitted in the first place; and in defect of them, such of his male collateral kindred as were of the blood or lineage of the first feudatory, but no others.

For this was an unalterable maxim in feudal succession, that "none was capable of inheriting a feud, but such as was of the blood of, that is, lineally descended from, the first feudatory" (*o*). And the descent, being thus confined to males, originally extended to all the males alike; all the sons, without any distinction of primogeniture, succeeding to equal portions of the father's feud. But this being found, upon many accounts, inconvenient (particularly, by dividing the

[* 135] services, and *thereby weakening the strength of the feudal union), and honorary feuds (or titles of nobility) being now introduced, which were not of a divisible nature, but could only be inherited by the eldest son (*p*); in imitation of these, military feuds (or those we are now describing) began also in most countries to descend, according to the same rule of primogeniture, to the eldest son, in exclusion of all the rest (*q*).

(*m*) "Upon investiture the duties of the vassal commenced. These it is impossible to define or enumerate; because the services of military tenure, which is chiefly to be considered, were in their nature uncertain, and distinguished as such from those incident to feuds of an inferior description. It was a breach of faith to divulge the lord's counsel, to conceal from him the machinations of others, to injure his person or fortune, or to violate the sanctity of his roof, and the honour of his family. In battle he was bound to lend his horse to the lord when dismounted, to adhere to his side while fighting, and to go into captivity as a hostage for him when taken. His attendance was due to the lord's courts, sometimes to witness and sometimes to bear a part in the administration of justice. The measure, however, of military service was generally settled by some usage: forty days was the usual term during which the tenant of a knight's fee was bound to be in the field at his own expense. This was extended by St. Louis to sixty days, except when the charter of infeudation expressed a shorter period. But the length of service diminished with the quantity of land; for half a knight's fee, but twenty days were due; for an eighth part, but five; and when this was commuted for an escuage or pecuniary assessment, the same proportion was observed. Men turned of

sixty, public magistrates, and of course women, were free from personal service, but obliged to send their substitutes: a failure in this primary duty incurred, perhaps, strictly a forfeiture of the fief; but it was usual for the lord to inflict an amercement, known in England by the name of *escuage*." Hall. vol. i. p. 170.

(*n*) Wright, 17.

(*o*) *Ib.* 183.

(*p*) Feud. 2, t. 55.

(*q*) Wright, 32. "A custom, very similar in effect to subinfeudation, was the tenure by *fréage*, which prevailed in many parts of France. Primogeniture, in that extreme which our common law has established, was unknown, I believe, in every country on the continent. The customs of France found means to preserve the dignity of families, and the indivisibility of a feudal homage, without exposing the younger sons of a gentleman to absolute beggary or dependence. Baronies, indeed, were not divided; but the eldest son was bound to make a provision in money, by way of appanage, for the other children, in proportion to his circumstances and their birth. As to inferior fiefs, in many places, an equal partition was made; in others, the eldest took the chief portion, generally two-thirds, and received the homage of his brothers for the remaining part, which

Other qualities of feuds were, that the feudatory could not aliene or dispose of his feud; neither could he exchange, nor yet mortgage, nor even devise it by will, without the consent of the lord (*r*). For, the reason of con-

Vassal could not aliene his feud,

ferring the feud being the personal abilities of the *feudatory to serve in war, it was not fit he should be at [*136]

liberty to transfer this gift, either from himself or from his posterity, who were presumed to inherit his valour, to others who might prove less able.

nor the lord his seignory, without consent.

And, as the feudal obligation was looked upon as reciprocal, the feudatory being entitled to the lord's protection in return for his own fealty and service; therefore the lord could no more transfer

his seignory or protection without consent of his vassal, than the vassal could his feud without consent of his lord (*s*): it being equally unreasonable, that the lord should extend his protection to a person to whom he had exceptions, and that the vassal should owe subjection to a superior not of his own choosing.

These were the principal, and very simple, qualities of the genuine or original feuds; which were all of a military nature, and in the hands of military

Feuds afterwards let to rent, and bought and sold.

persons; though the feudatories, being under frequent incapacities of cultivating and manuring their own lands, soon found it necessary to commit part of them to inferior tenants; obliging them to such returns in service, corn, cattle, or money, as might

enable the chief feudatories to attend their military duties without distraction:

Reditus, or rent.

which returns, or *reditus*, were the original of rents, and by these means the feudal polity was greatly extended; these infe-

rior feudatories (who held what are called in the Scots law "re-re-fiefs") being under similar obligations of fealty, to do suit of court, to answer the stipulated renders or rent-service, and to promote the welfare of their immediate superiors or lords (*t*). But this at the same time demolished the ancient simplicity of feuds; and an inroad being once made upon their constitution, it subjected them, in a course of time, to great varieties and innovations. Feuds began to be bought and sold, and deviations were made from the old fundamental rules of tenure and succession; which were held no longer sacred when the feuds themselves no longer continued to be purely *military. Hence these [*137]

tenures began now to be divided into *feoda propria et impropria*, proper and improper feuds; under the former of which divisions were comprehended such, and such only, of which we have before spoken; and under that of improper or derivative feuds were comprised all such as do not fall within the other description; such, for instance, as were originally bartered and sold to the feudatory for a price; such as were held upon base or less honourable services, or upon a rent, in lieu of military service; such as were in themselves alienable, without mutual license; and such as might descend indifferently

they divided. To the lord of whom the fief was held, himself did homage for the whole. In the early times of the feudal policy, when military service was the great object of the relation between lord and vassal, this, like all other subinfeudations, was rather advantageous to the former; for when the homage of a fief was divided, the service was diminished in proportion. Suppose, for example, the obligation of military attendance for an entire manor to have been forty days, if that came to be split equally between two, each would owe but a service of twenty. But if,

instead of being homagers to the same *suzerain*, one tenant held immediately of the other, as every feudatory might summon the aid of his own vassals, the superior lord would in fact obtain the service of both. Whatever opposition, therefore, was made to the rights of subinfeudation or *fréage*, would indicate a decay in the military character, the living principle of feudal tenure." Hall, *Med. Ages*, vol. i. p. 176.

(*r*) *Ib.* 29.

(*s*) Wright, 30.

(*t*) *Ib.* 20.

either to males or females. But where a difference was not expressed in the creation, such new created feuds did in all respects follow the nature of an original, genuine, and proper feud (*u*).

But as soon as the feudal system came to be considered in the light of a civil establishment, rather than as a military plan, the ingenuity of the same ages, which perplexed all theology with the subtilty of scholastic disquisitions, and bewildered philosophy in the mazes of metaphysical jargon, began also to exert its influence on this copious and fruitful subject: in pursuance of which, the most refined and oppressive consequences were drawn from what originally was a plan of simplicity and liberty, equally beneficial to both lord and tenant, and prudently calculated for their mutual protection and defence. From this one foundation, in different countries of Europe, very different superstructures have been raised: what effect it has produced on the landed property of England will appear in the following chapters (*x*).

The system
varied in
different
countries.

[* 138]

*CHAPTER V.

ANCIENT ENGLISH TENURES.

IN this chapter we shall take a short view of the ancient tenures of our English estates, or the manner in which lands, tenements, and hereditaments might have been holden, as the same stood in force till the middle of the last century. In which we shall easily perceive, that all the peculiarities, all the seeming and real hardships, that attended those tenures, were to be accounted for upon feudal principles, and no other; being fruits of, and deduced from, the feudal policy.

All the land of this kingdom is, by the theory of our laws, supposed to have been granted by, and to be dependent upon, and holden of, some superior lord,

Explanation
of the words
tenure, &c.

King called
lord para-
mount.

Mesne lords.

[* 139] king (*a*); and, thus partaking of a middle nature, *were called mesne, or middle, lords. So that if the king granted a manor to A., and he

(*u*) Feud. 2, t. 7.

(*x*) Upon the subject of this and the two following chapters, the student is recommended to study the excellent "Essay on Feudal Property" by Sir John Dalrymple, an author who, notwithstanding some errors on antiquarian points of little importance, cannot be too highly praised for the philosophical accuracy and elegance with which he has

treated a subject that most writers contrive to render extremely obscure and repulsive.

(*a*) William the First and other feudal sovereigns, though they made large and numerous grants of lands, always reserved a rent, or certain annual payments (commonly very trifling), which were collected by the sheriffs of the counties in which the lands lay, to show that they still retained the *dominium directum*

granted a part of the land to B., B. was said to hold of A., and A. of the king; or, in other words, B. held his lands immediately of A., but mediately of the king. The king therefore was styled lord paramount; A. was both tenant and lord, or was a mesne lord: and B. was called tenant *paravail*, or the lowest tenant; being he who was supposed to make avail or profit of the land (*b*). In this manner all the lands of the kingdom have since the complete introduction of the feudal system been held when in the hands of subjects. We have no allodial lands (*c*).

All tenures being thus derived, or supposed to be derived, from the king, those that held immediately under him, in right of his crown and dignity, were called his tenants *in capite*, or in chief (*d*); which was the most honourable species of tenure, but at the same time subjected the tenants to greater and more burthensome services, than inferior tenures did. This distinction ran through all the different sorts of tenure, of which we now proceed to give an account.

There seem to have subsisted among our ancestors four principal species of lay tenures, to which all others may be reduced: the grand criteria of which were the natures of the several services or renders, that were due to the lords from their tenants. The services, in respect of their quality, were either free or base services; in respect of their quantity and the time of exacting them, were either certain or uncertain. Free services were such as were not unbecoming the character of a soldier or a freeman to perform; as, to serve under his lord in the wars, to pay a sum of money, and the like. Base services were such as were fit only for peasants or persons of a servile rank; as to plough the lord's land, to make his hedges, to carry out his dung, or other mean employments. The certain services, whether free or base, were such as were stinted in quantity, and could not be exceeded on any pretence; as, to pay a stated annual rent, or to plough such a field for three days. The uncertain depended upon unknown contingencies; as, to do military service in person, or pay an assessment in lieu of it when called upon; or to wind a horn whenever the Scots invaded the realm; which are free services: or to do whatever the lord should command; which is a base or villein service.

From the various combinations of these services have arisen the four kinds of lay tenure which subsisted in England, till the middle of the 17th century; and three of which subsist to this day. Of these Bracton (who wrote under Henry the Third) seems to give the clearest and most compendious account, of any author ancient or modern (*e*); of which the following is the outline or abstract (*f*).

in themselves. Madox, History of the Exchequer, c. 10; Craig de Feudis, l. 1, c. 9.

(b) 2 Inst. 296.

(c) Co. Litt. 1.

(d) A distinction was taken between tenure *in capite ut de coronâ*, which meant a tenure of the king of lands which were always held directly from the crown, and tenure *ut de honore*, as of an honor or manor where the land, having originally been held of a subject, came to be held of the crown, by reason

of some escheat or forfeiture of the mesne seignory, whether an honor, manor, or castle. Tenure *in capite*, standing unexplained, was generally understood to be tenure *ut de coronâ*. See Harg. Co. Litt. 108 a.

(e) L. 4, c. 28.

(f) *Tenementorum aliud liberum, aliud villenagium. Item, liberorum aliud tenetur libere pro homagio et servitio militari; aliud in libero socagio cum fidelitate tantum.* S. 1.

"Tenements are of two kinds, frank-tenement and villenage. And, of frank-tenements, some are held freely in consideration of homage and knight-service; others in free-socage, with the service of fealty only." And again (g), "of villenages some are pure, and others privileged. He that holds in pure villenage [* 141] shall, * whether free or servile, do whatsoever is commanded him, and always be bound to an uncertain service. * * * The other kind of villenage is called villein-socage, held under the king (h) since the Norman conquest, and, though a villenage, is of a privileged sort. Being tenants of the king they cannot be removed from their lands so long as they are willing and able to perform the due services. Still they do villein services, but such as are certain and determined." Of which the sense seems to be as follows: first, where the service was free but uncertain, as military service with homage, that tenure was called the tenure in chivalry, *per servitium militare*, or by knight-service. Secondly, where the service was not only free, but also certain, as by fealty only, by rent and fealty, &c., that tenure was called *liberum socagium*, or free socage. These were the only free holdings or tenements; the others were villenous or servile: as thirdly, where the service was base in its nature, and uncertain as to time and quantity, the tenure was *purum villenagium*, absolute or pure villenage. Lastly, where the service was base in its nature, but reduced to a certainty, this was still villenage, but distinguished from the other by the name of privileged villenage, *villenagium privilegiatum*; or it might be still called socage (from the certainty of its services), but degraded by their baseness into the inferior title of *villanum socagium*, villein-socage, but the tenants held directly under the king.

- [* 142] I. The first, most universal, and esteemed the most * honourable species of tenure, was that by knight-service (i), called in Latin *servitium militare*; and in law-French chivalry, or *service de chivaler*, answering to the *fief d'haubert* of the Normans (k), which name is expressly given it by the *Mirroir* (l). This differed in very few points, as we shall presently see, from a pure and proper feud, being en-

(g) *Villanagiorum aliud purum, aliud privilegiatum. Qui tenet in puro villenagio sive liber sive servus faciet de villenagio quicquid ei praeceptum fuerit, et semper tenebitur ad incerta. * * * Est etiam aliud genus villenagii quod tenetur de domino rege à conquestu Angliæ, quod dicitur Socagium villanum, et quod est villenagium, sed tamen privilegiatum. Habent itaque tenentes de dominicis Domini Regis tale privilegium, quod à glebâ amoveri non debent, quamdiu velint et possint facere debitum servitium; et hujusmodi villani sokmanni propriè dicuntur glebæ ascripticii. Villani autem faciunt servitia, sed certa et determinata nec compelli poterunt contra voluntatem suam ad tenenda hujusmodi tenementa, et ideo dicuntur liberi."*

(h) See post, as to the tenure of Ancient Demeane.

(i) Knight-service, having regard to etymology, is a tautologous expression. Among the Anglo-Saxons the vassals of the king were called *Thegns* or *Thanes*, that is to say servants, from *Thegnian* (in modern German *Dienen*) to serve; and they rendered *Thanes* by the Latin word *ministri*. So, the knight

(Anglo-Saxon *cniht*) was the *knecht* or servant of his superior; and among the Germans the word still has this meaning only; their equivalent for our modern knight being *ritter*.

(k) Spelm. Gloss. 219.

(l) C. 2, s. 27. Sir M. Wright cites from Loyseau, *Traité des Seigneuries*, 156, 157, the following rational explanation of the fief d'haubert:—"Les seigneurs des baronnies se sont appelez Hauts Barons, ou Hauts Bers, car il est bien certain que ber et baron est mesme chose. Et Haut Ber et Baron sont confondus comme synonymes, et de là sans doute originairement a estre dit le fief de Hautbert. Mais pour ce que le Haut Ber ou seigneur de fief de hautbert estoit tenu servir le roy en guerre avec armes pleins, et conséquemment avec l'arme du corps, qui estoit lors la cotte de mailles, de là est venu que cest arme a esté appelez Hauber, ou Haubergeon, dont à succession de temps est advenu que le fief de hauber a esté pris pour toute espèce de fief, dont le seigneur est tenu servir le roy avec le hauber ou haubergeon." Wright, 143.

tirely military; and the genuine effect of the feudal establishment in England. To make a tenure by knight-service, a determinate quantity of land was necessary, which was called a knight's fee, *feudum militare*; the measure of which in 3 Edw. 1. was estimated at twelve plough-lands (*m*), and its value (though it varied with the times (*n*)) in the reigns of Edward I. and Edward II. (*o*) was stated at 20*l.* per annum (*p*). And he who held this proportion of land (or a whole fee) by knight-service, was *bound to attend his lord to the [*143] wars for forty days in every year, if called upon (*q*): which attendance was his *reditus* or return, his rent or service, for the land he claimed to hold. If he held only half a knight's fee, he was only bound to attend twenty days, and so in proportion (*r*). And there is reason to apprehend, that this service was the whole that our ancestors meant to subject themselves to; the other fruits and consequences of this tenure being fraudulently superinduced, as the regular (though unforeseen) appendages of the feudal system.

This tenure of knight-service had all the marks of a strict and regular feud: it was granted by words of pure donation, *dedi et concessi* (*s*), and was the tenure which by operation of law was created when the king made a grant without expressly reserving any particular service (*t*); it was conferred by investiture or delivering corporal possession of the land, usually called livery of seisin, the ceremony being perfect by homage and fealty (*u*). It also drew after it these seven fruits and consequences, as inseparably incident to the tenure in chivalry; viz. aids, relief, primer seisin, wardship, marriage, fines for alienation, and escheat: all which we will endeavour to explain. They will be seen to have a feudal origin.

1. Aids were originally mere benevolences granted by the tenant to his lord, in times of difficulty and distress (*x*); but in process of time they grew to be considered as a matter of right, and not of discretion. These aids were principally three: first, to ransom the lord's person, if taken prisoner: a necessary consequence of the feudal attachment and fidelity: insomuch that the neglect of doing it, whenever it was in the vassal's power, was by *the strict rigour of the feudal law an absolute forfeiture of his [*144] estate (*y*). Secondly, to make the lord's eldest son a knight; a matter that was formerly attended with great ceremony, pomp, and expense. This aid could not be demanded till the heir was fifteen years old, or capable of bearing arms (*z*): the intention of it being to breed up the eldest son and heir apparent of the seignory to deeds of arms and chivalry, for the better defence of the nation. Thirdly, to marry the lord's eldest daughter, by giving her a suitable portion: for daughters' portions were in those days extremely slender; few lords being able to save much out of their income for this purpose; nor could they acquire money by other means, being entirely devoted to matters of

(*m*) Pasch. 3 Edw. 1. Co. Litt. 69.
(*n*) 2 Inst. 596.
(*o*) Stat. Westm. 1, c. 36; Stat. de Milit. 1 Edw. 2; Co. Litt. 69.

(*p*) Mr. Selden contends, that a knight's fee did not consist of land of a fixed extent or value, but was as much as the king was pleased to grant, upon the condition of having the service of one knight. Tit. of Hon. p. 2, c. 5, ss. 17 and 26.

(*q*) See writs for this purpose in Memorand. Scacch. 36, prefixed to Maynard's Year-book, Edw. II.

(*r*) Litt. s. 95.
(*s*) Co. Litt. 9.
(*t*) Dalr. Essay on Feudal Prop. p. 24; Wright, Ten. 141.

(*u*) See *ante*, p. 183.

(*x*) *Auxilia sunt de gratia, et non de jure, — cum dependant ex gratia tenentium, et non ad voluntatem dominorum.* Bracton, l. 2, tr. 1, c. 16, s. 8.

(*y*) Feud. l. 2, t. 24.

(*z*) 2 Inst. 233.

arms, nor, by the nature of their tenure, could they charge their lands with this or any other incumbrances (*a*). From bearing their proportion to these aids no rank or profession was exempted: and therefore even the monasteries till the time of their dissolution, contributed to the knighting of their founder's male heir (of whom their lands were holden) and the marriage of his female descendants (*b*).

But besides these ancient feudal aids, the tyranny of lords by degrees exacted more and more; as, aids to pay the lord's debts, and aids to enable him to pay aids or reliefs to his superior lord (*c*); from which last indeed the Amount of aids. king's tenants *in capite* were, from the nature of their tenure, excused, as they held immediately of the king, who had no superior. To prevent this abuse, king *John's *magna carta* (*d*) ordained that no aids [* 145] be taken by the king without consent of parliament, nor in anywise by inferior lords, save only the three ancient ones above mentioned. But this provision was omitted in Henry III.'s charter, and the same oppressions were continued till the 25 Edw. I., when the statute called *confirmatio chartarum* was enacted; which in this respect revived king John's charter, by ordaining that none but the ancient aids should be taken. But though the species of aids was thus restrained, yet the quantity of each aid remained arbitrary and uncertain. King John's charter indeed ordered, that all aids taken by inferior lords should be reasonable (*e*); and that the aids taken by the king of his tenants *in capite* should be settled by parliament (*f*). But they were never completely ascertained and adjusted till the statute Westm. 1, 3 Edw. 1, c. 36, which fixed the aids of inferior lords at twenty shillings, or the supposed twentieth part of the annual value of every knight's fee, for making the eldest son a knight, or marrying the eldest daughter: and the same was done with regard to the king's tenants *in capite*, by stat. 25 Edw. 3, stat. 5, c. 11. The other aid, for ransom of the lord's person, being not in its nature capable of any certainty, was therefore never ascertained.

2. Relief, *relevium*, was before mentioned as incident to every feudal tenure, by way of fine or composition with the lord for taking up the estate, which was lapsed or fallen in by the death of the last tenant. Reliefs, 2. Reliefs. whether arising simply out of the rapacity of powerful lords or from some less manifestly unjust source, were looked upon as one of the greatest grievances of tenure: especially when, at the first, they were merely arbitrary and at the will of the lord; so that, if he pleased to demand an exorbitant relief, it was in effect to disinherit the heir (*g*). The English ill brooked this [* 146] consequence of *their new-adopted policy; and therefore William the Conqueror by his laws (*h*) ascertained the relief, by directing (in imitation of the Danish heriots) that a certain quantity of arms, and Amount of relief. habiliments of war, should be paid by the earls, barons, and vassours respectively; and if the latter had no arms, they should pay

(*a*) By the Stat. Westm. 1, c. 36, the aid for the marriage portion of the lord's eldest daughter could not be demanded till she was seven years of age, and if he died, leaving her unmarried, she might recover the amount so received by him from his executors.

(*b*) Phillips's Life of Pole, i. 223.

(*c*) See Du Cange, voc. Auxillium, where several aids existing in France (and proba-

bly more or less in England prior to Magna Charta), are mentioned. The aid to pay reliefs was the most usual in England, till it was abolished.

(*d*) Cap. 12, 15.

(*e*) Cap. 15.

(*f*) *Id.* 14.

(*g*) Wright, 99.

(*h*) C. 22, 23, 24.

100s. William Rufus broke through this composition, and again demanded arbitrary uncertain reliefs, as due by the feudal laws: thereby in effect obliging every heir to new purchase or redeem his land (i): but his brother Henry I., by the charter before mentioned, restored his father's law; and ordained, that the relief to be paid should be according to the law so established, and not an arbitrary redemption (k). But afterwards, when, by an ordinance in 27 Hen. II., called the assize of arms, it was provided that every man's armour should descend to his heir, for defence of the realm; and it thereby became impracticable to pay these acknowledgments in arms according to the laws of the conqueror, the composition was universally accepted of 100s. for every knight's fee; as we find it ever after established (l). But it must be remembered, that this relief was only then payable, if the heir at the death of his ancestor had attained his full age of one-and-twenty years (m).

3. *Primer seisin* was a feudal burthen, only incident to the king's tenants *in capite ut de coronā*, and not to those who held of inferior or mesne lords, or even *in capite* when *ut de honore* (n). It was a right which the king had, when any of his tenants *in capite* died seised of a knight's fee, to receive of the heir (provided he were of full age) one whole year's profits of the lands, if they were in *immediate possession: and [*147] half a year's profits, if the lands were in reversion expectant on an estate for life (o). This seems to be little more than an additional relief, but grounded upon this feudal reason; that, by the ancient law of feuds, immediately upon a death of a vassal the superior was entitled to enter and take seisin or possession of the land, by way of protection against intruders, till the heir appeared to claim it, and receive investiture: during which interval the lord was entitled to take the profits; and, unless the heir claimed within a year and day, it was by the strict law a forfeiture (p). This practice, however, seems not to have long obtained in England, if ever, with regard to tenure under inferior lords; but, as to the king's tenures *in capite*, the *prima seisin* was expressly declared, under Henry III. and Edward II., to belong to the king by prerogative, in contradistinction to other lords (q). The king was entitled to enter and receive the whole profits of the land, till livery was sued; which suit being commonly made within a year and day next after the death of the tenant, in pursuance of the strict feudal rule, therefore the king used to take as an average the first fruits, that is to say, one year's profits of the land (r). And this afterwards gave a handle to the popes, who claimed to be feudal lords of the church, to claim in like manner from every clergyman in England the first year's profits of his benefice, by way of *primitiæ*, or first fruits.

4. These payments were only due if the heir was of full age; but if he was under the age of twenty-one, being a male, or fourteen, being a female (s), the lord was entitled to the wardship of the heir, and was called the guardian in chivalry (t). This wardship consisted in having the

(i) 2 Roll. Abr. 514.

(k) "*Haeres non redimet terram suam sicut faciebat tempore fratris mei, sed legitima et justa relevatione relevabit eam.*" Text. Rot. tens. cap. 84.

(l) Glanv. l. 9, c. 4. Litt. s. 112.

(m) As to socage relief, see Harg. Co. Litt. 93 a.

(n) Co. Litt. 77 e.

(o) Co. Litt. 77 c.

(p) Feud. l. 2, t. 24; Ordonnances des Rois, p. 55.

(q) Stat. Marl. c. 16; 17 Edw. 2, c. 3.

(r) Staundf. Prerog. 12.

(s) Litt. s. 108.

(t) This incident of wardship, and the following one of marriage, did not obtain except in Normandy and England, and, perhaps, in some parts of Germany. By "the law of France, the custody of the land wa-

[* 148] * custody of the body and lands of such heir, without any account of the profits, till the age of twenty-one in males, and fourteen in females. For the law supposed the heir-male unable to perform knight-service till twenty-one; but as for the female, she was supposed capable at fourteen to marry, and then her husband might perform the service. The lord therefore had no wardship, if at the death of the ancestor the heir-male was of the full age of twenty-one, or the heir-female of fourteen; yet, if she was then under fourteen, and the lord once had her in ward, he might keep her so till sixteen, by virtue of the statute of Westm. 1, 3 Edw. 1, c. 22, the two additional years being given by the legislature for no other reason but to benefit the lord (u), but upon the marriage of the ward, if above fourteen years, she was entitled to enter.

This wardship, so far as it related to land, though it was not nor could be part of the law of feuds, when they were arbitrary, temporary, or for life only; yet when they were hereditary, and did consequently often descend upon infants, who by reason of their age could neither perform nor stipulate for the services of the feud, does not seem upon feudal principles to have been unreasonable. For the wardship of the land, or custody of the feud, was retained by the lord, that he might, out of the profits thereof, provide a fit person to supply the infant's services, till he should be of age to perform them himself (x). And

[* 149] * if we consider the feud in its original import, as a stipend, fee, or reward for actual service, it could not be thought hard that the lord should withhold the stipend, so long as the service was suspended. Though undoubtedly to our English ancestors, where such a stipendiary donation was a mere supposition or figment, inasmuch as the lands were not granted to them, but the system of tenure was forced upon them, it carried abundance of hardship; and accordingly it was relieved by the charter of Henry I. before mentioned, which took this custody from the lord, and ordained that the custody, both of the land and the children, should belong to the widow or next of kin. But this noble immunity did not continue many years.

The wardship of the body was a consequence of the wardship of the land; for he who enjoyed the infant's estate was the properest person to educate and maintain him in his infancy: and also, in a political view, the lord was most concerned to give his tenant a suitable education, in order to qualify him the better to perform those services which in his maturity he was bound to render (y).

When the male heir arrived to the age of twenty-one, or the heir-female to that of sixteen, they might sue out their livery or *ousterlemain* (z); that is, the delivery of their lands out of their guardian's hands. For this they were

entrusted to the next heir, and that of the person, as in socage tenures among us, to the nearest kindred of that blood which could not inherit. By a gross abuse of this custom in England, the right of guardianship in chivalry, or temporary possession of the lands, was assigned over to strangers. This was one of the most vexatious parts of our feudal tenures, and was never, perhaps, more sorely felt than in their last stage under the Tudor and Stuart families." Hall, *Mid. Ages*, vol. i. p. 179.

(u) *Ib.*; see 2 Inst. 208-4.

(z) If an infant tenant by knight's service was created a knight, the king was no longer

entitled to the wardship of his person, nor to the value of his marriage. *Sir John Radcliff's case*, Plow. 267. And the reason there assigned is, that "when he is made a knight by the king, who is the chief captain of all chivalry, or by some other great captain assigned by the king for that purpose, he is thereby allowed and admitted to be able to perform knight's service; and then his body ought not to be in ward, because his imbecility ceases, and *cessant causâ, cessabit effectus*."

(y) Co. Litt. 75 l.

(e) Co. Litt. 77.

obliged to pay a fine, namely, half a year's profits of the land; though this seems expressly contrary to *magna carta* (a). However, in consideration of their lands having been so long in ward, they were excused all reliefs, and the king's tenants also all primer seisins (b). In order to ascertain the profits that arose to the crown by these *fruits of tenure, and to grant the heir his livery, the itinerant justices, or justices in eyre, had it formerly [* 150] in charge to make inquisition concerning them by a jury of the county (c), commonly called an *inquisitio post mortem*; which was instituted to inquire (at the death of any man of fortune) the value of his estate, the tenure by which it was holden, and who, and of what age his heir was: thereby to ascertain the relief and value of the primer seisin, or the wardship and livery accruing to the king thereupon. A manner of proceeding that came in process of time to be greatly abused, and at length an intolerable grievance; it being one of the principal accusations against Empson and Dudley, the infamous tools of Henry VII., that by color of false inquisition, they compelled many persons to sue out livery from the crown, who by no means were tenants thereunto (d). And afterwards, a court of wards and liveries was erected (e) for conducting the same inquiries in a more solemn and legal manner (f).

When the heir thus came of full age, provided he held a knight's fee *in capite* under the crown, he was to receive the order of knighthood, and was compellable to take it upon him, or else pay a fine to the king. For, in those heroical times, no person was qualified for deeds of arms and chivalry who had not received this order, which was conferred with much preparation and solemnity. We may plainly discover the footsteps of a similar custom in what Tacitus relates of the Germans, who, in order to qualify their young men to bear arms, presented them in a full assembly with a shield and lance; which ceremony has been supposed to have been the origin of the feudal knighthood (g). This prerogative, of compelling the *tenants in knight-service to be knighted, or to pay a fine, was expressly recognized in parliament by the statute *de militibus*, 1 Edw. II., (h), and was exerted as an expedient for raising money by many of our sovereigns, particularly by Edw. VI. and queen Elizabeth; but it was ill-suited to the temper of the seventeenth century, and when Charles I. insisted upon exercising it, such discontent and murmurs were excited that he was compelled to abandon the claim. It was accordingly abolished by 16 Car. 1, c. 20.

5. But, before they came of age, there was still another piece of authority, which the guardian was at liberty to exercise over his infant wards: I mean the right of marriage (*maritagium*, contradistinguished from *matri-*
5. Lords' rights in marriage of wards. *monium*), which in its feudal sense signifies the power, which the lord or guardian in chivalry had, of disposing of his infant ward

(a) 9 Hen. 3, c. 8.

(b) Co. Litt. 77.

(c) Hoveden, sub. Ric. I.

(d) 4 Inst. 198.

(e) Stat. 32 Hen. 8, c. 46.

(f) The Court of Wards was created by the stat. 32 Hen. 8, c. 46, and in the following year the jurisdiction of liveries was added. 33 Hen. 8, c. 22.

(g) "In ipso concilio vel principum aliquis, vel pater, vel propinquus, acuto framedque ju-

venem ornant. Haec apud illos toga, hic primus juvenis honos: ante hoc domus pars videtur; mox reipublicae." De Mor. Germ. c. 18.

(h) This so-called statute appears to have been a mere writ entered on the roll. 2 Inst. 593. As to the exercise of the prerogative, see the commissions issued by Edw. 6 and queen Elizabeth; in 15 Rym. Foed. 124 and 493, and 16 Car. 1, c. 20; 2 Rushw. 70.

in matrimony. For, while the infant was in ward, the guardian had the power of tendering him or her a suitable match, without disparagement or inequality which if the infants refused, they forfeited the value of the marriage, *valorem maritagii*, to their guardian (*i*); that is, so much as a jury would assess, or any one would *bonā fide* give to the guardian for such an alliance (*k*): and, if a male infant to whom a suitable marriage was tendered refused it and afterwards married without the guardian's consent, he forfeited double the value, *duplicem valorem maritagii* (*l*). This seems to have been one of the greatest hardships of our ancient tenures. There were indeed substantial reasons why the lord [* 152] should have the *restraint and control of the ward's marriage, especially of his female ward; because of their tender years, and the danger of such female ward's intermarrying with the lord's enemy (*m*); but no tolerable pretence could be assigned why the lord should have the sale or value of the marriage. And as this claim was by no means coextensive with the establishment of the feudal system (*n*), it cannot be held as of strictly feudal origin; the most probable account of it seeming to be this: by the custom of France the lord's consent was necessary to the marriage of his female wards (*o*). This was introduced into England, together with the rest of the Norman doctrine of feuds: and it is likely that the lords usually took money for such their consent, since, in the often-cited charter of Henry I., he engages for the future to take nothing for his consent; which also he promises in general to give, provided such female ward were not married to his enemy. But this, among other beneficial parts of that charter, being disregarded, and guardians still continuing to dispose of their wards in a very arbitrary unequal manner, it was provided by king John's great charter, that heirs should be married without disparagement, the next of kin having previous notice of the contract (*p*); or, as it was expressed in the first draught of that charter, *ita maritentur ne disparagentur, et per concilium propinquorum de consanguinitate suā* (*q*). But these provisions in behalf of the relations were omitted in the charter of Henry III.: wherein (*r*) the clause stands merely thus, "*hæredes maritentur absque disparagatione*:" meaning certainly, by *hæredes*, heirs-female, as there are no traces before this to be found of the lord's claiming the marriage (*s*) of heirs male; and as Glanvil (*t*) [* 153] expressly confines it to heirs *female. But the king and his great lords thenceforward took a handle (from the ambiguity of this expression) to claim them both, *sive sit masculus sive femina*, as Bracton more than once expresses it (*u*): and also, as nothing but disparagement was restrained by *magna carta*, they thought themselves at liberty to make all other advantages that they could (*x*). And afterwards this right of selling the ward in marriage, or else receiving the price or value of it, was expressly declared by the statute of Merton (*y*); which is the first direct mention of it that occurs in our own or any other law (*z*).

(i) Litt. s. 110.

(k) Stat. Mert. c. 6; Co. Litt. 83.

(l) Litt. s. 110; see also 5 Rep. 126; 6 id. 70; 2 Inst. 90, 92, 202, 204.

(m) Bract. l. 2, c. 37, s. 6; Hall. Mid. Ages, 119, 128.

(n) *Ante*, p. 147, n. (f).

(o) Gr. Cust. 95.

(p) Cap. 6, edit. Oxon.

(q) Cap. 8, id.

(r) Cap. 6.

(s) The words *maritare* and *maritagium* seem *ex vi termini* to denote the providing of an husband.

(t) L. 7, cc. 9 and 13, and l. 7, c. 4.

(u) L. 2, c. 88, s. 1.

(x) Wright, 97.

(y) 20 Hen. 8, c. 6.

(z) What fruitful sources of revenue these wardships and marriages of the tenants, who held lands by knight's service, were to the crown, will appear from the two following

6. Another attendant or consequence of tenure by *knight-service [*154] was that of fines due to the lord for every alienation, whenever the tenant had occasion to make over his land to another. This depended on the nature and spirit of the feudal connexion; it not being reasonable nor allowed, as we have before seen, that a feudatory should transfer his lord's gift to another, and substitute a new tenant to do the service in his own stead, without the consent of the lord: and, as the feudal obligation was considered as reciprocal, the lord also could not alienate his seignory without the consent of his tenant, which consent of his was called an attornment. This restraint upon the lords soon wore away; that upon the tenants continued longer. For, when everything came in process of time to be bought and sold, the lords would not grant a licence to their tenant, to aliene, without a fine being paid; apprehending that, if it was reasonable for the heir to pay a fine or relief on the renovation of his paternal estate, it was much more reasonable that a stranger should make the same acknowledgment on his admission to a newly-purchased feud. With us in England, these fines seem only to have been exacted from the king's tenants *in capite*, who were never able to aliene without a licence: but as to common persons, they were at liberty, by the statute of *quia emptores* (a) (if not earlier), to aliene the whole of their estate, to be holden of the same lord as they themselves held it of before. But the king's tenants *in capite*, not being included under the general words of this statute, could not aliene without a licence: for if they did, it was in ancient strictness an absolute forfeiture of the land (b). But this severity was mitigated by the statute 1 Edw. 3, c. 12, which ordained, that, in *such case, the lands should not be forfeited, but a reasonable fine be paid to the king. Upon which statute it was settled, that one-third [*155] of the yearly value should be paid for a licence of alienation; but if the tenant presumed to aliene without a licence, a full year's value should be paid (c).

7. The last consequence of tenure in chivalry was escheat (d); which is the

instances collected among others by Lord Lyttleton, Hist. Hen. II. 2 vol. 296. "John Earl of Lincoln gave Henry the Third 3,000 marks to have the marriage of Richard de Clare, for the benefit of Matilda, his eldest daughter; and Simon de Mortford gave the same king 10,000 marks to have the custody of the lands and heir of Gilbert de Unfraville, with the heir's marriage, a sum equivalent to a hundred thousand pounds at present." In this case the estate must have been large, the minor young, and the alliance honourable. For, as Mr. Hargrave informs us, who has well described this species of guardianship, "the guardian in chivalry was not accountable for the profits made of the infant's lands, during the wardship, but received them for his own private emolument, subject only to the bare maintenance of the infant. And this guardianship, being deemed more an interest for the profit of the guardian, than a trust for the benefit of the ward, was saleable and transferable, like the ordinary subjects of property, to the best bidder; and if not disposed of, was transmissible to the lord's personal representatives. Thus the custody of the infant's person, as well as the care of his estate, might devolve upon the

most perfect stranger to the infant; one prompted by every pecuniary motive to abuse the delicate and important trust of education, without any ties of blood or regard to counteract the temptations of interest, or any sufficient authority to restrain him from yielding to their influence." Co. Litt. 88, n. 11. It seems astonishing that these "intolerable burthens," wardship and marriage, should have been allowed to remain in force here till the year 1660, when they were not admitted on the continent.

(a) 18 Edw. 1, c. 1. There has been some discussion whether the 32nd chapter of Magna Charta has not a like effect. Sir E. Coke (2 Inst. 65, 501) and Sir M. Wright (Ten.) thought it had. But the construction is open to much doubt. Dair. Ess. 88; 1 Hall. Mid. Ages, 175.

(b) 2 Inst. 66; Hall. Mid. Ages, c. 2, Part I.

(c) *Ib.* 67. A relic of the same principle upon which fines on alienation were founded remains to the present day in the case of copyholds, as to which more will appear hereafter.

(d) Escheat, from *echoir*, to expire or run out, a word which also had the secondary meaning of, to happen, whence *échet*, an op-

determination of the tenure, or dissolution of the mutual bond between the lord and tenant, from the extinction of the blood of the latter by
 7. *Escheat.* either natural or civil means, if he died without heirs of his blood, or if his blood was corrupted and stained by commission of treason or felony, whereby every inheritable quality was entirely blotted out and abolished (*e*). In such cases the land escheated or fell back to the lord of the fee (*f*); that is, the tenure was determined by breach of the original condition expressed or implied in the feudal donation. In the one case there were no heirs subsisting of the blood of the first feudatory or purchaser, to which heirs alone the grant of the feud extended; in the other, the tenant, by perpetrating an atrocious crime, showed that he was no longer to be trusted as a vassal, having forgotten his duty as a subject; and therefore forfeited his feud, which he held under the implied condition that he should not be a traitor or a felon. The consequence of which in both cases was, that the gift being determined, resulted back to the lord who gave it (*g*).

*These were the principal qualities, fruits, and consequences of the
 [* 156] tenure by knight-service: a tenure, by which the greatest part of the lands in this kingdom were holden, and that principally of the king *in capite*, till the middle of the seventeenth century; and which was created, as Sir Edward Coke expressly testifies (*h*), for a military purpose, viz. for defence of the realm by the king's

Summary of incidents of tenure by knight-service.

own principal subjects, which was judged to be much better than to trust to hirelings or foreigners. The description here given is that of knight-service proper; which was to attend the king in his wars. There were also some other species of knight-service; so called, though improperly, because the service or render was of a free and honourable nature, and equally uncertain as to the time of rendering as that of knight-service proper, and because they were attended with similar fruits and consequences. Such was the tenure by grand

serjeanty, *per magnum servitium*, whereby the tenant was bound, instead of serving the king generally in his wars, to do some special honorary service to the king in person; as to carry his banner, his sword, or the like; or to be his butler, champion, or other officer, at his coronation (*i*). It was in most other respects like knight-service (*k*); only he was not bound to pay aid (*l*), or escuage (*m*); and when tenant by knight-service paid five pounds for a relief on every knight's fee, tenant by grand serjeanty paid one year's value of his land, were it much or little (*n*).

Tenure by *cornage*, which existed in the marches of Scotland, was to wind a horn when the Scots or other enemies entered the
 [* 157] land, in order to warn the king's subjects, was (like *other services of

portunity, a piece of luck. See *Burgess v. Wheats*, 1 Eden. 191. The effect of the statutes 54 Geo. 3, c. 145, and 3 & 4 Will. 4, c. 106, will be noticed in another place.

(*e*) Escheats on account of delinquencies, or, as it is in that case more usually called, forfeiture, were on the continent for various periods, according to circumstances, a year, for life, or for ever. The doctrine of corruption of blood was peculiar to England.

(*f*) Co. Litt. 18.

(*g*) Feud. l. 2, t. 86.

(*h*) 4 Inst. 193.

(*i*) Litt. s. 158. In Italy, it seems, and probably in other countries where the feudal system prevailed, the most ordinary mechanical employments in the houses of the great were made the services and conditions of holding lands. Muratori, Diss. ii.

(*k*) *Ib.* s. 158.

(*l*) 2 Inst. 288.

(*m*) Litt. s. 158.

(*n*) *Ib.* s. 154.

the same nature) a species of grand serjeanty (*o*) if held of the king, and of knight-service if held of any other.

These services, both of chivalry and grand serjeanty, were all personal, and uncertain as to their quantity or duration. But, the personal attendance in knight-service growing troublesome and inconvenient in many

Escuage.

respects, the tenants found means of compounding for it; by first sending others in their stead, and in process of time making a pecuniary satisfaction to the lords in lieu of it, and the tenure to which it was incident was called *scutagium* in Latin, or *servitium scuti*: and in our Norman French, *escuage*.

A tenant by escuage could, instead of himself personally serving in war, send a substitute, or pay a compensation for the non-performance of the military service (*p*). When this kind of tenure became common, it would seem that sometimes grants were made with the reservation to the lord of a tribute of this kind, varying according to the expenditure which the lord had to incur in his own personal service to the king (*q*). In process of time the claim for escuage was levied by royal authority at so much for a knight's fee, the amount however being uncertain, like knight-service.

The first time this appears to have been taken was in the 5 Hen. II., on account of his expedition to Toulouse: *but it soon came to be so [*158] universal, that personal attendance fell quite into disuse. Hence we find in our ancient histories, that, from this period, when our kings went to war, they levied escuages or scutages on their tenants, that is, on all the landholders of the kingdom, to defray their expenses, and to hire troops; and these assessments, in the time of Hen. II., seem to have been made arbitrarily and at the king's pleasure. Which prerogative being greatly abused by his successors, it became matter of national clamour; and king John was obliged to consent by his *magna carta*, that no scutage should be imposed without consent of parliament (*r*). But this clause was omitted in his son Henry III.'s charter, where we only find (*s*) that scutages or escuage should be taken as they were used to be taken in the time of Henry II.: that is, in a reasonable and moderate manner. Yet afterwards by statute 25 Edw. 1, c. 5 & 6, and many subsequent statutes (*t*), it was again provided, that the king should take no aids or tasks but by the common assent of the realm: hence it was held in our old books, that escuage or scutage could not be levied but by consent of parliament (*u*); such scutages being indeed the groundwork of all succeeding subsidies, and the land-tax of later times.

Since, therefore, escuage differed from knight-service in nothing, but as a compensation differs from actual service, knight-service is frequently confounded with it. And thus Littleton (*x*) must be understood, when he tells us, that

(*o*) *Ib.* s. 156. The well-known case of the Pusey Horn, where a bill in Chancery was brought for its recovery (*Pusey v. Pusey*, 1 Vern. 273), was an instance where land had been held by the Pusey family by "a horn anciently given to their ancestors by Canute, the Danish King." *Camd. Brit. Berks.* p. 203, ed. 1807. The inscription on the horn was as follows:—

"King Knowd gave Wylliam Pewse
This horne to hold by the londe."

—*Archæolog.* iii. 13.

(*p*) *Litt.* s. 96.

(*q*) Wright, Ten. 121, 134. *Litt.* s. 98, says, "some hold by custom" that they should pay but a moiety or other part of the amount assessed by parliament. There seems some doubt whether escuage was a distinct tenure or a new incident of other tenure.

(*r*) *Nullum scutagium ponatur in regno nostro, nisi per commune consilium regni nostri.* Cap. 12.

(*s*) Cap. 87.

(*t*) See vol. i.

(*u*) Old Ten. tit. "Escuage."

(*x*) S. 103.

tenant by homage, fealty, and escuage, was tenant by knight-service: that is, that this tenure (being subservient to the military policy of the nation) was respected (*y*) as a tenure in chivalry (*z*). But as the actual service was [*159] *uncertain, and depended upon emergencies, so it was necessary that this pecuniary compensation should be equally uncertain, and depend on the assessments of the legislature suited to those emergencies. For had the escuage been a settled invariable sum, payable at certain times, it had been neither more nor less than a mere pecuniary rent; and the tenure, instead of knight-service, would have then been of another kind, called socage (*a*), of which we shall speak in the next chapter.

For the present we may observe, that by the degeneration of knight-service, or personal military duty, into escuage, or pecuniary assessments, all the advantages (either promised or real) of the feudal constitution were

Corruption of
military tenures
destroyed, and
nothing but the
hardships remained.
Instead of
by escuage.

forming a national militia composed of barons, knights, and gentlemen, bound by their interest, their honour, and their oaths, to defend their king and country, the whole of this system of tenures now tended to nothing else but a wretched means of raising money to pay an army of occasional mercenaries. In the meantime the families of all our nobility and gentry groaned under the intolerable burthens, which (in consequence of the fiction adopted after the conquest) were introduced and laid upon them by the subtlety and finesse of the Norman lawyers. For, besides the scutages to which they were liable in defect of personal attendance, which however were assessed by themselves in parliament, they might be called upon by the king or lord paramount for aids, whenever his eldest son was to be knighted or his eldest daughter married; not to forget the ransom of his own person. The heir, on the death of his ancestor, if of full age, was plundered of the first emoluments arising from his inheritance, by way of relief and primer seisin; and, if under age, of the whole of his estate during infancy. And then, as sir Thomas

[*160] Smith (*b*) very feelingly *complains, "when he came to his own, after he was out of wardship, his woods decayed, houses fallen down, stock wasted and gone, lands let forth and ploughed to be barren," to reduce him still farther, he was yet to pay half a year's profits as a fine for suing out his livery; and also the price or value of his marriage, if he refused such wife as his lord and guardian had bartered for, and imposed upon him; or twice that value if he married another woman. Add to this, the untimely and expensive honour of knighthood, to make his poverty more completely splendid. And when by these deductions his fortune was so shattered and ruined, that perhaps he was obliged to sell his patrimony, he had not even that poor privilege allowed him, without paying an exorbitant fine for a licence of alienation.

A slavery so complicated, and so extensive as this, called aloud for a remedy in a nation that boasted of its freedom. Palliatives were from time to time applied by successive acts of parliament, which assuaged some temporary grievances. Till at length king James I. consented (*c*), in consideration of a proper equivalent, to abolish them all; though the plan proceeded not to

(*y*) Wright, 122.

(*z*) *Pro feodo militari reputatur*. Flet. l. 2, c. 14, s. 7.

(*a*) Litt. s. 97, 98, 120. Escuage certain is according to Littleton included in socage.

(*b*) Commonw. l. 3, c. 5.

(*c*) 4 Inst. 202.

effect; in like manner as he had formed a scheme, and began to put it in execution for removing the feudal grievance of heritable jurisdictions in Scotland (*d*), which has since been pursued and effected by the statute 20 Geo. 2, c. 43 (*e*). King James's plan for exchanging our military tenures seems to have been nearly the same as that which has been since pursued; with this difference only, that, by way of compensation for the loss which the crown and other lords would sustain, an annual fee-farm rent was to have been settled and inseparably annexed to the crown and assured to the inferior lords, payable out of every *knight's fee within their respective [*161] seignories. An expedient seemingly much better than the hereditary excise, which was afterwards made the principal equivalent for these concessions (*f*). For at length the military tenures, with all their heavy appendages (having during the Commonwealth been discontinued), were destroyed at one blow by the statute 12 Car. 2, c. 24, which enacts, that the court of wards and liveries, and all wardships, liveries, primer seisins, and ousterlemains, values and forfeitures of marriages, by reason of any tenure of the king or others, be totally taken away (*g*). And that all fines for alienations, tenures by homage, knight-service, and escuage, and also aids for marrying the daughter or knighting the son, and all tenures of the king *in capite*, be likewise taken away. And that all sorts of tenures, held of the king or others, be turned into free and common socage; save only tenures in frankalmoign, copyholds, and the honorary services (other than wardship, marriage, and *charges incident to knight-service) of grand [*162] serjeanty (*h*). A statute, which was a greater acquisition to the civil

Military tenures
destroyed.

(*d*) Dalrymp. of Feuds, 292.

(*e*) By another statute of the same year (20 Geo. 2, c. 50), the tenure of wardholding (equivalent to the knight-service of England) is for ever abolished in Scotland.

(*f*) By 12 Car. 2, c. 24, the compensation given to the crown consisted of excise duties on beer, wine, &c. Somewhat later, (in the reign of William and Mary) the practice was adopted of granting a land tax. This long continued to be imposed for periods of one year only. In 1798, under Mr. Pitt's administration, it was made perpetual; provision at the same time being made for its redemption by landowners, (see 88 Geo. 3, c. 60). The act now in force as to land tax and its redemption is 42 Geo. 3, c. 116, amended by several acts, the principal of which are: 53 Geo. 3, c. 123; 4 & 5 Will. 4, c. 60; 5 & 6 Vict., c. 87.

(*g*) Both Mr. Madox and Mr. Hargrave have taken notice of this inaccuracy in the title and body of the act, viz., of taking away tenures *in capite* (Mad. Bar. Ang. 238; Co Litt. 108, n. 5); for tenure *in capite* signifies nothing more than that the king is the immediate lord of the land-owner; and the land might have been either of military or socage tenure. The same incorrect language was held by the Speaker of the House of Commons in his pedantic address to the throne upon presenting this bill:—"Royal sir, your tenures *in capite* are not only turned into a tenure in socage (though that alone will for ever give your Majesty a just right and title to the labour of our ploughs, and the sweat of our brows); but they are likewise turned into a

tenure *in corde*. What your Majesty had before in your court of wards, you will be sure to find it hereafter in the exchequer of your people's hearts." Journ. Dom. Proc. 11 vol. 234.

(*h*) "The tenure by grand serjeanty still continues, though it is so regulated by the 12th of Chas. 2 as to be made in effect free and common socage, except so far as regards the merely honorary part of grand serjeanty; for the first part of the statute, which destroys the incidents to tenures by knight's service, of which grand serjeanty was the highest species, is expressed with a generality sufficient to reach grand serjeanty; but then a proviso follows by which the honorary services of this tenure are expressly saved. It is observable, that the proviso for this purpose is penned with an inaccuracy which leads to a very mistaken idea of the incidents to grand serjeanty. The honorary services are preserved with a cautious exception of several burthensome properties, such as marriage, wardship, and voyages royal; to which are added escuage, and the aids *pur faire fits chivaler et file marier*, though these latter were certainly quite foreign to grand serjeanty. From this undistinguishing mode of expression, and from the confusion and redundancy so conspicuous in most parts of the statute, we are inclined to infer that those who attribute the framing of it to Lord Chief Justice Hale, found themselves on a loose report very injurious to the memory of that shining ornament of his profession." See Gilb. Eq. R. 176. Harg. Co. Litt. 108 a.

property of this kingdom than even *magna carta* itself: since that only pruned the luxuriances that had grown out of the military tenures, and thereby preserved them in vigour; but the statute of King Charles extirpated the whole, and demolished both root and branches.

[* 163]

* CHAPTER VI.

MODERN ENGLISH TENURES.

ALTHOUGH, by the means that were mentioned in the preceding chapter, the oppressive or military part of the feudal constitution was abolished, yet we are not to imagine that the constitution itself was utterly laid aside, and a new one introduced in its room: for by the statute 12 Car. 2, the tenures of socage and frankalmoign, the honorary services of grand serjeanty (a), and the tenure by copy of court roll, were preserved; and all other tenures were not so much destroyed as reduced to one general species, then well known and subsisting, called free and common socage. And this, since it sprang from the same feudal origin as the rest, suffices to indicate the necessity of considering that ancient system; for it is that alone to which we can recur, to explain any seeming or real difficulties that may arise in our present mode of tenure. (229)

The military tenure, or that by knight-service, consisted of what were reputed the most free and honourable services, but which in their nature were unavoidably uncertain in respect to the time of their performance. The second species of tenure, or free-socage, consisted also of free and honourable services; but such as were reduced to an absolute certainty. To this tenure, which not only [* 164] * exists at this day, but has in a manner absorbed and swallowed up (since the statute of Charles II.) almost every other species of tenure, we are next to proceed.

Socage, in its most general and extensive signification, seems to denote a tenure by any certain and determinate service. And in this sense it is by our ancient writers constantly put in opposition to chivalry, or knight-service, where the render was precarious and uncertain. Thus Bracton (b); if a man holds by a rent in money, without any escuage or serjeanty, "*id tenementum dici potest socagium*:" but if you add thereto any royal service, or escuage, to any the smallest amount, "*illud dici poterit feodum militare*." So too the author of Fleta (c); "*ex donatationibus, servitia militaria vel magnæ serjantiae non continentibus, oritur nobis quoddam nomen generale, quod est socagium*." Littleton also (d) defines it to be, where the tenant holds

(a) The tenure of grand serjeanty was destroyed by the statute along with the other tenures in chivalry (of which this was one; ante, p. 156). It was the honorary services only which were reserved.

(b) L. 2, c. 19, s. 9.

(c) L. 3, c. 16, s. 9.

(d) Sect. 117.

(229) For a discussion of the doctrine of socage tenures see 3 Kent's Com. 509 to 514 and notes; Story's Const. U. S., §§ 172, 173, 174.

his tenement of the lord by any certain service, in lieu of all other services; so that they be not services of chivalry, or knight-service. And therefore afterwards (e) he tells us, that whatsoever is not tenure in chivalry is tenure in socage: in like manner it is defined by Finch (f), as a tenure to be done out of war. The service must therefore be certain, in order to denominate it socage; as to hold by fealty and 20s. rent; or, by homage, fealty, and 20s. rent; or by homage and fealty without rent; or, by fealty and certain corporal service, as ploughing the lord's land for three days; or, by fealty only without any other service: for all these are tenures in socage (g).

But socage, as was hinted in the last chapter, is of two sorts: free-socage, where the services are not only certain but honourable; and villein-socage,

where the services, though certain, are of a baser nature. Such as hold by the *former tenure are called in Glanvil (h), [*165]

and other subsequent authors, by the name of *liberi sokemanni*, or tenants in free-socage. Of this tenure we are first to speak; and this both in the nature of its service, and the enjoyment of its privileges

was always by much the most free and independent species of any.

The word socage (i) has been derived from the Saxon appellation *soc*, which signifies a franchise or jurisdiction, and being joined to a usual termination, is called socage, in Latin, *socagium*; signifying thereby a free and privileged tenure. This etymology seems to be much more just than that of our common lawyers in general (k), who derive it from *soca*, an old Latin word, denoting (as they tell us) a plough: for that in ancient time this socage tenure consisted in nothing else but services of husbandry, which the tenant was bound to do to his lord, as to plough, sow, or reap for him; but that in process of time, this service was changed into an annual rent by consent of all parties, and that, in memory of its origin, it still retains the name of socage or plough-service (l). But this by no means agrees with what Littleton himself tells us (m), that to hold by fealty only, without paying any rent, is tenure in socage; for here is plainly no commutation for plough-service.

The possession of freedom and the right of attending the feudal territorial courts as suitors and judges were the most marked and valued distinctions of the *sokemanni*, who certainly were considered in ancient times with great respect (n). Britton describes lands in socage tenure, * under the name of *franke ferme*, as being "lands and tenements whereof the nature of the fee [*166] is changed by feoffment out of chivalry for certain yearly services, and in respect whereof neither homage, ward, marriage, nor relief can be claimed" (o). This, though not as we see accurate, inasmuch as these claims might be made, though in a different manner to that in military tenures, yet expresses with some truth the freedom of socmen from many of the oppressive qualities of these demands.

(e) Sect. 118.

(f) L. 147.

(g) Litt. s. 117, 118, 119.

(h) L. 3, c. 7.

(i) Somner, Gavelk. 188; Gloss. voc. Socca.

(k) Litt. s. 119; Co. Litt. 86; Bract. c. 35; *dicti poterit socagium a socco*. Ducange, voce Soc. Spelm. voc. Socagium.

(l) Litt. s. 119.

(m) Sect. 118.

(n) Mr. Hallam (Mid. Ages, 350) says, "It

now appears strange to me that I ever could have given the preference to Bracton's derivation of *socage* from *soc ds charrus*. The word *sokeman*, which occurs so often in Domesday, is continually coupled with *soca*, a franchise or right of jurisdiction belonging to the lord whose tenant or rather suitor the *sokeman* is described to be." As to the jurisdiction of these territorial courts, see Leges Hen. I., 2 Inst. 31.

(o) Chap. 66.

Taking this then to be the meaning of the word, it seems probable that the socage tenures were the relics of Saxon liberty; retained by such persons as had neither forfeited them to the king, nor been obliged to exchange their tenure for the more honourable, as it was called, but, at the same time, more burthensome, tenure of knight-service. This is peculiarly remarkable in the tenure which prevails in Kent, called gavelkind, which is generally acknowledged to be a species of socage tenure (*p*); the preservation of which, inviolate from the innovations of the Norman conqueror, is a fact universally known. And those who thus preserved their liberties were said to hold in free and common socage.

Free socage of
Saxon origin.

The distinguishing mark of this species of tenure is the having its renders or services ascertained; it will therefore include under it all other methods of holding free lands by certain and invariable rents and duties: and, in particular, *petit serjeanty*, tenure in *burgage*, and *gavelkind*.

We may remember that by the statute 12 Car. 2 grand serjeanty is not itself totally abolished, but only the slavish appendages belonging to it: for the honorary services (such as carrying the king's sword or banner, officiating as his butler, carver, &c. at the coronation) are still preserved. Now *petit serjeanty* bears a great resemblance

Honorary serv-
ices of grand
serjeanty
remain.

Petit serjeanty. [* 167] * to grand serjeanty; for as the one is a personal service, so the other is a rent or render, both tending to some purpose relative to the king's person. *Petit serjeanty*, as defined by Littleton (*q*), consists in holding lands of the king by the service of rendering to him annually some small implement of war, as a bow, a sword, a lance, an arrow, or the like. This, he says (*r*), is but socage in effect; for it is no personal service, but a certain rent: and we may add, it is clearly no predial service, or service of the plough, but in all respects *liberum et commune socagium*: only being held of the king, it is by way of eminence dignified with the title of *parvum servitium regis*, or *petit serjeanty*. And *magna carta* respected it in this light, when it enacted (*s*), that no wardship of the lands or body should be claimed by the king in virtue of a tenure by *petit serjeanty* (*t*).

Tenure in *burgage* is described by Glanvil (*u*), and is expressly said by Littleton (*x*), to be but tenure in socage: and it is where the king or other person is lord of an ancient borough, in which the tenements are held by a rent certain (*y*). It is indeed only a kind of town socage; as [* 168] common socage, by which other lands are holden, is * usually of a rural nature. A borough, as we have already seen, is usually distinguished from other towns by the right of sending members to parliament; and

(*p*) Wright, 211.

(*q*) Sect. 159.

(*r*) Sect. 160.

(*s*) Cap. 27.

(*t*) "The tenure of *petit serjeanty* is not named in 12 Chas. 2, but the statute is not without its operation on this tenure. It being necessarily a tenure *in capite*, though in effect only so by socage, livery and primer seisin were of course incident to it on a descent; and these are expressly taken away by the statute from every species of tenure *in capite*, as well socage *in capite* as knight's service *in capite*. But we apprehend that in other respects *petit serjeanty* is the same as

it was before, that it continues in denomination, and still is, a dignified branch of the tenure by socage, from which it only differs in name on account of its reference to war." Harg. Co. Litt. 108 b. n. 1.

The tenure by which the grants to the Duke of Marlborough and the Duke of Wellington, for their great military services, are held, is of this kind, each rendering annually a small flag or ensign, which is deposited in Windsor Castle.

(*u*) Lib. 7, Cap. 8.

(*x*) Sect. 162.

(*y*) Litt. s. 162, 163.

where the right of election was, before the reform of 1832, by burgage tenure, that fact alone is a proof of the antiquity of the borough. Tenure in burgage therefore, or burgage tenure, is where houses, or lands which were formerly the site of houses, in an ancient borough, are held of some lord in common socage, by a certain established rent. And these seem to have withstood the shock of the Norman encroachments principally on account of their insignificance, which made it not worth while to compel them to an alteration of tenure; as a hundred of them put together would scarce have amounted to a knight's fee. Besides, the owners of them being chiefly artificers and persons engaged in trade, could not with any tolerable propriety be put upon such a military establishment as was involved in the tenure in chivalry. The free socage, in which these tenements are held, seems to be plainly a remnant of Saxon liberty; which may also account for the great variety of customs, affecting many

of these tenements so held in ancient burgage: the principal and most remarkable of which is that called Borough English; so named in contradistinction as it were to the Norman customs, and which is taken notice of by Glanvil (x), and by Littleton (a); viz. that the youngest son, and not the eldest, succeeds to the burgage tenement on the death of his father (b). For which Littleton (c) gives this reason: because the younger son, by reason of his tender age, is *not so capable as the rest of his brethren to help himself. Other authors (d) have indeed [* 169] given a much stranger reason for this custom, as if the lord of the fee had anciently a right of concubinage with his tenant's wife on her wedding-night; and that therefore the tenement descended not to the eldest, but the youngest son, who was more certainly the offspring of the tenant. But it is very doubtful whether this custom ever existed in England, though it certainly did in Scotland (under the name of *mercheta* or *marcheta*), till abolished by Malcolm III. (e). Another and not more irrational account may be derived from the practice of the Tartars; among whom, according to father Duhalde, this custom of descent to the youngest son also prevails. That nation is composed totally of shepherds and herdsmen; and the elder sons, as soon as they are capable of leading a pastoral life, migrate from their father with a certain allotment of cattle; and go to seek a new habitation. The youngest son therefore, who continues latest with the father, is naturally the heir of his house, the rest being already provided for. And thus we find that, among many other northern nations, it was the custom for all the sons but one to migrate from the father, which one became his heir (f). So that possibly this custom, wherever it prevails, may be the remnant of that pastoral state of our British and German ancestors, which Cæsar and Tacitus describe. Other

special customs there are in different burgage tenures; as that, in some, the wife shall be endowed of all her husband's tene-

(e) Ubi supra.

(a) Sect. 165.

(b) In some places the custom is confined to the children of the deceased proprietor; in others, in default of children, the youngest brother or other collateral male relation is preferred. But the former custom is the most usual. (See Forr. 976; Com. Dig. *Borough English*; Co. Litt. 110 b.; 1 T. R. 486.) In some places the youngest female relations

lineal and collateral inherit on failure of heirs male. See Rob. Gavel. 3rd ed. p. 391.

(c) Sect. 211.

(d) 3 Mod. Pref.

(e) Seld. Tit. of Hon. 2, 1, 47, n. 188, f. 995. Reg. Mag. l. 4, c. 31.

(f) *Pater cunctos filios adultos a se pellebat, præter unum quem hæredem sui juris relinquebat.* Walsingh. Upodigm. Neustr. c. 1.

ments (*g*), and not of the third part only, as at the common law: and that, in others, a man might dispose of his tenements by will (*h*), which, in general, [*170] was not *permitted after the conquest till the reign of Henry VIII; though in the Saxon times it was allowable (*i*). A pregnant proof that these liberties of socage tenure were fragments of Saxon liberty.

Another species of socage tenure is that commonly called tenure in gavelkind, or, more properly, tenure in socage, subject to the custom of gavelkind. It is chiefly found in Kent, where it has prevailed to

such an extent that the law presumes that all lands held for estates of inheritance are so held subject to the custom, unless proof to the contrary be furnished; though it was and is to be found in other parts of the country (*l*). It has generally been thought to have existed before the Norman conquest, and to have been retained by the men of Kent, who, as is well known, succeeded more than most others in preserving their ancient liberties and customs after that event (*m*). The distinguishing properties of this tenure are various; some of the principal are these: 1. The tenant is of age sufficient to aliene his estate by the ancient mode of conveyance called a feoffment at the age of fifteen (*n*). 2. The estate does not escheat in case of an attainder and execution for felony; the maxim being, "the father to the bough, the son to the plough" (*o*); but this maxim does not extend to protect the lands from escheat, if the tenant in gavelkind being indicted for felony absent himself and is outlawed (*p*). 3. In most places the tenant had a power of devising lands [*171] by will, before the statute for that purpose *was made (*q*). 4. The lands descend, not to the eldest, youngest, or any one son only, but to all the sons together (*r*); and in default of issue to the brothers equally, with a right of representation to their descendants in case of their death, and so on in cases of remoter collateral lines (*s*); which was indeed anciently the most usual course of descent all over England (*t*), though in particular places particular customs prevailed. These, among other properties, distinguished this tenure in a most remarkable manner: but it is only a species of a socage tenure, modified by the custom of the country; the lands being holden by suit of court and fealty, which is a service in its nature certain (*u*). We find, by a charter of king John (*x*), that Hubert, archbishop of Canterbury, was authorized to exchange the gavelkind tenures holden of the see of Canterbury into tenures by knight's-service; and by statute 31 Hen. 8, c. 3, for disgavelling the lands of divers lords and gentlemen in the county of Kent, they are directed to be descendible for the future like other lands which were never holden by service of socage. Many lands in Kent have been made by special acts to descend according to the rules of common law: and so have been commonly said to

(*g*) Litt. s. 166.

(*h*) Sect. 167.

(*i*) Wright, 173.

(*k*) 3rd Report of Real Property Commissioners, p. 7.

(*l*) Stat. 32 Hen. 8, c. 29; Kitch. of Courts, 200.

(*m*) According to Mr. Selden, the custom of gavelkind was, before the Norman conquest, general throughout the country. *In toto regno, ante ducis adventum, frequens et usitata fuit: postea cæteris adempta (sed privatis quorundam locorum consuetudinibus alibi*

postea regerminans). Cantianis solum integra et iniolata remansit. Analect, l. 2, c. 7.

(*n*) Lamb Peramb. 614.

(*o*) Lamb. 634.

(*p*) Rob. Gav. 239.

(*q*) F. N. B. 198; Cro. Car. 561.

(*r*) Litt. s. 210.

(*s*) Hook v. Hook, 1 H. & M. 43.

(*t*) Glanvil, l. 7, c. 3. This custom of descent to all the sons exists in many manors now in respect of the copyhold tenements of the manors. Rob. Gav. 42, 49.

(*u*) Wright, 211.

(*x*) Spelm. Cod. Vet. Leg. 855.

have been disgavelled, though these acts do not affect their tenure but only the descent (*y*).

Having thus distributed and distinguished the several species of tenure in free socage, we will consider how far they partake of the feudal nature. That they do so at all may arise from its ancient Saxon origin; since

Tenure in free socage partakes of feudal nature. (as was before observed) it is not improbable that fends were * known among the Saxons, although they did not form [* 172] a part of their military policy, nor were drawn out into

such arbitrary consequences as among the Normans. It seems therefore reasonable to imagine, that socage tenure existed in much the same state before the conquest as after; that in Kent it was preserved; and that the rest of the socage tenures dispersed through England escaped the general fate of other property, partly out of favour and affection to their particular owners, and partly from their own insignificance: for there seems little doubt that the amount of land held by socage tenure was for some time after the conquest inconsiderable; till by successive charters of enfranchisement granted to the tenants, which are particularly mentioned by Britton (*z*), the number and value of lands so held began to swell so far, as to make a distinct, and justly envied, part of our English system of tenures.

However this may be, the tokens of their original or forced connection with feudal laws will evidently appear from a short comparison of the incidents and consequences of socage tenure with those of tenure in chivalry:

Comparative view of incidents, similar in socage tenure and ancient chivalry.

1. Both held of superior lord.

2. Rent or service.

remarking their agreement or difference as we go along.

1. In the first place, then, both were held of the king, either immediately, or as lord paramount, and (in the latter case) of a subject or mesne lord between the king and the tenant.

2. Both were subject to the feudal return, render, rent, or service of some sort or other, which arose from a supposition of an original grant from the lord to the tenant. In the military tenure, or more proper fend, this was from its nature uncertain: in socage, which was a feud of the improper kind, it was certain, fixed, and determinate (though perhaps nothing more than bare fealty), and so continues to this day.

3. Both were, from their constitution, universally subject (over and above all other renders) to the oath of * fealty, or mutual bond of obligation [* 173] between the lord and tenant (*a*). Which oath of fealty usually draws

after it suit to the lord's court. And this oath every lord, of whom tenements are holden at this day, may call upon his tenants

to take in his court baron; Littleton (*b*) indeed suggests that this ought to be done, because if it be neglected, it will by long continuance of time grow out of memory (as doubtless frequently has happened) whether the land be holden of the lord or not; and so he may lose his seignory, and the profit which may accrue to him by escheats and other contingencies (*c*).

4. The tenure in socage was subject, of common right, to aids for knighting the son and marrying the eldest daughter of the lord (*d*): which were fixed by the statute Westm. 1, c. 36, at 20*s.* for every 20*l.*

(*y*) Rob. Gavelk. 75. See Hardr. 325; 1 Sid. 185; 1 Lev. 79; T. Raym. 59, 77.

(*z*) C. 66.

(*a*) Litt. s. 117, 181.

(*b*) Sect. 180.

(*c*) *Eo maxime præstandum est, ne dubium reddatur jus domini et ætuitate temporis obscuretur.* Corvin. Jus. Feud. l. 2, t. 7.

(*d*) Co. Litt. 91.

per annum so held; as in knight-service. These aids, as in tenure by chivalry, were originally mere benevolences, though afterwards claimed as matter of right; but were all abolished by the statute 12 Car. 2.

5. Relief is due upon socage tenure, as well as upon tenure in chivalry: but the manner of taking it is very different. The relief on a knight's fee was 5*l.*,

or one quarter of the supposed value of the land; but a socage
 a. Reliefs. relief is one year's rent or render, payable by the tenant to the lord, be the same either great or small (e): and therefore Bracton (f) will not allow this to be properly a relief, but *quædam præstatio loco relevii in recognitionem domini*. So too the statute 28 Edw. 1, c. 1, declares, that a free sokeman shall give no relief, but shall double his rent after the death of his ancestor, according to that which he hath used to pay his lord, and shall not be grieved above measure. Reliefs in knight-service were only payable, if the heir at the [*174] death of his *ancestor was of full age: but in socage they were due even though the heir was under age, because the lord has no wardship over him (g). The statute of Charles II. reserves the reliefs incident to socage tenures; and therefore, wherever lands in fee-simple are holden by a rent, relief is still due of common right upon the death of a tenant (h).

6. Primer seisin was incident to the king's socage tenants *in capite*, as well as to those by knight-service (i). But primer seisins, among the other feudal burthens of tenancy *in capite*, were entirely abolished by
 a. Primer seisin. the statute.

7. Wardship is also incident to tenure in socage; but of a nature very different from that incident to knight-service. For if the inheritance descend to an infant under fourteen, the wardship of him does not, nor ever did
 7. Wardships. belong to the lord of the fee; because, in this tenure, no military or other personal service being required, there was no occasion for the lord to take the profits, in order to provide a proper substitute for the infant tenant; but his nearest relation (to whom the inheritance cannot descend) shall be his guardian in socage, and have the custody of his land and body till he arrives at the age of fourteen. The guardian must be such a one, to whom the inheritance by no possibility can descend. At fourteen this wardship in socage ceases; and the heir may oust the guardian, and call him to account for the rents and profits (k): for at this age the law supposes him capable of choosing a guardian for himself. It was in this particular of wardship, as also in that of marriage, and in the certainty of the render or service, that the socage tenures had so much the advantage of the military ones. But as the wardship ceased at fourteen, there was this advantage attending it: that young heirs, being left at so [*175] tender *an age to choose their own guardians till twenty-one, might make an improvident choice. Therefore, when almost all the lands in the kingdom were turned into socage tenures, the same statute 12 Car. 2, c. 24, enacted, that it should be in the power of any father by will to appoint a guardian, till his child should attain the age of twenty-one. And, if no such appointment be made, the court of Chancery will frequently interpose, and

(e) Litt. s. 126.

(f) L. 2, c. 37, s. 8.

(g) Litt. s. 127.

(h) 3 Lev. 145. As to the distinction between socage reliefs payable by special cus-

tom, and such as arise from express reservation, see Hargr. Co. Litt. 93 a.

(i) Co. Litt. 77.

(k) Litt. s. 123; Co. Litt. 89.

name a guardian, to prevent an infant heir from improvidently exposing himself to ruin (l).

8. Marriage, or the *valor maritagii*, was not in socage tenure any perquisite or advantage to the guardian, but rather the reverse. For, if the guardian

married his ward under the age of fourteen, he was bound to
 8. Marriage. account to the ward for the value of the marriage, even though he took nothing for it, unless he married him to advantage (m). For, the law in favour of infants is always jealous of guardians, and therefore in this case it made them account, not only for what they did, but also for what they might, receive on the infant's behalf; lest by some collusion the guardian should have received the value, and not brought it to account: but the statute having destroyed all values of marriages, this doctrine of course ceased with them. At fourteen years of age the ward might have disposed of himself in marriage, without any consent of his guardian, till the late act for preventing clandestine marriages. These doctrines of wardship and marriage in socage tenure were so diametrically opposite to those in knight-service, and so entirely agree with those parts of king Edward's laws, that were restored by Henry I.'s charter, as might alone convince us that socage was of a higher origin than the Norman conquest.

9. Fines for alienation were, it would seem, due for lands holden of the king *in capite* by socage tenure, as well as in *case of tenure by knight-service: for the statutes that relate to this point, and sir Edward [* 176]

9. Fines for alienation. Coke's comment on them (n), speak generally of all tenants *in capite*, without making any distinction: but now all fines for alienation are demolished by the statute of Charles II.

10. Escheats are equally incident to tenure in socage, as they were to tenure by knight-service; except only in gavelkind lands, which are (as is before-mentioned) not subject to escheat on attainder of the tenant, though they are to escheats for want of heirs (o).

Thus much for the two grand species of tenure, under which almost all the
 10. Escheats, except in gavelkind lands. free lands of the kingdom were holden till the restoration in 1660, when the former was abolished and sunk into the latter: so that
 Lands are now of free and common socage tenure only. lands of both sorts are now holden by the one universal tenure of free and common socage.

The other grand division of tenure, mentioned by Bracton as cited in the preceding chapter, is that of villenage, as contradistinguished from *liberum tenementum*, or frank tenure. And this (we may remember) he
 Villenage, pure or privileged. subdivides into two classes, pure and privileged villenage: from whence have arisen two other species of our modern tenures.

From the tenure of pure villenage have sprung our present copyhold tenures, or tenure by copy of court-roll at the will of the lord: in order to
 Copyholds. obtain a clear idea of which it will be previously necessary to take a short view of the origin and nature of manors.

A manor, *manerium* (so called (p) from *manere*, because there usually was a

(l) As to wardship, see Macpherson on Infants, 19 *et seq.*

(m) Litt. s. 138.

(n) 1 Inst. 43; 2 Inst. 65, 66, 67.

(o) Wright, 210.

(p) Lord Coke derives the word from *māner*, to govern, but the derivation given in the text has been generally adopted, and

seems to be the most probable. The word "mansion," denoting the residence of the lord, seems closely connected with the word manor; it was the place where the tenants rendered their services. (5 M. & Ry. 154 n.) It is to be observed that the word manor is often used merely to denote the locality where land is situate.

[* 177] residence for the lord, or mansion, * forming a conspicuous feature in it), is a complex artificial quantity comprising not only the ownership of a tract of land but certain other rights and privileges, some of which were, in the times when manors were created, considered essential to its existence as a manor; others, though usually found among its incidents, yet not being so universally, were therefore not deemed essential.

The essential constituent parts of a complete legal manor seem to be, First, the demesne lands, *terra dominicales*, that is to say, lands occupied by the lord or his servants. Secondly, seignory or tenemental lands, or lands forming part of the original grant to the lord and held of him by freehold tenants. Thirdly, a court called the court baron, for the redress of misdemeanors and nuisances within the manor, and for settling disputes of property among the tenants: in this court the freehold tenants of the manor were both the suitors and the judges. Without these several parts there could be no manor, for without demesne lands there could be merely a seignory; without two freehold tenants at least there could be no court baron (*q*), which was the distinguishing mark separating the grant of a tract of land as a manor from an ordinary grant of the land.

But manors usually involved many other peculiarities which in the present day are their most prominent characteristics. Lords of manors, besides granting by deed part of their lands to free tenants to be held of them according to the ordinary feudal tenures, usually distributed parts of what would otherwise be their demesne lands amongst the common people or villeins. The lands so given were held at the mere arbitrary will of the lord, who might at pleasure revoke his gift. The tenants of these lands were compelled to render services to their lord of a base or menial kind, and were, as we [* 178] shall see * more at length presently, in a condition of bondage now unknown in any part of Europe. These precarious holdings have become by lapse of time, notwithstanding their mean origin, the most important incidents of a manor, being, in fact, no other than our modern copyholds, the arbitrary power of revocation originally possessed by the lord being gradually converted into the seignorial rights which now exist. As a natural accompaniment of this villein tenancy, there was established in every manor a court called the customary court, differing from the court baron, though held commonly at the same time; in this customary court the lord or his steward alone exercised judicial power. In many manors also there was a court leet, similar in its jurisdiction to the sheriffs' court, being created by the king's charter (*r*).

In most manors also there was a considerable portion of the land which was not capable of culture, at least according to the state of agriculture in the early times when manors were created. This waste land the lord allowed his tenants generally to use for pasture, recreation, or for roads, as occasion might require, it having probably been so used by the inhabitants immemorially. This permission, like that from which copyhold tenure has sprung, became in course of time irrevocable, and thus arose the rights of common of pasture, and other commons of the present day.

It will be seen from this description that in order to constitute a manor there must exist on the part of the lord a power of sub-infeudation or of granting

(*q*) Roll. Abr. Manor, F. 121; *Glover v. Doe v. Williams*, 11 M. & W. 807; *Doe v. Lane*, 8 T. R. 447; *R. v. Mein*, 4 T. R. 480; *Heakins*, 6 A. & E. 495.

(*r*) *Mirr. c. 1*, s. 10.

lands to be held of him in fee. This in the early times of our legal constitution was exercised without question as to its legal foundation. But more than this, the great barons, holding large territories under the crown, granted not only lands to be held of them in fee as lords of a manor, but frequently granted out of their great manors smaller manors to be held of themselves, the seignory reserved by *them being then frequently called an honour (*s*). In imitation of this, the inferior lords made similar sub-grants, the process being continued downwards *ad infinitum*. As a consequence of this method of sub-infeudation, the superior lords observed that they lost all their feudal profits of wardships, marriages, and escheats, which fell into the hands of the mesne or middle lords, who were the immediate superiors of the tenant, or him who occupied the land: and also that the mesne lords themselves were so impoverished, that they were disabled from performing their services to their own superiors. This occasioned, first, that provision in the thirty-second chapter of *magna carta*, 9 Hen. III. (which is not to be found in the first charter granted by that prince, nor in the great charter of king John (*t*)), that no man should either give or sell his land, without reserving sufficient to answer the demands of his lord; and, afterwards, the statute of Westm. 3, or *Quia emptores*, 18 Edw. 1, c. 1, which directs, that, upon all sales or feoffments of land, the feoffee shall hold the same, not of his immediate feoffor, but of the chief lord of the fee, of whom such feoffor himself held it (*u*). But these provisions not extending to the king's own tenants *in capite*, the like law concerning them is declared by the statute of *Prerogativa regis*, 17 Edw. 2, c. 6, and 34 Edw. 3, c. 15, by which last all subinfeudations, previous to the reign of king Edward I., were confirmed: but all subsequent to that period were left open to the king's prerogative. And from hence it is clear, that all manors existing at this day must have existed as early as king Edward I.: it being essential to a manor, that there be tenants who *hold of the lord; and, by the operation of these statutes, no tenant *in capite* since the accession of that prince, and no tenant of a common lord since the statute of *Quia emptores*, could create any new tenancies to be held of himself (*x*).

Having mentioned the various heterogeneous elements composing a manor, we will somewhat more at length dwell upon their several peculiarities, with reference to the present state of things, premising that manors themselves might be held upon any of the various kinds of free tenures which we have described, being however in ancient times chiefly held by knight-service, and now since the abolition of military tenures, with few exceptions, in common socage: and, moreover, a manor when in the hands of the king himself, through escheat or otherwise, was not considered as absorbed in the supreme lordship of the crown, but continued in contemplation of law to exist.

The demesnes of a manor being in the absolute disposal of the lord without any restriction arising from claims of tenants of the manor, can be granted by

(*s*) See *Hutton v. Gifford*, sub. nom. *Anon.*, Saville, 24.

(*t*) See the Oxford editions of the charters.

(*u*) The words of the act are, "That it shall be lawful to every freeman to sell, at his own pleasure, his lands and tenements, or part of them, so that the feoffee shall hold the same

of the chief lord of the same fee, by such service and customs as his feoffor held before."

(*x*) See, however, 5 Man. & Ry. 156, n., and a case arising out of certain patents, granted by Charles II., of lands in Ireland, giving rights to create manors notwithstanding *quibus emptores*. *Delacherois v. Delacherois*, 11 H. L. 62.

the lord for years, for life, or in tail, without affecting the manor (y), though (since the statute *Quia emptores*) during the continuance of such an estate they cease to be parcel of the manor. If granted in fee they are severed for ever from the manor, and cannot be reannexed to it, even if repurchased by the lord (z).

[* 181] * Next, as to the free tenemental lands. These are now held in common socage, and only differ from ordinary freehold lands in respect that the seignory is in the lord of the manor instead of the crown, and a small rent is still often payable: therefore, in cases of escheat, which is now the most valuable quality of such seignory, the lord of the manor regains possession. They again become part of the demesnes, the tenancy being extinguished in the seignory (a). If, however, the union of the tenancy and seignory arise from purchase, as if the lord purchase the tenemental lands, they do not become again part of the manor, but are severed from it for ever (b).

If all of the freehold lands become vested in one person, or if the lord purchase all the freehold lands, or all but those of one owner, the manor is extinguished. Because in either case there can be no court baron, for which, as we have already remarked, two suitors at least are requisite: though it would revive if the freeholds after being united in one person should become separated again by alienation or otherwise. In this instance the law is the same as to purchase and escheat (c). Since, however, by a recent act (d) the jurisdiction of the court baron has been taken away in all cases except such as relate to the rights of a widow in her husband's lands, the legal existence of a manor has become of small consequence, for we may remark that manors thus *extinguished [* 182] or suspended may still remain manors in reputation and retain many of the incidents which attached to them in their perfect state (e). In particular the jurisdiction of the lord to hold customary courts, accept surrenders, and make grants of copyholds, which is now the most notable power possessed by the lord, remains after the extinction of the manor (f). By far the greater number of manors of the present day are but manors by reputation, the instances where freeholds can be proved to be held of a manor being comparatively rare.

We come now to the consideration of those parts of the lands within a manor which, formerly held in realty at the will of the lord, are now so held only in name. These, though originally of slight consideration and not part of the

(y) Litt. s. 591.

(z) If one, seised of a manor, grants in fee part of the demesnes, and afterwards repurchases them, and then grants or devises the whole manor, the demesnes repurchased (not being specifically mentioned) will not pass. Though they may do so by reputation if the unity of possession continue for a long time. *Thetford's Case*, 1 Lev. 204; *R. v. Duchess of Buccleugh*, 6 Mod. 151. See also *Lee v. Brown*, 2 Mod. 69; *Lemon v. Blackwell*, Skinn. 192; *R. v. Bishop of Rochester*, 2 Mod. 2.

(a) *Brett v. Rigden*, 1 Plowd. 843; *Shep. Touchstone*, 439; *Prest. ed. Co. Litt.* 813 a; 814 a; *Anon.*, 12 Mod. 188. See *Delacherois v. Delacherois*, 11 H. L. 62; where much discussion was had, and diverse opinions were held upon the point.

(b) *Anon.*, 12 Mod. 188; *Mountjoy's Case*, 5 Rep. 6 a; *Temple v. Cooke*, Jenkins' Centuries, s. c. Dyer, 265 b. If the lord has only a limited interest in the manor, as, for instance, a life interest, then the severance is only temporary, and on the death of the lord, or expiration of his limited interest, his heirs would be entitled to the tenemental lands as such. Litt. ss. 559, 560, 561, and Coke's Comm. thereon; *Com. Dig. Suspension*, A. & B.; *Roe v. Vernon*, 5 East, 51.

(c) *Roll. Abr.*, Manor, F. 121.

(d) 3 & 4 Will. 4, c. 27, s. 86.

(e) *Glover v. Lane*, 3 T. R. 447; *Bradshaw v. Lambert*, 4 T. R. 446; *Soane v. Ireland*, 10 East, 259.

(f) Coke, Tr. 58.

original conception of a manor, have become, in England at least, the most common, and, at the same time, most important incidents of one (*g*).

Among our Anglo-Saxon ancestors lands were divided into two species, called bocland and folcland, which, though not directly represented by the freehold and copyhold lands of feudal and modern times, were distinguished from each other by peculiarities similar to those which mark the difference between the latter tenures. Bocland was held by book or charter, and conveyed by deed or written grant. It was alienable and devisable at the will of the proprietor. Folcland, on the contrary, was held by a much less certain title. Originally, land belonging to the community at large seems to have been parcelled out among the common people by some recognized authority, such as the folcgemot or court of the district; * when so distributed, the allottees held it for [* 183] such period as was fixed by the court, but never in perpetuity. They were subject to many burthens and exactions, from which owners of bocland were exempt, particularly the obligation to render hospitality and afford means of travelling and maintenance to the king and great lords and their followers (*h*). This admitted duty owing to the state, and a forced submission to the will of some particular powerful lord, would be, not improbably, much the same in their effects. A class of people in a state of servitude would be equally incapable of resisting the demands of one as the other, and the possession of lands for a period depending upon the will of a community would be very similar in substance to a tenancy at the will of the nearest lord. When the Normans, therefore, introduced their system of tenure, they found a class of inhabitants not possessed as of right of any property, nor even enjoying freedom of person, but occupying part of the land at the arbitrary will of others, and on condition of rendering menial and arbitrary services. Importing into this state of slavery the feudal notion of faithful allegiance, and the corresponding duty of the lord to grant personal protection from the aggressions of all but himself, we have a near approach to the condition of the villein (*i*) of the 12th century.

In accordance with the nature and characteristics of a manor and the necessities of the case, the demesnes of the lord were cultivated by his villeins, to whom a portion of them was assigned for their own subsistence. Villeins thus employed were called regardant (*k*), that is, annexed to the manor or land. A villein regardant might, however, be * granted by deed separately from the land: [* 184] he then became a villein in gross, that is, annexed to the person of his lord (*l*), and consequently a man might be seised of a villein in gross without relation to any land. Villeins in gross being considered as of the nature of land, but not capable of livery of seisin, could only be granted by deed (*m*). A villein could not leave his lord without permission; and if he ran away, or was taken away, he might be claimed and recovered by action, like beasts or other chattels. They held their little plots of land by way of sustaining themselves and families; but it was at the mere will of the lord, who might dispossess them when-

(*g*) Litt. s. 73. Vin. Abr., Manor, 218. It has been said in the case above cited (*Delacherois v. Delacherois*, 11 H. L. 62) that these base tenures are not found in any part of Ireland, though manors have been by no means uncommon there.

(*h*) Allen's Rise and Growth of the Royal Prerogative; see Hall. Mid. Ages, c. 8, n. ix.

(*i*) Derived by sir E. Coke from *villa*, be-

cause they lived in villages, and were occupied principally in rustic works. Co. Litt. 116.

(*k*) This word was restricted to denote the annexation of villeins to a manor. Litt. s. 184. The synonymous word for other things being "appendant."

(*l*) Litt. s. 181.

(*m*) *Ib.* s. 183.

ever he pleased; and it was upon villein services, that is, to carry out dung, to hedge and ditch the lord's demesnes, or any other the meanest offices (*n*): and their services were not only base, but uncertain both as to their time and quantity (*o*). A villein could acquire no absolute property either in lands or goods: for if he purchased either, the lord might enter upon them, oust the villein, and seize them to his own use, unless he contrived to dispose of them again before the lord had seized them; for the lord had then lost his opportunity (*p*).

In many places also a fine was payable to the lord, if the villein presumed to [* 185] marry his daughter to any one * without leave from the lord (*q*): and, by the common law, the lord might also bring an action against the husband for damages in thus purloining his property (*r*). For the children of villeins were also in the same state of bondage with their parents; whence they were called, in Latin, *nutivi*, which gave rise to the female appellation of a villein, who was called a *neife* (*s*). In case of a marriage between a freeman and a *neife*, or a villein and a free-woman, the issue followed the condition of the father, being free if he was free, and villein if he was villein (*t*); contrary to the maxim of the civil law, that *partus sequitur ventrem*. But no bastard could be born a villein, because, by another maxim of our law, he is *nullius filius*: and as he can gain nothing by inheritance, it were hard that he should lose his natural freedom by it (*u*). The law however protected the persons of villeins, as the king's subjects, against atrocious injuries of the lord: for an indictment on the king's behalf lay against the lord if he should kill or maim his villein (*x*). *Neifes* had also an appeal of rape, in case the lord violated them by force (*y*).

Villeins might be enfranchised by manumission, which is either expressed or implied: express, as where a man granted to the villein a deed of manumission (*z*): implied, as where a man bound himself in a bond to his
Enfranchisement of villeins. villein for a sum of money, granted him an annuity by deed, or gave him an estate in fee, for life or years (*a*); for this was dealing with his villein on the footing of a freeman, it was in some of the instances giving him [* 186] an action against * his lord, and in others vesting in him an ownership entirely inconsistent with his former state of bondage. So also if the lord brought an action against his villein, this enfranchised him (*b*); for, as the lord might have a short remedy against his villein, by seizing his goods (which was more than equivalent to any damages he could recover), the law, which is

(*n*) *Ib.* s. 172.

(*o*) *Ille qui tenet in villenagio faciet quicquid ei preceptum fuerit, nec scire debet sero quid facere debet in crastino, et semper tenebitur ad incerta.* (Bracton, l. 4, tr. 1, c. 28, s. 5.)

(*p*) Litt. s. 177. Villeins were not protected by Magna Carta: *nullus liber homo capiatur vel imprisonetur, &c.*, was cautiously expressed, to exclude the poor villein; for, as lord Coke tells us, the lord might beat his villein, and, if it be without cause, he cannot have any remedy. In another part of Magna Carta, there is an evident allusion to villeins, as part of the fixtures or chattels annexed to the freehold: "*Custos terras hujusmodi heredis non capiat de terra heredis nisi rationabiles exitus, et hoc sine destructione et vasto hominum et rerum.*" A somewhat greater degree of slavery seemed to have existed in

England than on the continent. Hall. Mid. Ages, i. 200.

(*q*) Co. Litt. 140; Du Cange, voc. *Forismari tagium*. Mr. Hallam thinks this is the true origin of the *mercheta mulierorum*.

(*r*) Litt. s. 202.

(*s*) *Ib.* s. 186.

(*t*) Leges, Hen. 1, cc. 75, 77.

(*u*) Litt. ss. 187, 188. Bracton, l. 1, c. 6, states a contrary doctrine; but the law presumed that the father was free, and the deviation in England from the rule on which he relies, *quia partus sequitur conditionem matris*, was well established.

(*x*) Litt. ss. 189, 194.

(*y*) *Ib.* s. 190.

(*z*) *Ib.* s. 204.

(*a*) *Ib.* ss. 204, 205, 206.

(*b*) Litt. s. 208.

always ready to catch at any thing in favour of liberty, presumed that by bringing this action he meant to set his villein on the same footing with himself, and therefore held it an implied manumission. But in case the lord indicted him for felony, it was otherwise; for the lord could not inflict a capital punishment on his villein without calling in the assistance of the law. By the indulgence of custom, in some places villeins were permitted to acquire property and so purchase their freedom (c). Moreover, it must be noticed that, in England at least, during the period after the Norman conquest with which we are now dealing, the villein was only in a state of servitude as against his lord. As regarded all other men, he possessed the usual rights of citizens. He might acquire and enjoy property without fear of disturbance: he might sue and be sued (d). If, therefore, he either by contract, gift, or otherwise, escaped from the power of his lord, he became in all respects a free man.

Villeins, by these and many other means, in process of time gained considerable ground on their lords; and in particular strengthened the tenure of their estates to that degree, that they came to have in them an interest in many places full as good, in others better than their lords. ^{Gradually raised their condition to copyholders.} For the goodnature and benevolence of many lords of manors having, time out of mind, permitted their villeins and their children to enjoy their possessions without interruption, in a regular course of descent, the *common law, of which custom is the life, now gave them title to prescribe against their lords; and, on performance of the same services, to hold their lands in spite of any determination of the lord's will. For, though in general they are still said to hold their estates at the will of the lord (e), yet it is such a will as is *agreeable to the custom of the manor; which customs are preserved and evidenced by the rolls of [*187] [*188]

(c) Hall. Mid. Ages, i. 201.

(d) Litt. 189. Though if a suit were brought against him for the recovery of land, he might plead his villenage.

(e) In some manors there are found tenements held according to the custom of the manor, but not expressed to be at the will of the lord. They are held by copy of court-roll, and are assigned by surrender and admittance in the customary court. But the tenure of them is of a rather higher nature than of ordinary copyholds, inasmuch as the inheritable quality which attaches to them does not depend upon custom, since the lord may not oust them. They are, however, for all purposes at the present day copyholds. The freehold is in the lord, and the right of the tenant to the minerals, &c., can only exist by custom. 2 Scriv. Cop. 665; *Bishop of Winchester v. Knight*, 1 P. W. 405; *Rouse v. Brenton*, 8 M. & R. 143, 230; *Duke of Portland v. Hill*, L. R. 2 Eq. 765; where the rights of copyholders of this kind were much discussed. They are sometimes called customary freeholds. Again, there are some estates held according to the custom of a manor, but not by copy of court-roll, nor at the will of the lord. "These customary estates, known by the denomination of tenant right, are peculiar to the northern parts of England, in which border-services against Scotland were antiently performed before the union of England and

Scotland under the same sovereign. And although these appear to have many qualities and incidents, which do not properly belong to the villenage tenure, either pure or privileged (and out of one or other of these species of villenage all copyhold is derived); and also have some which savour more of military service by escuage uncertain, which, according to Litt. s. 99, is knight's service; and although they seem to want some of the characteristic qualities and circumstances which are considered as distinguishing this species of tenure, viz., the being holden at the will of the lord, and also the usual evidence of title by copy of court-roll; and are alienable also contrary to the usual mode by which copyholds are aliened, viz., by deed and admittance thereon (if indeed they could be immemorably aliened at all by the particular species of deed stated in the case, viz., a bargain and sale, and which at common law could only have transferred the use);—I say, notwithstanding all these anomalous circumstances, it seems to be now so far settled in courts of law, that these customary tenant-right estates are not freehold, but that they in effect fall within the same consideration as copyholds, that the quality of their tenure in this respect cannot properly any longer be drawn into question." *Per* lord Ellenborough, C. J. (*Doe v. Huntingdon*, 4 East, 270, 288; see *Burrell v. Dodd*, 3 Bos. & P. 378; 4 Per. & D. 579.)

the several manorial courts in which they are entered, or kept on foot by the constant immemorial usage of the manors in which the lands lie. And, as such tenants had nothing to show for their estates but these customs, and admissions in pursuance of them, entered on those rolls, or the copies of such entries witnessed by the steward, they now began to be called tenants by copy of court-roll, and their tenure itself a copyhold (*f*).

Thus copyhold tenures, as sir Edward Coke observes (*g*), although very meanly descended, yet come of an ancient house; for, from what has been premised, it appears that copyholders are in truth no other but villeins, who, by a long series of immemorial encroachments on the lord, have at last established a customary right to those estates, which before were held absolutely at the lord's will (*h*). Which affords a very substantial reason for the great variety of customs that prevail in different manors, with regard both to the descent of [* 189] the estates, and the *privileges belonging to the tenants (*i*). And these encroachments grew to be so universal, that when tenure in villenage was virtually abolished (though copyholds were reserved) by the statute

Pure villenage
ceased before
Charles II. of Charles II., there was not a pure villein left in the nation (*k*). For sir Thomas Smith (*l*) testifies, that in all his time (and he was secretary to Edward VI.) he never knew any villein in gross throughout the realm; and the few villeins regardant that were then remaining were such only as had belonged to bishops, monasteries, or other ecclesiastical corporations, in the preceding times of popery. For he tells us, that "the holy fathers, monks, and friars had in their confessions, and specially in their extreme and deadly sickness, convinced the laity how dangerous a practice it was, for one Christian man to hold another in bondage: so that temporal men, by little and little, by reason of that terror in their consciences, were glad to manumit all their villeins. But the said holy fathers, with the abbots and priors, did not in like sort by theirs, for they also had a scruple in conscience to impoverish and despoil the church so much, as to manumit such as were bond to their churches, or to the manors which the church had gotten; and so kept their villeins still." By these several means the generality of villeins in the kingdom have long ago developed into copyholders: their persons being

(*f*) F. N. B. 12. See Hall. Mid. Ages, vol. ii. p. 304, *et seq.*

(*g*) Cop. s. 32.

(*h*) Lord Loughborough is inclined to question the origin of copyholds: "I cannot help doubting (observes that learned lord) whether this deduction is not founded in mistake. The circumstance which first led me to entertain the doubt is, that, in those parts of Germany from whence the Saxons migrated into England, there exists, at this day, a species of tenure exactly the same with our copyhold estates; and there exists likewise, at this day, a complete state of villenage; so that both stand together, and are not one tenure growing out of another, and by degrees assuming its place, &c. What I have stated I found in a very accurate treatise of German law by Selchow, one of the professors of the university of Gottingen, entitled *Elementa Juris privati Germanici*. This seems sufficient to negative the idea that copyholders

sprang out of villeins. In England, villenage has ceased, and copyholds remain; but here, as in other countries, they both prevailed at the same time." (Doug. 698.)

(*i*) The customs regulating the rights and privileges of copyholders must be immemorial, that is, they are supposed to have existed before the period of legal memory (as to which see vol. i. p. 69). In the absence of evidence of their commencement since the beginning of the reign of Richard I., they may be presumed by their existence for any period, inasmuch as the prescription act does not apply to them. *Hammer v. Chance*, 34 L. J. Ch. 413. We may here refer to what has been said in vol. i. pp. 66—74.

(*k*) The last claim of villenage, which we find recorded in our courts, was in the 15 Jac. 1 (*Pigg v. Caley*, Noy, 27; 11 Harg. St. Tr. 342). See Barrington on the Statutes, 307.

(*l*) Commonwealth, b. 8 c. 10.

enfranchised by manumission or long acquiescence: but their estates, in *strictness, remaining subject to the same servile conditions and forfeitures as before. [* 190]

We may now exhibit the principal rules regulating copyhold tenure as they exist at the present day, and the grounds upon which those rules rest. First, the freehold or feudal seisin of the land is in the lord of the manor, the tenant has merely a possessory right by grant of the lord, evidenced by his admission. Therefore the soil, and everything deemed to constitute part of the soil, such as timber or minerals, belong to the lord (*m*). Nevertheless it must be remarked that this dominion of the lord may be qualified by special custom, for by the customs of some manors the tenants have the right to dig mines and cut timber (*n*). But the onus of proving such a custom lies upon the tenant claiming it. And, on the other hand, the lord, even where entitled to the minerals or timber by virtue of his ownership, may not come upon the land to open mines or cut the wood without the copyholder's leave. He may not even work the minerals by outstroke, that is by mining them through adjacent mines (*o*). Therefore, in consequence of this divided power, the existence of copyhold tenure is no slight hindrance to the full enjoyment of all those products of land which are not strictly agricultural (*p*).

Copyholders, with a very few exceptions (*q*), have by law (as distinguished from custom, which, however, be it remembered, is, when proved, recognised and acted upon *by courts of law) only an interest in the land, [* 191] determinable at the will of the lord. But their actual beneficial interest differs very materially in different manors according to the custom. In most manors this interest is of as perdurable a character as can be enjoyed in freehold lands, if the duties of the tenant be always duly observed. When this is so, the estates are called copyholds of inheritance (*r*).

In other manors (*s*) the custom is for the lord to demise the lands only for the duration of one or more lives, at the expiration of which period they revert to him to be again demised, or, unless there be a custom for renewal, which is very common, to be retained by the lord, if he pleases, in his own possession. Frequently small rents are reserved, both on copyholds of inheritance and for lives; these rents are fixed by the custom from which the lord cannot deviate (*t*).

(*m*) 1 Watk. Cop. 832; 1 Scriv. Cop. 499. For a curious case illustrating this right of the lord, see *Dearden v. Evans*, 5 M. & W. 11.

(*n*) *Hanmer v. Chance*, 84 L. J. Ch. 418; *Marquis of Salisbury v. Gladstone*, 9 H. L. C. 692; *Bluett v. Jenkins*, 13 C. B. N. S. 16.

(*o*) *Lewis v. Branthwaite*, 2 B. & Ad. 437.

(*p*) Of course it is not to the interest of the tenant that there should be any trees, and their absence is an observable trait of those parts of the country where copyhold lands are frequent. See 3rd Report, Real Property Commissioners, p. 15.

(*q*) Noticed *ante*, p. 187, n.

(*r*) It is to be noticed that the heir of copyhold lands is to be ascertained by the custom of the manor, and often according to rules very different from those which regulate the descent of freehold lands, as to which we shall see more hereafter. There often exists considerable difficulty in ascertaining the customary heir. See *Locke v. Colman*, 1 M. & Cr.

423; 2 *ib.* 42 and 635; *Tranh v. Wood*, 4 M. & Cr. 324; *Doe d. Dand v. Thompson*, 18 L. J. Q. B. 326; *Muggleton v. Barnett*, 2 H. & N. 658; *Bickley v. Bickley*, L. R. 4 Eq. 216. A similar difference between the customary and common law exists as to the rights of a widow in her deceased husband's lands. We shall have occasion, in a subsequent chapter (c. 8) to notice the rights of a widow over her husband's copyhold lands. See *Smith v. Adams*, 5 D. G. M. & G. 712.

(*s*) The manor of Chardstock, in Dorsetshire, belonging to the Bishop of Salisbury, is an instance where this has been the case. *Ex parte Lord Henley*, 29 Beav. 811. See *Walker v. Lord Abingdon*, 10 L. J. Ch. 289. Where the lord of the manor is a lay prebendary, or a rector, vicar, or incumbent, he is now not allowed to make grants by copy of court; 24 & 25 Vict. c. 105, amended by 25 & 26 Vict. c. 52.

(*t*) *Doe d. Rayer v. Strickland*, 2 Q. B. 792.

The lands must have been demised or demisable by copy of court-roll immemorially, for immemorial custom is the life of all copyhold tenure, and no part of the *demesne or of the waste, unless there is a special custom for [* 192] the purpose, can be so granted at the present day (u). And if the lord in a case where the land comes into his possession deals with it in any manner different from the customary mode, the power of demising it by copy is gone for ever; that is, when the lord is owner in fee of the manor, for if the lord has only a temporary interest in the manor, as for life, or for years, the demisable quality is only suspended (x). If a partial interest in the [* 193] *copyhold is assigned to the lord there is a suspension, *pro tanto* (y). In those manors where the heir is entitled by custom to succeed to the lands of his ancestor, it is necessary in order that his title should be complete as against the lord, that he should claim the land, and be admitted by the lord to be his tenant. Though as against all others than the lord the title of the heir is complete without any such ceremony (z).

When the death of a copyholder has been "presented" or made known to the customary court, the lord may thereupon require the heir or other person claiming title to the land of which the copyholder died seised, to come in and be admitted. Proclamations to this effect are made by the lord at three successive courts (a). If after the third proclamation no such person claims to be admitted, a precept may be issued by the lord or steward to seize the lands into the lord's hands *pro defectu tenentis* (b). This seizure is not absolute but is *quousque*, as it is called, that is, until some person claims admittance, unless indeed there is a custom to warrant an absolute

(u) 1 Watk. Cop. 33; 2 T. R. 415; 3 B. & P. 346; *Doe d. Lowes v. Davidson*, 2 M. & S. 175; 2 B. & Al. 189; *Boulcott v. Winmill*, 2 Campb. 261; *Paine v. Ryder*, 24 Beav. 154; as to where there is a special custom, see the provision made by 4 & 5 Vict. c. 35, s. 91.

(x) *Lee v. Boothby*, Cro. Car. 521, where the doctrine is stated as extending beyond that in the text, as if a lord holding the manor, *pro tempore*, or for half a year, could by granting an ordinary lease for years, destroy the copyhold quality of the land. But this seems incorrect. See 2 Roll. Abr. 271; *Prior of Bath's Case*, 4 Leon. 199; *Rastal v. Turner*, Cro. Eliz. 598; 5 M. & S. 154; *Ex parte Lord Henry*, 29 Beav. 311; see *Doe d. Rayer v. Strickland*, 2 Q. B. 792; *Bingham v. Wood*, 1 R. & M. 750. These doctrines are stated by lord Coke as follows: "If a copyhold is forfeited to the lord, or escheats, or otherwise comes to the lord's hands, if the lord make a lease for years or for life, or other estate by deed or without deed, this land can never after be regranted by copy, for the custom is discharged, because during such estates the land was not demised nor demisable by copy. So, if the lord makes a feoffment in fee thereof upon condition, and afterwards enters for the condition broken, yet it can never be regranted by copy. But if the lord keeps the land in his hands for a long time, or lets it at will, he, his heirs or assigns, may well regrant it at his pleasure. So, if the interruption is wrongful, or if the lord is disseised, and the disseisor dies seised, or if the land is

recovered against the lord by false verdict or erroneous judgment; in these cases, till the land is recovered or the judgment reversed by the lord of the manor, the land was not demised or demisable, and yet after the land is recontinued, it is grantable again by copy; but if the land so forfeited or escheated, before any new grant made, is extended upon a statute or recognizance acknowledged by the lord, or if the wife of the lord in a writ of dower has this land assigned to her, although these impediments are by acts in law, yet, inasmuch as the interruptions are lawful, the lands can never after be granted by copy. If a copyholder accepts a lease for years of the lord of his copyhold, the copyhold is destroyed for ever, and can never be granted again. If the copyholder takes a lease for years of the manor, by that his copyhold has not continuance; but such lessee may regrant the copyhold to whom he will, for this land was always demised or demisable." (4 Rep. 81; see *Badger v. Ford*, 3 B. & Al. 153.)

(y) Co. Cop. s. 34.

(z) Comyn, 245; 1 Watk. Cop. 281; Co. Cop. s. 41; Cro. Car. 16; *Doe d. Besley v. Maisey*, 7 L. J. K. B. 85.

(a) There has been some difference of opinion whether the proclamations should be at three consecutive courts, the better opinion seems to be that they should. See *Doe d. Bover v. Trueman*, 1 B. & Ad. 736.

(b) 1 Watk. Cop. 234; 1 Scriv. Cop. 355.

forfeiture (c), but meanwhile the lord takes the profits for his own use. This right of seizure formerly was a cause of much hardship where the persons entitled to claim admission were infants or lunatics or otherwise incapacitated to protect their own interest. To remedy this, the legislature has provided that a suitable representative of the incapacitated person may appear and claim admission on his behalf (d).

* It is a consequence of the peculiar mode by which copyholders [* 194] hold their lands that the manner of transfer of lands *inter vivos* is wholly different from that which is applicable to ordinary freeholders. The

mode of alienation which has continued to the present day is very similar to that which obtained in the strict feudal times as to fiefs, before the right of free alienation was established. A copyholder now, when desirous of transferring his interest to another, surrenders his land into the hands of the lord (acting commonly by his steward) to

the use of the transferee and his heirs (e). This surrender may be made either in or out of a customary court, or even out of the manor (f). In the former case a notice of the fact is recorded in the court rolls: in the latter, a memorandum is made forthwith by the steward, which is afterwards entered upon the court rolls (g). Formerly, this memorandum must be presented or proclaimed at the next customary court (h). But the recent legislative improvement in regulating copyhold customs and formalities have reduced the inconvenience and consequent delay and expense which used to attend all these ceremonies to as shadowy a state as is possible consistently with the preservation of the substantial rights of all parties. The copies of the court rolls made by the steward, which evidently contain a notice of every transaction and thing connected with the title to the land, constitute the muniments of title of the tenant (i). The enactments to which we refer (j) have * also made provisions for conveniently holding courts competent to [* 195] transact all the business which now devolves upon them, for, of course, nothing but administrative acts are now required, all judicial proceedings being altogether obsolete. A court may now be held without the presence of a single copyholder (k), the steward or his deputy alone sufficing for every requisite; but proclamations at any court so held are inoperative against absent persons unless notified to them within a month. A court must be held within the manor, no alteration in the old law being made as to this (l).

(c) *Doe v. Hollier*, 8 T. R. 162; See *Doe d. Bover v. Trueman*, 1 B. & Ad. 735.

(d) 11 Geo. 4 & 1 Will. 4 c. 65; 16 & 17 Vict. c. 70.

(e) In some manors it is necessary for the alienor to execute a deed of bargain and sale and surrender to the alienee; it has been thought that when this was the case the lands were not strictly copyholds, but that the tenant had the freehold, (see *Bingham v. Woodgate*, 1 Russ. & Myln. 32, 750.) but it seems that they are copyholds, and the freehold is in the lord; *Graham v. Jackson*, 6 Q. B. 811; *Thompson v. Hardinge*, 14 L. J. C. P. 268.

(f) A custom that a steward shall not take

surrenders out of a manor is void, 1 Ld. Raym. 76.

(g) See 4 & 5 Vict. c. 35, s. 89.

(h) 1 Watk. Cop. 79; 1 Scriv. Cop. 277.

(i) 1 Scriv. Cop. 587, 538; *Doe d. Gurrod v. Olley*, 12 A. & E. 481.

(j) 4 & 5 Vict. c. 35, amended and extended by the following acts: 6 & 7 Vict. c. 23; 7 & 8 Vict. c. 55; 15 & 16 Vict. c. 51; 21 & 22 Vict. c. 94; 31 & 32 Vict. c. 89; and continued from time to time by 14 & 15 Vict. c. 53; 21 & 22 Vict. c. 53; 23 & 24 Vict. c. 81; 25 & 26 Vict. c. 78.

(k) 4 & 5 Vict. c. 35, s. 86.

(l) *Doe d. Leach v. Whittaker*, 5 B. & Ad. 409.

After a surrender, the person in whose favour it has been made, is in the same position as an heir or devisee; he may at any time require the lord to acknowledge his title by a formal admittance (*m*). This is a ceremony which the steward performs, and may also be either in or out of court, and in or out of the manor (*n*).

If a lord refuse, in a proper case, to admit a tenant, courts of law will issue a mandamus to compel him to do so (*o*); and it is immaterial that there is any defect in the title of a lord acting as such with an apparent title (*p*), the admission being valid notwithstanding any such defect.

In strict consonance with the old feudal exactions upon the admission of a new tenant, whether following the * death of the former tenant or a surrender by him, there is commonly required by the lord a payment of a fine. Fines are in some cases fixed by custom; in other cases they are left to the arbitrary will of the lord. But now even when arbitrary in name, they are restricted by the rules laid down by courts of common law to two years' improved value of the land (*q*). In addition to the fines, certain fees are usually paid to the steward (*r*).

In those manors where the custom is to demise the land for lives, the fine is, as might be expected, often arbitrary; and when the admission is made for several lives in succession, the fine payable is usually a full fine for the first life, half that amount for the second, a quarter of it for the third, and so on, so that the whole fine can never amount to double two years' annual value (*s*).

We may notice that if under a will or other settlement dealing with the copyholds a person is made tenant for life of the property or with some other similar limited interest, the admission of such tenant for life enures for the benefit of the remainderman under the settlement, so that no further fine is payable after the death of the tenant for life, always excepting that there is a special custom of the manor providing otherwise (*t*).

Where several persons are entitled as joint tenants, the admission of any one is the admission of all (*u*); this being a consequence of the unity of their possession, of *which we shall see more hereafter: any one of them may demand admission: it would seem that in this case the lord is entitled to a larger fine than on the admission of a single tenant (*x*).

When the admission is of several persons as tenants in common, a single fine only is payable, which is apportioned upon each so admitted (*y*).

In estimating the annual value of the property, the quit rents, the expenses

(*m*) *Doe d. Tofield v. Tofield*, 11 East, 216; *Doe d. Winde v. Lawes*, 7 A. & E. 195.

(*n*) Formerly a steward could only admit in court though the lord himself might admit out of court. *Doe d. Lench v. Whittaker*, 5 B. & Ad. 409, but 4 & 5 Vict. c. 35, s. 88, altered this.

(*o*) 1 Wils. 283; *R. v. Brewers' Co.*, 2 B. & C. 172; *R. v. Dendy*, 23 L. J. Q. B. 89; s. c. 1 E. & B. 829; *R. v. Manor of Hexham*, 5 A. & E. 559; *R. v. Wilson*, 3 Best & S. 201; *R. v. Wellesley*, 3 E. & B. 924.

(*p*) *Doe d. Burgess v. Thompson*, 5 A. & E. 532.

(*q*) *Douglas*, 724; *Douglas v. Dysent*, 10 C. B. N. S. 688; *Curtis v. Scates*, 14 M. & W. 444.

(*r*) *R. v. Eton College*, 8 Q. B. 526; *Evans v. Upsher*, 10 M. & W. 675.

(*s*) *Wilson v. Hoare*, 2 B. & Ad. 350. See also *Wellesley v. Withers*, 4 E. & B. 750; *Sheppard v. Woodford*, 5 M. & W. 608; *Garland v. Alston*, 3 H. & N. 390.

(*t*) *Dean and Chapter of Ely v. Caldecott*, 8 Bing. 439; *Phypers v. Eburn*, 3 Bing. N. C. 250; *Smith v. Glascock*, 4 C. B. N. S. 357; *Randfield v. Randfield*, 31 L. J. Ch. 113.

(*u*) 1 Watk. Cop. 272, 277. See *R. v. Lord of the Manor of Wanstead*, 23 L. J. Q. B. 67; s. c. sub nom.; *R. v. Wellesley*, 4 E. & B. 750.

(*x*) See the case cited in the preceding note; and *Wellesley v. Withers*, 4 E. & B. 750; but the point has been decided the other way as to heriots.

(*y*) 1 Watk. Cop. 312; Scriv. Cop. 374; *R. v. Bonsall*, 3 B. & Cr. 178.

of repairs, and other outgoings of a like nature, but not the land tax, must be taken into account (*z*). The right of the lord to the fine accrues only on the admittance, after which he may, though not before, sue for it in assumpsit (*a*).

Another exaction permitted by the customs of some manors is that of heriots. Heriots which were known to the Danes, and probably were introduced by them, are a render of the best beast (*b*) or other chattel (as may be

Heriots. the custom which fixes the particular article), to the lord on the death of a tenant. They are sometimes due even from the free tenants of a manor as well as the copyhold tenants (*c*). Frequently also heriots are by custom converted into a money payment of fixed amount (*d*). Unless by special custom one heriot only is due upon the admission of joint tenants (*e*).

For the latter division of heriots, which is called heriot-service, and is only a species of rent, the lord may distrain, *as well as seize, but for [*198] heriot-custom (which Sir Edward Coke says (*f*) lies only in prender, and not in render) the lord may seize the identical thing itself, but cannot distrain any other chattel for it (*g*). This speedy and effectual remedy of seizing is given with regard to many things which the lord may in many manors claim as lying as it is said in franchise; as waifs, wrecks, estrays, deodands, and the like; all which the lord or person entitled thereto may seize without the formal process of a suit or action. Not that they are debarred of their remedy by action; but have also the other and more speedy one, for the better asserting their property; the thing to be claimed being frequently of such a nature as might be out of the reach of the law before any action could be brought.

Reliefs are by special custom sometimes incident to copyhold tenements, but they are usually included in the fine, or at least commuted by custom into a certain money payment. In some manors also there is a special

Bellefs. custom for the lord to have wardship of an infant tenant, in which case he is accountable for the rents and profits, like a guardian in socage. The right is rarely exercised, the duty being delegated to some relation of the infant tenant. It must be remembered, however, that by the statute of Charles II., (*h*), which abolished military tenures, the power of appointing guardians by will was given to a father, and even where the custom above mentioned exists, it would seem that the guardian appointed by the father would at least have the control of the person, if not of the copyhold property of the infant (*i*).

Escheats on failure of heirs and forfeiture on the felony or corruption of blood of the tenant are further incidents of this tenure by which the lord regains possession of the land (*k*), which again becomes part of the demesne of *the manor. On the treason of the tenant it seems that [*199]

(e) Dougl. 724; *Lord Verulam v. Howard*, 7 Bing. 327; *Richardson v. Kensit*, 5 Man. & Gr. 485; *Dean and Chapter of Ely v. Caldecot*, 8 Bing. 439.

(a) 2 T. R. 484; *R. v. Wellesley*, 2 E. & B. 924; *R. v. Lord of Manor of Wanstead*, 23 L. J. Q. B. 67.

(b) Formerly the armour of the tenant was rendered as a heriot.

(c) *Domerell v. Protheroe*, 10 Q. B. 20, a case concerning lands in the manor of S. Tawton, Devonshire.

(d) *Garland v. Jekyl*, 2 Bing. 273; *Mayor, &c., of Basingstoke v. Bolton*, 1 Drew. 270, 8 Drew. 50.

(e) *Padwicke v. Tyndale* 1 E. & E. 184.

(f) Cop. s. 25.

(g) Cro. Eliz. 590; Cro. Car. 260.

(h) 12 Ch. 2, c. 24, ss. 8 and 9.

(i) 1 Scriv. Cop. 102, 471; 2 Watk. Cop. 104. Lord Coke, however (Cop. s. 23), is an authority to the contrary.

(k) 2 Scriv. Cop. 631.

the lands are forfeited to the crown (*l*) if the traitor be seised at the time of his treason, but if it be committed by the heir in the lifetime of the ancestor, there would be merely a *defectus tenentis* on the death of the ancestor through failure of heirs, and the lands would, if not devised by the tenant, escheat to the lord (*m*).

A forfeiture to the lord takes place if the tenant does any act unauthorised by custom, as grant a lease for a longer period than the customs of the manor warrant (*n*), or commit any waste. When the land has thus

Forfeiture.

reverted to the lord, and become demesne land, it may again be demised by copy (*o*), and the same seems to be the case if the land, instead of coming to the hands of the lord by escheat or forfeiture, is purchased by him (*p*), [* 200] *moreover the merger of the copyhold tenure in the seignory takes place even if the lord have only a limited interest in the manor (*q*).

If the lordship belong to several, as tenants in common or joint tenants, and one of them purchase copyhold lands held of the manor, a part of the tenancy, in proportion to the interest of the purchaser in the manor, is extinguished (*r*).

If the lord, being tenant in fee, convey the freehold to the tenant, the land thenceforth becomes in all respects land of ordinary socage tenure, it is severed from the manor, and is enfranchised or made free from every customary duty and burden (*s*). By the copyhold act before alluded to (*t*) power is given either to the tenant or to the lord to insist upon enfranchisement, and means are provided for effecting this, in cases where the parties cannot agree to the terms of enfranchisement or some of them are under disability. It is obvious that in the present day the peculiar nature and incidents of copyhold tenure are a hindrance to the improvement of land and the development of its resources, the policy of the legislature has therefore been to encourage as far as possible its abolition, and meanwhile to alleviate the inconvenience attending its continuance (*u*).

(*l*) 2 Scriv. 632. Though it is stated that they escheat to the lord and are not forfeited to the crown, see *Lord Cornwall's Case*, 2 Vent. 38; 1 Watk. Cop. 340.

(*n*) 2 Scriv. 632; Br. Escheate, pl. 6; Co. Litt. 13 a.

(*o*) An unwarranted lease is not void as against a stranger, but is a ground of forfeiture, of which the lord alone can take advantage. *Doe d. Robinson v. Bouafield*, 1 Car. & K. 558; see, as to forfeiture generally, *Clarke v. Arden*, 16 C. B. 227. A wrongful seizure by the lord is a matter of which courts of equity will take cognizance in a suit instituted to set it aside, although the question may also be tried by action of trespass. *Thomas v. Porter*, 1 Ch. Ca. 95; *Cudmore v. Raven*, 2 Vern. 664; *Nash v. Lord Derby*, *ib.* 537; *Andrews v. Hulse*, 4 K. & J. 392. See also the cases, *Doe d. Grubb v. Earl of Burlington*, 5 B. & Ad. 507; 2 N. & M. 534; *R. v. Lady St. John Mildmay*, 5 B. & Ad. 254.

(*p*) For obvious reasons it will seldom be to the advantage of the lord to demise the land by copy, unless, indeed, the lord has himself only a limited interest in the manor as tenant for life, or for years. See *Re London and South Western Railway Company Act*, *Ex parte* Lord Henley, 29 Beav. 311.

(*p*) It will be noticed that this is a different effect to that which takes place on the purchase by the lord of free tenemental lands, as to which see *ante*, p. 181. The reason why no distinction exists between purchase and escheat of copyholds is, that no alteration in the estate of the lord takes place in either case. *Brunker v. Cole*, 11 Mod. 122; *Doe v. Pott*, Doug. 684; *St. Paul v. Lord Dudley*, 15 Ves. 167; *Roe v. Wegg*, 6 T. R. 708; *Shep. Touch. Prest. ed.* 439.

(*q*) *St. Paul v. Lord Dudley*, 15 Ves. 167; see also *Doe v. Danvers*, 7 East, 299.

(*r*) *Cuttley v. Arnold*, 4 K. & J. 595, upon the authority of Vin. Abr., Davies' ed. p. 167; Year-book, 26 Hen. 8, Ca. 15. As to the partition of manors, see *Hanbury v. Hussey*, 14 Beav. 153.

(*s*) Litt. s. 206.

(*t*) *Ante*, p. 194.

(*u*) A peculiar attempt to erect a species of tenure not unlike that of copyholds occurred recently in the town of Huddersfield. Relying upon the faith of the tenure being secure, much money was expended by the tenants. The foundation for such faith proved to be shadowy. See *Ramsden v. Dyson*, L. R. 1 H. L. 120.

There is yet another species of tenure called ancient demesne, which differs but slightly from socage, or rather *perhaps is a peculiar form of [* 201] socage, but requires separate mention, having regard to its origin, and also because, so far as there is a variation from the ordinary characteristics of socage tenure, it is in the direction of villenage or copyhold tenure, the original services due from the tenants being of a base or villein character.

Ancient demesne consists of those lands or manors, which, though now perhaps granted out to private subjects, were actually in the hands of the crown in the time of Edward the Confessor, or William the Conqueror; and so appear to have been by the great survey in the Exchequer called Domesday Book (x). The tenants of these lands, under the crown, were not all of the same order or degree. Some of them, as Britton testifies (y), though free, holding their land like villeins, except that their tenure was more certain. Others were enfranchised by royal charter: being only bound in respect of their lands to perform some of the better sort of villein services, but those determinate and certain; as to plough the king's land for so many days, to supply his court with such a quantity of provisions, or other stated services, all of which are now changed into pecuniary rents: and in consideration thereof they had many immunities and privileges granted to them (z); as to try the right of their property in a peculiar court of their own, called a court of ancient demesne, by a peculiar process denominated a writ of *right close (a); not to pay toll or [* 202] taxes; not to contribute to the expenses of knights of the shire; not to be put on juries; and the like (b).

These tenants, therefore, have an interest equivalent to a freehold: for notwithstanding their services were of a base and villenous origin (c), yet the tenants were esteemed in all other respects to be highly privileged villeins; and especially because their services were fixed and determinate, and that they could not be compelled (like pure villeins) to relinquish these tenements at the lord's will, or to hold them against their own: "*et ideo*," says Bracton, "*dicuntur liberi*." Britton also, from such their freedom, calls them absolutely *sokemans* (d), and their tenure *sokemanries*; which he describes to be "lands and tenements, which are not hold by knight-service, nor by grand serjeanty, nor by petit, but by simple services, being, as it were, lands enfranchised by the king or his predecessors from their ancient demesne." And the same name is also given them in Fleta (e). Hence Fitzherbert observes (f), that no lands are ancient demesne, but lands holden in socage: that is, not in free and common socage, but in this amphibious subordinate class of villein-socage. And it is possible, that as this species of socage tenure is plainly founded upon pre-

(x) F. N. B. 14, 16

(y) "Ancient demesnes are lands which were part of the ancient manors annexed to the crown, in which demesne dwell some who have been freely enfeoffed by charter; others who are free of blood, and hold land of us in villenage, and these are properly our sokemen, and are privileged in this manner: that they are not to be ousted from such tenements so long as they perform the services which appertain to their tenements, nor can their services be increased or altered, so that they shall do any other or greater

services, or in any other way than they have been used to do. And because such sokemen are the tillers of our lands, we will that they be not summoned anywhere to toil in juries or inquests." Lib. iii. c. 2, p. 165, Nicholls' ed.

(z) 4 Inst. 269.

(a) F. N. B. 11.

(b) *Ib.* 14.

(c) Gilb. Hist. of Exch. 16 and 30.

(d) *Ubi sup.*; see also c. 66.

(e) L. 1, c. 8.

(f) N. B. 18.

dial services, or services of the plough, it may have given cause to imagine that all socage tenures arose from the same origin; for want of distinguishing, with Bracton, between free socage or socage of frank-tenure, and villein-socage of socage of ancient demesne (*g*).

From the account which we have given of the principal and fundamental points of the doctrine of tenures, both ancient and modern, it appears, that [* 203] whatever changes *and alterations lay tenures have in process of time undergone, from the Saxon era to the 12 Car. II., all lay tenures are now in effect reduced to two species: free tenure in common socage, and base tenure by copy of court-roll.

We say lay tenures only; because there still remains one other species of tenure, reserved by the statute of Charles II., which is of a spiritual nature, and called the tenure in frankalmoign.

Tenure in *frankalmoign*, in *libera eleemosyna*, or free alms, is that whereby a religious corporation, aggregate or sole, holdeth lands of the donor to them and their successors for ever (*h*). The service which they were bound to render for these lands was not certainly defined; but only in general to pray for the souls of the donor and his heirs, dead or alive; and therefore they did no fealty (which is incident to all other services but this (*i*)), because this divine service was of a nobler and more exalted nature (*k*). This is the tenure, by which almost all the ancient monasteries and religious houses held their lands: and by which the parochial clergy, and very many ecclesiastical and eleemosynary foundations, hold them at this day (*l*): the nature of the service being upon the reformation altered, and made conformable to the doctrines of the reformed church of England. It was an old Saxon tenure; and continued under the Norman revolution, through the great respect that was shown to religion and religious men in ancient times. Which is also the reason that tenants in frankalmoign were discharged of all other services, except the *trinoda necessitas*, of repairing the highways, building castles, and repelling invasions (*m*): just as the Druids, among the ancient Britons, [* 204] had *omnium rerum immunitatem* (*n*). And, even *at present, this is a tenure of a nature very distinct from all others; being not in the least feudal, but merely spiritual. For, if the service be neglected, the law gives no remedy by distress or otherwise to the lord of whom the lands are

holden: but merely a complaint to the ordinary or visitor to correct it (*o*). Wherein it materially differs from what was called tenure by divine service (*p*): in which the tenants were obliged to do some special and certain divine services; as, to sing so many masses, to distribute such a sum in alms, and the like; which, being expressly defined and prescribed, could with no kind of propriety be called free alms; especially as for this, if unperformed, the lord might distrain, without any complaint to the visitor (*q*). All such donations are indeed now out of use: for since the statute of *quia emptores*,

(*g*) See Third Real Property Report, p. 18, and the passage from Bracton, cited ante, p. 140.

(*h*) Litt. s. 188, Bac. Ab., *Tenure* (F); 1 Cruise, Dig. 297.

(*i*) Litt. 131.

(*k*) *Ib.* 135.

(*l*) Bract. l. 4, tr. 1, c. 28, s. 1.

(*m*) Seld. Jan. 1, 42.

(*n*) Cæsar de Bell. Gall. l. 6, c. 18.

(*o*) Litt. s. 136.

(*p*) Bac. Ab., *Tenure* (G).

(*q*) Litt. s. 187.

18 Edw. I. (r), none but the king can give lands to be holden by this tenure (s). So that they are here mentioned only because frankalmoign is excepted by name in the statute of Charles II., and therefore subsists in many instances at this day.

* CHAPTER VII.

[* 205]

ESTATES OF INHERITANCE.

WE have shown how the feudal system with all its peculiar incidents of tenure was adopted by, or rather forced upon, this country, with an universality hardly to be found elsewhere, so that the ownership of every acre of land throughout the kingdom became subject to feudal rules. The most superficial acquaintance with the principles of feudal tenure is sufficient to render intelligible the doctrine that no subject can be an absolute owner of land, a doctrine which formed the main feature of the system, and which still remains, though nearly every other important member has perished.

It is impossible to understand the laws regulating the possession of landed property, unless this fundamental principle be carefully borne in mind. A subject may, in the present decrepitude of the rules of tenure, have such an interest in land and such powers of dealing with it, that, for all practical purposes, there seems none but a verbal difference between his right of ownership, and those of an absolute owner; but this interest and these powers are, in the eye of the law, only of a limited duration and extent. There must in every case be a possibility of their coming to an end, and of another and paramount title supervening.

To use the terminology of the law, a subject can only be a tenant of lands, having an estate in them. The next subject for our consideration, therefore, is the nature of estates, together with their properties and incidents. *But, in order to prevent confusion in the mind, in dealing with the [* 206] present condition of things we must here premise that a modification of almost every remark is necessary when it is to be applied to lands of copyhold tenure. For as we have seen, a copyholder is in one sense a mere tenant at the will of the lord of the manor, although, this will of the lord being controlled by custom, the interest of the tenant may be as perdurable as if the lands were not held at the will of the lord of a manor but in fee simple under the seignory of the crown alone.

The estate which a man has in lands, tenements, or hereditaments, denotes the whole interest which he has in them, and his power over them (a). It is called in Latin *status*, indicating thereby the condition of the owner with regard to his property. There may, however, be

Estates. (r) This statute enacts "that it shall be lawful to every freeman to sell at his own pleasure his lands and tenements, or part of them, so that the feoffee shall hold the same of the chief lord of the same fee by such service and customs as his feoffor held before." *Ante*, p. 52.

(s) Litt. s. 140.

(a) In colloquial language the word "estate" is, by an error of a common kind, often used to indicate a particular tract of land belonging to an individual or family.

powers unaccompanied by benefit to their possessor, which do not amount to what is involved in the meaning of estate. Thus an executor has in many cases a power conferred upon him to sell land for the purposes of winding up his testator's affairs; this is no estate, the executors taking nothing without an exercise of the power, and upon that exercise, it is the vendee, and not the executor who takes the beneficial interest in the estate. Such powers are perhaps therefore, better described as powers over some estates in the land, rather than powers over the land itself. The mode in which they operate is highly technical (*b*). To this we shall hereafter revert.

Estates may be considered in three different views: first, as regards the duration and extent of the estate; secondly, as regards the time when the estate is to commence in beneficial enjoyment of the property; and thirdly, as regards the number and connection of the tenants or possessors.

[* 207] First as regards the duration and extent of the interest * which a tenant has in the tenement:—The law recognises various periods during which an estate may exist. Thus it may subsist for a period of a definite number of years, months, or days, or it may be made to last during the tenant's life, or that of any other man, terminating at his death; or again it may continue after the tenant's death, so long as any descendants from him shall live. The greatest estate, and that which most nearly approaches to absolute dominion is one which may last not only during the tenant's life, but so long as there shall continue any heir to him, without any restriction upon the title of his heirs. It is an estate limited to a man and his heirs generally. These are the most usual estates, but others may be created partaking more or less of a mixed character; for instance, an estate may be limited to exist for 100 years if J. S. should live so long, but to terminate upon the death of J. S. This is not an estate during the life of J. S. because by supposition of law J. S. may live more than 100 years, neither is it an estate for years, for it probably will not continue till the expiration of the 100 years. We will treat the various estates in their order.

In ancient times the practice of granting leases for terms of years, *i.e.* of creating estates for years, was rare, it being considered that the smallest interest which was worthy of the acceptance of a freeman was one which must endure during his life. In feudal times, therefore, when the possession of land, otherwise than at the arbitrary will of some lord, was only given to freemen, the form of investiture only applied to this or a greater estate. Whence it arose that estates for the life or for any longer duration than the life of the tenant, were called freehold estates. *Liberum tenementum*, frank tenement, or freehold is defined by Britton as being "the possession of the soil by a freeman" (*c*).

[* 208] The feudal ceremony of investiture * became afterwards the common law ceremony of livery of seisin, and this, therefore, explains what is said by Littleton (*d*), "that, where a freehold shall pass, it behoveth to have livery of seisin." In the case of incorporeal hereditaments, however, such as a rent, although livery of seisin, or the actual physical delivery is not applicable,

(b) See Sug. Powers, chs. 1 & 2.

law of England the frank tenement, or freehold."

(c) C. 82. See also Doctor and Studt. b. 2, §. 22, where St. Aubyn Jermyn tells us that "the possession of the land is called in the

(d) S. 59.

still by analogy to the case of land, estates of inheritance, or for life are called freehold. Estates limited to a certain number of years, are, in the eye of the law, less than freehold; livery of seisin, therefore, never applied to them, and they are looked upon as less enduring, because although an estate for a 1000 years will undoubtedly outlast the lives of any number of living persons; yet inasmuch as the law does not take account of the duration of human life, it considers that the uncertainty of the latter period includes a possibility that it may extend beyond any given limit. The laws applicable to the two classes of estates, those of freehold and those less than freehold, were formerly widely different. They have been so far assimilated by modern legislation suited to the requirements of modern times, that there is, for most purposes, little difference material to the interests of the community other than that arising from the essential character of the estates themselves. The most important difference between the laws concerning a tenancy for years and one in fee simple, consists in the different destination of the property when the tenant dies intestate.

We proceed to consider in detail the different estates, taking in order first, those which are freehold, and next those of inferior degree. We will begin with the greatest estate a man can have, an estate in fee simple as it is usually called.

Tenant in fee simple (or, as he is frequently styled, tenant in fee) is he that has lands, tenements or hereditaments, (whether corporeal or incorporeal), to hold to him and his heirs for ever (e), generally, absolutely, and simply, not restricted to any particular kind of heir. [* 209] The word tenant (in Latin *tenans*) indicates that the land or hereditament is holden. By the theory of English law, as we have seen, all lands are holden mediately or immediately of the king (f). The king, therefore, alone has *absolutum et directum dominium* (g).

A fee simple (*feudum* or *feodum simplex* (h)), is, therefore, the utmost interest in land which a subject may possess; under it the tenant enjoys *dominium utile* (i), or, the full perception of every profit which may be derived from the soil; and hence it is that, in the most solemn acts of law, a man having this estate in land is said to be "seised in his demesne as of fee," to have the demesne or *dominium*, i.e. property, not absolute however, but qualified, or feudal "as of fee;" that is, it is held of a superior lord, and either directly or remotely of the king, in whom the ultimate property resides.

The word fee or *feodum* then, as we have already seen, indicates this quality of tenure, and thus is distinguished from *allodium*, or absolute property in land, wholly irrespective of any superior lord, and without any duty of rendering rent or service (k). This primary sense, however, in early times ceased to be the common acceptation of the word, for (as sir Martin Wright justly observes (l)) the doctrine that "all lands are holden" having been for so many

(e) Litt. s. 1.

(f) Wright, Ten. 148; Co. Litt. 1 a; *Case of Stannaries*, 12 Rep. 9; Bract. lib. x. cap. 8. *Omnis quidem sub eo (rege) et ipse sub nullo nisi tantum sub Deo.*

(g) *Prædium domini regis est directum dominium cuius nullus auctor est nisi Deus.* Co. Litt. 1 a.

(h) In Domesday it is called *feudum*.

(i) Co. Litt. 1.

(k) As to allodial lands, and the meaning of the word allodium, concerning which much controversy has existed, see *ante*, p. 118.

(l) Ten. 148.

ages a fixed and undeniable axiom, our English lawyers became accustomed to use the word fee, to express the continuance or quantity of estate. Thus Little-
 [* 210] ton says, "*feodum* is the same as inheritance" (m), and thus * fee, "in our legal understanding, signifieth that the land belongs to us and our heirs, in respect whereof the owner is said to be seised in fee, and in this sense the king is said to be seised in fee" (n): that is to say, the king may have an estate of inheritance, but he can be the feudatory of no man.

It is in this sense, also, that a man may have an estate in fee in incorporeal hereditaments (o). There is this difference, however, in the technical legal description of the estates in the two species of hereditaments, that, of a corporeal hereditament of which manual occupation can be enjoyed, a man is said to be seised in his demesne as of fee, the word demesne denoting beneficial personal enjoyment; thus the lands—part of a manor which the lord of the manor himself occupies—are called the demesne lands. But of an incorporeal hereditament, such as an advowson, a man is said merely to be seised as of fee (p).

The fee simple, or inheritance of lands and tenements, comprises the whole interest which a subject may possess in land; and this doctrine has been held so completely at common law, that, although the estate may determine through failure of heirs, yet it was considered that when a fee simple has been conveyed to any person, no interest could by any possibility be given to any other person in the same lands: for example, if there were limitation to A. and his heirs, with a further limitation, that in case there should be a general failure of A.'s heirs then to C. in fee, this further limitation was absolutely void, for the first limitation carrying the whole fee there could be nothing left in the grantor which can be limited over. The same principle was extended to all cases where it was attempted to limit a fee after the determination of a fee, even to cases
 [* 211] less obviously contradictory to the nature of * a fee simple. Thus, if there were a limitation to A. and his heirs so long as B. should have issue, and upon failure of B.'s heirs then to C. in fee; or so long as they paid annually to the dean and chapter of St. Paul's fourteen marks, and if they failed in payment, then that their estate should cease, and that the said dean and chapter and their successors should have the land, this latter limitation was considered to be wholly void (q). This general doctrine that an estate cannot be limited to take effect after the natural determination of a fee simple, still remains in force; but, as we shall hereafter see, the law has allowed it to be practically evaded and means to be adopted for causing an abrupt determination of a fee simple to take place, and then that another fee simple in some other person should take the place of the one so cut short.

It is a principle of law, derived from feudal notions respecting the possession of land, that the freeholder or feudal seisin must never be without an owner, and further, though this was not so strictly insisted upon, that the inheritance in fee always resides in some person or other. In general there is little difficulty in seeing how the estates, as vested in particular cases, accord with this principle, as to which something more will appear hereafter, when treating of

(m) S. 1.

(n) Co. Litt. 1.

(o) *Feodum est quod quis tenet sibi et heredibus suis sive sit tenementum sive redditus.* (Flet. 1. 5, c. 5, s. 7.)

(p) Litt. s. 10.

(q) 1 Eq. Abr. 186, pl. 8; Fearn, Cont. Rem. 878.

remainders. But there are cases in which it is not very obvious how this may be. To take a much discussed instance; suppose a grant to John for life, and afterwards to the heirs of Richard, a living person. Here the seisin is in John, by virtue of his freehold estate for life, but plainly, the inheritance is not so, neither is it in any person answering the description of the heirs of Richard, for *nemo est hæres viventis*. Formerly, a case like this was explained by saying that during John's life it was in abeyance, or *in gremio legis*, or *in nubibus*, but this artificial doctrine is not now accepted, the true opinion being that the inheritance remains in the grantor until some person arises by the death of Richard, * answering the description given, and so capable of taking [* 212] under the grant. Indeed it is obvious that if John died before Richard, the only person who could enter would be the grantor, who might then resume his former estate, and the estate given to Richard's heir would never take effect. The establishment of this opinion is due to the treatise upon contingent remainders, originally published by the late Mr. Fearne in the year 1772, the great learning of which, and the able discussions therein contained, have contributed greatly to the clear understanding of many disputed questions of this nature. A similar difficulty in determining where the inheritance resides occurs in the case put by Littleton (r), of land belonging to a corporation sole, as the parson of a church. Here, during the life of the parson, the freehold of the glebe of the parsonage is in him, but the fee simple, Littleton says, is in abeyance, and after the death of a parson, and before the church is filled by his successor, the freehold also seems to be without an owner, or in abeyance. Perhaps, however, notwithstanding Littleton's view of this case, it may be explained by observing that a freehold, equivalent to one of inheritance, is in the parson subject to the restriction of there being no power of alienation, and further, that the successor takes exactly as the heir would take on intestacy in an ordinary case, the succession by blood being replaced by the succession in the office of parson. As to the period during which the church is void, it may be noticed that the successor must then be in existence, though not actually pointed out till his institution and induction. He, on institution, claims and can receive all the rights accruing since the death of his predecessor (s). It is clear, however, that the original grantor and his heirs are entitled to everything which is not taken by the corporation; and the estate will revert to them on the dissolution of the corporation.

* Such is the nature of an estate in fee-simple, which a subject possesses. It only remains to notice that the possession of this estate carries with it the invariable right of alienation, by which not only the ownership of the estate is transferred from one person to another, but in some sense the estate is itself affected, for being before an estate capable of enduring so long as there shall be any heirs of the alienor, after the alienation it becomes an estate, limited to endure so long as there shall be heirs of the alienee, the latter class of heirs being substituted for the former. This right of fee alienation constitutes one of the most valuable attributes of this estate. The various modes of alienation will come under our consideration when investigating the various kinds of title under which a man may claim an estate. A few points may, however, here be noticed, regulating the grant or creation of an estate, which also govern the present powers of alienation.

(r) Sects. 646, 647.

(s) 6 Cl. & Fin. 850.

The word "heirs" is necessary in the grant or donation, in order to make a fee, or inheritance. For, if land be given to a man for ever, or to him and his assigns for ever, this vests in him but an estate for life (*t*). This assigns for ever, this vests in him but an estate for life (*t*). This very great nicety about the insertion of the word "heirs" in all feoffments and grants, in order to vest a fee, is plainly a relic of feudal strictness; by which we may remember (*u*), it was required that the form of the donation should be punctually pursued; or that, as Crag (*x*) [** 214*] *expresses in the words of Baldus, "*donationes sint stricti juris, ne quis plus donasse præsumat quam in donatione expresserit*." And therefore, as the personal abilities of the donee were originally supposed to be the only inducements to the gift, the donee's estate in the land extended only to his own person, and subsisted no longer than his life; unless the donor, by an express provision in the grant, gave it a longer continuance, and extended it also to his heirs. But this rule has been softened by many exceptions (*y*).

In the case of wills made before the year 1838, the necessity for the use of the word "heirs" was dispensed with if the testator had sufficiently expressed his intention that a devise should be in perpetuity. Thus if the devise were to A. in fee-simple (*z*), or for ever (*a*), or to A. and his assigns or successors for ever (*b*); in all these cases the words of perpetuity or description sufficiently denote the intention of the testator. And as the power of alienation by will was introduced when feudal rigour was rapidly declining, the court adopted such a liberal construction of wills as would give effect to that which was thus manifestly intended, though not couched in the formal language which had always been required in deeds.

There must, however, be no ambiguity in the mode in which the intention appears, and, therefore, a gift to A. and his assigns, since there could be no inconsistency with this gift, that A. should take an estate for life only, that is all which will be taken under it (*c*). This question as to the estate taken under a will cannot now arise in cases where the will has been made since the year 1837, for it being found that, notwithstanding the anxiety of the court thus to [** 215*] give effect to the intention of testators * which seemed the most probable, it was often defeated from not being sufficiently expressed, it has been enacted (*d*), that a devise of any real estate without words of limitation shall carry the fee-simple or the whole interest, whatever it may be, of the testator, unless a contrary intention appear by the will.

In the peculiar assurances which formerly were made with the aid of the courts by the pretence of actions, an estate was conveyed without the use of the word "heirs" (*e*); for, by these fines and recoveries (*f*), the estate in fee

(*g*) Litt. s. 1; 2 W. Bl. 1185. Mr. Preston observes, that the word "heirs," or, in the case of a corporation, "successors," needs not be in the identical deed or grant; and therefore, where one to whom lands had been granted in fee does, after reciting the grant, or without any recital, grant the lands to another, "as fully as they were granted to him," the fee-simple will pass without any limitation to the heirs in express terms. (2 Prest. on Est. 2; Shep. Touch. 101; Com. Dig., Estate, A. 2.) It is the practice at this day, in conveying an estate in fee, to limit the property to the grantee, his heirs and assigns for

ever, but these latter words are unnecessary and immaterial. (2 Prest. on Est. 3.)

(*u*) See *ante*, p. 184.

(*x*) L. 1, t. 9, s. 17.

(*y*) Co. Litt. 9, 10.

(*z*) *Baker v. Raymond*, And. 51; 8 Vin. Ab. 206, pl. 8.

(*a*) Co. Litt. 9 b; 8 Vin. Ab. 206, pl. 6.

(*b*) Co. Litt. 9 b.

(*c*) Co. Litt. 9 b. For a collection of forms of devises which have been held to carry a fee simple, see 2 Jarm. Wills, 253 *et seq.*

(*d*) 1 Vict. c. 26, s. 28.

(*e*) Co. Litt. 9.

(*f*) As to these, see *post*.

passed by the operation of law. The same result occurs in many cases of release by deed, the effect of which is the extinction of an estate or interest, and this effect may be produced without the use of the word "heirs" (g).

In creations of nobility by writ, the peer so created has an inheritance in his title, without expressing the word, "heirs;" for heirship is implied in the creation, unless it be otherwise specially provided: but, in creations by patent, which are *stricti juris*, the word "heirs" must be inserted, otherwise there is no inheritance (h). In grants of lands to sole corporations and their successors, the word "successors" supplies the place of "heirs;" for, as heirs take from the ancestor, so doth the successor from the predecessor (i). Nay, in a grant to a bishop, or other sole spiritual corporation, in *frankalmoign*, the word "*frankalmoign*" supplies the place of "successors" (as the word [* 216] "successors" supplies the place of "heirs") *ex vi termini*; and in all these cases, a fee simple vests in such sole corporation. But, in a grant of lands to a corporation aggregate, the word "successors" is not necessary, though usually inserted: for although such simple grant be strictly only an estate for life, yet, as a corporation never dies, such estate for life is perpetual, or equivalent to a fee simple, and therefore the law allows it to be one (k). Lastly, in the case of the king, a fee simple will vest in him, without the word "heirs" or "successors" in the grant; partly from prerogative royal, and partly from a reason similar to the last, because the king in judgment of law never dies (l). But the general rule is, that the word "heirs" is necessary to create an estate of inheritance. (230)

(g) Co. Litt. 9.

(h) Co. Litt. 9. It appears from recent inquiries in Parliament that the crown cannot now create life peerages.

(i) In a grant to a sole corporation, the word "heirs" will not convey a fee any more than the word "successors" would in a grant to a natural person. For instance, a limitation to a parson as such, and to his heirs, gives him only an estate for life. Co. Litt. 8 b; 4 H. 5, 9. The word successors, is not necessary to pass a fee to a sole corporation

in *frankalmoign*. Co. Litt. 94 b. But if unnecessary words be added to those which suffice to pass the fee, in grants to corporations sole, or natural persons, they may be rejected as surplusage; as if lands be granted to a bishop as such, his heirs and successors, or to a man, his heirs and successors, the word "heirs," in the one case, and "successors" in the other, come within this rule. Co. Litt. 9 a.

(k) See vol. 1, p. 484.

(l) *Ib.* p. 249.

(230) In many of the States of the Union the word "heirs," or other words of inheritance are not required in deeds or wills for the purpose of carrying a fee, if such intent is evident from the language employed. Where the rule has not been changed by statute the common-law rule generally prevails, and the word "heirs" is necessary to create an estate of inheritance. *Taylor v. Marshall*, Hill and Denio, 98; *Adams v. Ross*, 30 N. J. Law (1 Vroom) 505, 511; *Clearwater v. Rose*, 1 Blackf. 187; *Sedgwick v. Laflin*, 10 Allen, 430; *Jones v. Bramblet*, 1 Scam. 276; *Van Horn v. Harrison*, 1 Dall. 137.

Usually no other words will supply the place of the word "heirs." A deed to M. "and his generation, to endure so long as the waters of the Delaware run," was held to convey but a life estate. *Foster v. Joice*, 3 Wash. C. C. 498.

But it has been held that an omission of the word "heirs" may be supplied by other words. A deed given in 1804 conveyed the right to the grantee to erect mills, to have and to hold for ever, but omitting the word "heirs" in the *habendum* clause; but there was a subsequent clause which restricted the grantee, *his heirs and assigns* in certain respects, and this was held to convey a fee at common law. *Saunders v. Hanes*, 44 N. Y. (5 Hand) 353. A lease which is to continue "as long as wood grows and water runs" was held to convey a fee. *Arms v. Burt*, 1 Vt. 308.

In conveyances in trust the trustee may take a fee without the word "heirs" when the purposes of the trust require that a fee should pass. *Fisher v. Fields*, 10 Johns. 495; *Angell*

In discussing hitherto the nature and quality of an estate in fee simple, or the largest estate a man may possess in lands, we have treated it as absolute, free from condition or qualification (*m*). But besides such absolute [*217] * fees there are others commonly called base fees, which are to be distinguished by the peculiarity that they are liable to come to a determination sooner than the natural determination of a fee simple, by the cesser of some other continuous fact, the duration of which has been made the measure of the continuance in existence of the estate. Thus, in the case of a grant to A. and his heirs, tenants of the manor of Dale; in this instance, whenever the heirs of A. cease to be tenants of that manor (*n*), the grant is entirely defeated. So, when Henry VI. granted to John Talbot, lord of the manor of Kingston-Lisle in Berks, that he and his heirs, lords of the said manor, should be peers of the realm, by the title of barons of Lisle; here John Talbot had a base or qualified fee in that dignity (*o*), and the instant he or his heirs quitted the seignory of this manor, the dignity was at an end. This estate is a fee, because by possibility it may endure for ever in a man and his heirs: yet, as that duration depends upon the concurrence of collateral circumstances, which qualify and debase the purity of the donation, it is therefore a qualified or base fee.

[*218] Another example of a base fee, and one which is the *most common, or indeed in the present day the only one that is not very uncommon is, a fee-simple which continues so long as A. or any lineal descendants of A. shall be alive, and no longer; this is a base fee, and is one which

(*m*) For a classification of estates by Lord Coke, see his note to *Seymour's Case*, 10 Rep. 978:—"Nota, reader, every estate descendible to the heir is either an estate of inheritance or an estate of freehold; an estate of inheritance is either fee-simple or fee-tail; an estate of fee-simple is either an estate of inheritance absolute and indeterminable, as, where lands are given to a man and his heirs, he has such a pure and absolute estate which can never determine; or a fee-simple determinable, and that is in two manners, scilicet, either expressly derived out of an absolute and pure estate in fee-simple, or implicit, and derived out of an estate-tail. Out of an absolute estate in fee, also in two manners, first, by condition, as, upon mortgage, and that is called a fee-simple conditional; secondly, by limitation, as if A. enfeoffs B. of the manor of D., to have and to hold to him and his heirs so long as C. has heirs of his body, and that is called a fee-simple limited and qualified; and in both these cases the whole estate in the land is in the feoffee, and therefore no remainder or reversion can be expectant upon either of them

(but only a right of entry by the feoffor or his heirs, when the condition is determined): Implicit, and derived out of an estate-tail, as in the case at bar, where tenant in tail bargains and sells the said messuage by deed indented and enrolled to W. H. and his heirs, and afterwards levies a fine to him and his heirs, with proclamations, he has an estate in fee-simple, as long as the tenant in tail has heirs of his body, derived out of the estate-tail; and this is a more inferior and subordinate estate in fee-simple than the other two aforesaid, for upon this a remainder or reversion may be expectant; and yet in all these cases he who has any such estate of inheritance may plead that he is seized of the land in his demesne as of fee, without showing the beginning of his estate, as well when he has a fee-simple derived out of an estate-tail, as a fee-simple conditional or limited."

(*n*) Even for a short period, and they afterwards resume it. *Yelv.* 150; *Prest. on Est.* 20. But if A. die, the birth of a posthumous child will continue the tenancy and prevent the defeat of the grant. 1 *Leon.* 74.

(*o*) *Co. Litt.* 27.

v. Rosenbury, 12 Mich. 241; *Newhall v. Wheeler*, 7 Mass. 189; *Spessard v. Rohrer*, 9 Gill. 261; *Welch v. Allen*, 21 Wend. 147; *Korn v. Cutler*, 26 Conn. 4; *North v. Philbrook*, 34 Me. 532; *Neilson v. Lagow*, 13 How. (U. S.) 98; *Wilcox v. Wheeler*, 47 N. H. 488. See *Weller v. Rolason*, 17 N. J. Eq. (2 C. E. Green) 13, as to the rule in equity.

In a will the use of the word "heirs" is not necessary when the testator owns the fee, and it is evident from the will that he intends to pass all his estate in the lands. *Jackson v. Merrill*, 6 Johns. 185; *Spraker v. Van Alstyne*, 18 Wend. 200; *Fogg v. Clark*, 1 N. H. 163; *Baker v. Bridge*, 12 Pick. 27, 81; *Lambert v. Paine*, 3 Cranch, 97; *Lillard v. Robinson*, 3 Litt. 415.

most frequently in practice arises in a manner which will appear hereafter (*p*). A base fee is in no way distinguishable from an absolute fee-simple, except by this liability to an abnormal termination.

It is to be remembered (*q*), that, though these base or qualified fees are of a duration which may be considerably less than that of an estate in fee simple; yet a tenant in fee simple cannot, upon granting a base fee, reserve to himself an estate in remainder to come into possession upon the determination of the base fee. What in such a grant is reserved to the grantor is merely a right of entry upon the determination of the fee so created (*r*).

The next estate which we shall notice is an estate limited to a man and the heirs of his body begotten. This is such an estate that it descends to the issue of the first owner in regular succession; but it comes to an end *Estate in fee-tail.* upon the failure of his descendants on the happening of which

event the land reverts to the grantor or creator of the estate. This estate is called an estate-tail, *feodum talliatum* (*s*), or an estate cut out of the greater estate in fee-simple; and herein we notice at once a distinction which the law makes between this and a base fee such as that above described, where the estate continues so long as there should be descendants of a given person. * Because, although the duration of the estate-tail is the same as that of the base fee, yet there may be an estate in fee tail, or a series of [*219] estates in fee tail, or estates for life followed ultimately by an estate in fee simple, limited to take effect in succession, one after the other, as the prior estates determine. Thus, a limitation to A. and the heirs of his body, and after the determination of this estate to B. (a living person) for life, and after B.'s death to C. (also a living person) and the heirs of his body, and after the determination of the last estate, to D. and his heirs, would be a perfectly good limitation. But a limitation to A. and his heirs so long as B. or any lineal descendant of B. shall live, with remainder to C. and his heirs, would have no effect in giving any estate to C. (*t*).

There are also special forms of estate-tail; thus, the limitation may not only be to a man and the heirs of his body generally, but it may be confined to him and the heirs of his body by a particular wife, or to him and the heirs male of his body, or the heirs female of his body. In all these cases the descent is only to those who fall within the special description; thus no daughter or remoter female issue, or person claiming through any female, could succeed to an estate in tail male (*u*), and conversely, no male or person derived from one could claim an estate given in tail female (*x*). Thus, if the donee in tail male has a daughter,

(*p*) In *Seymour's Case*, *ubi sup.*, the estate which gave rise to the litigation was held to be of this kind, and there being no lineal descendants of the propositus the estate was at an end.

(*q*) *Ante*, p. 210.

(*r*) Such a right of entry is an incorporeal hereditament which descends to the heirs, or is devised by the will, of the grantor, like other real property (see *ante*, p. 19, note (*o*)).

(*s*) From *tailleur*, *scindere*, i.e., *hereditas in quantum certitudinem talliatum*. Litt. s. 18; Co. Litt. 19.

(*t*) Where, however, an estate-tail is converted into a base fee, the estate in remain-

der expectant upon the determination of the estate-tail would seem to be an exception to the general rule that there can be no remainder after a fee, for having been good at its creation it does not lose its character by the alteration of the prior estate. See 3 & 4 Will. 4, c. 74, s. 39, which provides for certain consequences which might ensue upon the union of the two estates.

(*u*) See Litt. ss. 14, 15, 16, 21, 22, 24, 26, 27, 28, 29, for examples.

(*x*) Tail female is very rarely, if ever, now found. When an estate-tail is given to a female it is always tail general.

who dies leaving a son, the grandson in this case cannot inherit the estate-tail; [* 220] for he cannot *deduce his descent wholly by heirs male (*y*). And as the heir male must convey his descent wholly by males, so must the heir female wholly by females. And therefore, if a man has two estates-tail, the one in tail male, the other in tail female; and he has issue a daughter, which daughter has issue a son; this grandson can succeed to neither of the estates; for he cannot trace his descent wholly either in the male or female line (*z*).

As the word heirs is necessary to create a fee, so in further limitation of the strictness of the feudal donation, the word body, or some other words of procreation, are necessary to make it a fee tail, and ascertain to what heirs in particular the fee is limited. If, therefore, either the words of inheritance or words of procreation be omitted, albeit the others are inserted in the grant, this will not make an estate-tail. As, if the grant be to a man and the issue of his body, to a man and his seed, to a man and the children, or offspring; all these are only estates for life, there wanting the words of inheritance, his heirs (*a*). So, on the other hand, a gift by deed to a man, and his heirs, male or female, is an estate in fee simple, and not in fee tail; for there are no words to ascertain the body out of which they shall issue (*b*). But in last wills and testaments, wherein greater indulgence is allowed, an estate-tail may be created by a devise to a man and his seed, or to a man and his heirs male; or by other irregular modes of expression (*c*).

There is still another species of entailed estates, now indeed grown out of use, yet still capable of subsisting in law; which are estates in *libero maritagio*, or Estate in frank-marriage. [* 221] *frankmarriage. These are defined (*d*) to be, where tenements are given by one man to another, together with a wife (*e*), who is the daughter or cousin of the donor, to hold in frankmarriage. Now, by such gift, though nothing but the word frankmarriage is expressed, the donees shall have the tenements to them, and the heirs of their two bodies begotten; that is, they are tenants in special tail. For this one word, frankmarriage, does *ex vi termini* not only create an inheritance, like the word frankalmoign, but likewise limits that inheritance; supplying not only words of descent, but of procreation also. Such donees in frankmarriage are liable to no service but fealty; for a rent reserved thereon is void, until the fourth degree of consanguinity be past between the issues of the donor and donee (*f*).

(*y*) Litt. s. 24.

(*z*) Co. Litt. 25.

(*a*) Co. Litt. 20; 2 W. Bl. 728.

(*b*) Litt. s. 31; Co. Litt. 27.

(*c*) Co. Litt. 9, 27. Or to a man and his children, if he has no children at the time of the devise (6 Co. 17); or to a man and his posterity (1 H. Bl. 447); or by any other words, which show an intention to restrain the inheritance to the descendants of the devisee. See 2 Jarman on Wills, 232 *et seq.*

(*d*) Litt. s. 17.

(*e*) But it seems the gift may be as well after marriage as before. Dy. 147; Co. Litt. 21 b.

(*f*) Litt. ss. 19, 20. "And the degrees in frankmarriage shall be accounted in this manner, viz., from the donor to the donees in frankmarriage the first degree, because the wife that is one of the donees ought to be daughter, sister, or other cousin to the donor; and from the donees unto their issue shall be accounted the second degree, and so forth." Litt. s. 20. And the reason is, that after the fourth degree the issues of the donor and donee may intermarry, *ib.*; but the rule is inflexible, though sometimes the issues may intermarry before the fourth degree is past. Harg. Co. Litt. 23 a.

In order fully to understand the nature of these estates-tail, which we have been describing, we must refer to their history. Our ancestors held, that a gift to a man and the heirs of his body was a gift subject to the provision that it should revert to the donor, if the donee had no heirs of his body; but, if he had, it should then remain to the donee. They therefore called it a fee-simple, on condition that he had issue. So that as soon as the grantee had any issue born, his estate was supposed to become absolute, by the performance of the condition; at least for these three purposes: 1. To enable the tenant to aliene the land, and thereby to bar not only his own issue, but * also [* 222] the donor of his interest in the reversion (*g*). 2. To subject him to forfeit it for treason, which he could not do, till issue born, longer than for his own life; lest thereby the inheritance of the issue, and reversion of the donor, might have been defeated (*h*). 3. To empower him to charge the land with rents, commons, and various other incumbrances, so as to bind his issue (*i*). And this was thought the more reasonable, because, by the birth of issue, the possibility of the donor's reversion was rendered more distant and precarious: and his interest seems to have been the only one which the law, as it then stood, was solicitous to protect; little regard being had to the right of succession intended to be vested in the issue. However, if the tenant did not in fact deal with the land, no effect was produced on the legal character of his estate; for if the issue had afterwards died, and then the tenant, or original grantee, had died, without making any alienation; the land, by the terms of the donation, could descend to none but the heirs of his body, and therefore, in default of them, must have reverted to the donor; moreover, after the death of the issue, the donee could not aliene unless other issue were born (*k*). For which reason, in order to subject the lands to the ordinary course of descent, to collaterals in default of descendants, the donees of these conditional fee simples took care to aliene as soon as they had issue; and afterwards repurchased the lands, which gave them a fee simple absolute, that would descend to the heirs general, according to the course of the common law. And thus stood the old law with regard to fees of this character: which things, says sir Edward Coke (*l*), "though they seem ancient, are yet necessary to be known; as well for the knowledge of the common law as for annuities, and such like inheritances, as cannot be entailed within the said statute (*de donis*), and therefore * remain at the common law," one of the most important of [* 223] which, we may add, is copyhold land in a manor where there is no custom to entail.

The inconveniences which attended these limited and fettered inheritances, were probably what induced the judges to give way to this subtle finesse of construction (for such it undoubtedly was), in order to shorten the duration of these conditional estates. But, on the other hand, the nobility, who were willing to perpetuate their possessions in their own families, to put a stop to this practice, procured the statute of Westminster 2 (*m*) (commonly called the statute *de donis conditionalibus*) to be made; which paid a greater regard to the private will and intentions of the donor, than to

(*g*) Co. Litt. 19; 2 Inst. 233.

(*h*) Co. Litt. 19; 2 Inst. 234.

(*i*) Co. Litt. 19.

(*k*) 7 Rep. 63; Plowd. 235.

(*l*) 1 Inst. 19.

(*m*) 18 Ed. I., c. 1, A. D. 1295.

the propriety of such intentions, or any public considerations whatsoever. This statute revived in some sort the ancient feudal restraints which were originally laid on alienations, by enacting, that from thenceforth the will of the donor be observed; and that the tenements so given (to a man and the heirs of his body) should at all events go to the issue, if there were any; or, if none, should revert to the donor (*n*).

Upon the construction of this act of parliament, the judges determined that the donee had no longer a conditional fee simple, which became absolute and at his own disposal, the instant any issue was born; but they divided the estate into two parts, leaving in the donee a
Construction of statute. [* 224] * new kind of particular estate, which they denominated a fee-tail, and vesting in the donor the ultimate fee-simple of the land, expectant on the failure of issue; which expectant estate is what we now call a reversion (*o*). And hence it is that Littleton tells us (*p*), that tenant in fee-tail is by virtue of the statute of Westminster 2.

Such was the origin of estates-tail; the next question, therefore, is, what things may, or may not, be entailed under the statute *de donis*. Tenements is the only word used in the statute: and this sir Edward Coke (*q*) expounds as comprehending all corporeal hereditaments whatsoever; and also all incorporeal hereditaments, which savour of the realty, that is, which issue out of corporeal ones, or which concern, or are annexed to, or may be exercised within the same; as rents, estovers, commons, and the like. Also officers and dignities which concern lands, or have relation to fixed and certain places, may be entailed (*r*). But mere personal chattels, which savour not at all of the realty, cannot be entailed. Neither can an office, which merely relates to such personal chattels; nor an annuity, which charges only the person, and not the lands of the grantor. But in these last, if granted to a man and the heirs of his body, the grantee has either an absolute interest at once, or at least a fee conditional such as at common law existed before the statute; and by his alienation (in the latter case after issue born) may bar the claim of every person whether heir or reversioner (*s*). An *estate to a man and his heirs for another's life cannot be entailed (*t*): for
All hereditaments which savour of the realty may be entailed.
Personal chattels not.
Estate for life of another, not, [* 225]

(*n*) The words are, "That the will of the donor according to the form in his deed of gift manifestly expressed should be observed, so that they to whom a tenement was so given upon condition, should not have power of alienating the tenements so given, whereby it might not remain after their death to their issue, or to the heir of the donor if the issue should fail, whether by the want of any issue at all, or by death and failure of heirs of what issue there might have been."

It will be observed that the statute does not absolutely annul every alienation the tenant in tail may make, but merely provides that no alienation shall prevent the title of the issue in tail, and of the donor's heirs; and this distinction will be found to be important.

(*o*) 2 Inst. 385.

(*p*) Sect. 13.

(*q*) 1 Inst. 19, 20.

(*r*) 7 Rep. 83.

(*s*) Co. Litt. 19, 20. If an annuity is granted

out of personal property to a man and the heirs of his body, it is a fee-conditional at common law, and there can be no remainder or further limitation of it; and when the grantee has issue, he has the full power of alienation, and of barring the possibility of its reverting to the grantor by the extinction of his issue. *Stafford v. Buckley*, 2 Ves. 8. 170; 1 Bro. 325.

But out of the term for years, or any personal chattel, except in the instance of an annuity, neither a fee-conditional nor an estate tail can be created; for if they are granted or devised by such words as would convey an estate tail in real property, the grantee or devisee has the entire and absolute interest without having issue; and as soon as such an interest is vested in any one, all subsequent limitations of necessity become null and void. (1 Bro. 274; Harg. Co. Litt. 20; Fearn, 345, 3rd ed.) See *post*, c. 9; 1 J. B. Moore, 346; 12 Ves. 225.

(*t*) 2 Vern. 225.

this is strictly no estate of inheritance (as will appear hereafter), and therefore not within the statute *de donis* (*u*). Neither can a copyhold estate be entailed by virtue of the statute; for that would tend to encroach upon and restrain the will of the lord (*x*); but by the special custom of the manor, a copyhold may be limited to the heirs of the body (*y*); for here the custom ascertains and interprets the lord's will (*z*).
nor copyholds, except by custom of manor.

*The incidents to a tenancy in tail under the statute of Westminster 2 are principally these (*a*): a tenant in tail may commit waste on the entailed land, by felling timber, pulling down houses, or the like, without being impeached or called to account for the same by the issue in tail (*b*). [* 226]

Next, the widow of the tenant in tail shall have her dower, or life interest, in a third of the tenement, in like manner as the widow of tenant in fee simple; the right to which we shall hereafter more fully explain.

Lastly, an estate-tail, may notwithstanding the apparently adverse declaration of the statute, be barred or converted into an ordinary estate in fee simple by the tenant in tail. This now can only be done in the special manner and subject to certain restrictions pointed out by a modern enactment; previously to which, however, it could be effected by certain fictitious legal processes called common recoveries and fines, the nature of which, though now obsolete, it may be well shortly to examine. These ancient as well as the present methods of depriving the issue of a tenant in tail of the benefit of the gift which the law had declared should remain to them, we shall, therefore, in a subsequent chapter explain.

Thus much for the nature of estates-tail: the establishment of which family law (as it is properly styled by Pigott (*c*)), occasioned infinite difficulties and disputes (*d*). Children grew disobedient when they knew they could not be set aside: farmers were ousted of their leases made by tenants in tail; for, if such leases had been valid, then, under colour of long leases, the issue might have been virtually disinherited: creditors were de-

(*u*) See *post*, c. 8.
 (*x*) *Doe v. Clark*, 5 B. & Al. 458. "Where an act of parliament doth alter the service, tenure, or interest of the land or other thing, in prejudice of the lord or of the custom of the manor, or in prejudice of the tenant, there the general words of such act of parliament shall not extend to copyholds; but where an act of parliament is generally made for the good of the weal public, and no prejudice can accrue by reason of alteration of any interest, service, tenure, or custom of the manor, there many times copyhold and customary estates are within the general purview of such acts." *Heydon's Case*, 3 Rep. 8. For an example of copyholds being held to be included in a statute, under the general description of lands, tenements and hereditaments, where no prejudice could ensue to the lord, see *Doe v. Bottrill*, 5 B. & Ad. 181.

(*y*) 3 Rep. 8.
 (*z*) "It is not a sufficient proof that lands have been granted in tail; for albeit lands have anciently and usually been granted by copy to many men, and to the heirs of their bodies, that may be a fee simple conditional, as it was at the common law. But if a remainder have been limited over of such estates and enjoyed, or if the issues in tail have avoided the alienation of the ancestor, or if they have recovered the same in writs of formedon in the descender, these and such like be proofs of an estate tail." Co. Litt. 60 b; see 3 Dougl. 806.
 In some places (as in the forest of Knareborough), there is an express custom prohibiting entails; and even without such prohibition, copyhold lands cannot be entailed, unless there be a special custom for the purpose; and in manors where there is no such custom, a limitation to A. and the heirs of his body confers a fee simple conditional as at common law. 5 Scott, 787. An entail in lands subject to the custom of Borough English goes to the youngest son (2 W. Bl. 1238); and so of other customary descents. 2 B. & Ad. 95; *Trash v. Wood*, 4 Myl. & Cr. 324.

(*a*) Co. Litt. 224.
 (*b*) *A.-G. v. Duke of Marlborough*, 8 Mod 553; *Savell's Case*, Ca. t. Talb. 16.
 (*c*) Com. Recov. 5.
 (*d*) 1 Rep. 181.

frauded of their debts; for, if tenant in tail could have charged his estate with [* 227] their payment, he might also have defeated his issue * by mortgaging it for as much as it was worth; innumerable latent entails were produced to deprive purchasers of the lands they had fairly bought; of suits in consequence of which our ancient books are full: and treasons were encouraged; as estates tail were not liable to forfeiture, longer than for the tenant's life. So that they were justly branded, as the source of new contentions and mischiefs unknown to the common law; and almost universally considered as the common grievance of the realm (e). But as the nobility were always fond of this statute, because it preserved their family estates from forfeiture, there was little hope of procuring a repeal by the legislature, and therefore, by the connivance of an active and politic prince, a method was devised to evade it.

About two hundred years intervened between the making of the statute *de donis*, and the application of common recoveries to this intent, in the twelfth year of Edward IV.: which were then openly declared by the judges to be a sufficient bar of an estate-tail (f). For though the courts had, so long before as the reign of Edward III., very frequently hinted their opinion that a bar might be effected upon these principles (g), yet it never was carried into execution, till Edward IV., observing (h) (in the disputes between the houses of York and Lancaster) how little effect attainders for treason had on families, whose estates were protected by the sanctuary of entails, gave his countenance to this proceeding, and suffered Taltarum's case to be brought before the court (i): wherein, in consequence of the principles then laid down, it was in effect determined, that a common recovery suffered by a tenant in tail should be an effectual destruction thereof [* 228] of (k). Common recoveries thenceforward were * adopted as ordinary assurances, and continued to be so until, as we shall see, they were abolished to make way for a more simple mode of effecting the same object in manner suited to modern ideas and wishes. Whilst, however, they existed they were looked upon as the legal mode of conveyance, by which a tenant in tail might dispose of his lands and tenements: so that no court would suffer them to be shaken or reflected on, and even acts of parliament (l) by a side-wind countenanced and established them.

This expedient having greatly abridged estates-tail with regard to their duration, others were soon invented to strip them of other privileges. The next that was attacked was their freedom from forfeitures for treason. For, notwithstanding the large advances made by recoveries, in the compass of about threescore years, towards unfettering these inheritances, and thereby subjecting the lands to forfeiture, the rapacious prince then reigning, finding them frequently resettled in a similar manner, to suit the convenience of families, had address enough to procure a statute (m), whereby all estates of inheritance (under which general words

(e) Co. Litt. 19; Moor, 156; 10 Rep. 38.

(f) 1 Rep. 131; 6 Rep. 40.

(g) 13 Rep. 37, 38.

(h) Pigott, 8.

(i) Year Book, 12 Ed. 4, 14, 19; Fitzh. Abr. tit. *Faux Recov.* 20; Bro. Abr. *lb.* 30, tit. *Recov. in value*, 19; tit. *Tails*, 36.

(k) In *Taltarum's Case* the court decided, that, under the circumstances, the entail had

not been destroyed; but they founded their argument upon the assumption that a recovery properly suffered would have destroyed it.

(l) 11 Hen. 7, c. 20; 7 Hen. 8, c. 4; 34 & 35 Hen. 8, c. 20; 14 Eliz. c. 8; 4 & 5 Ann. c. 16; 14 Geo. 2, c. 20.

(m) 26 Hen. 8, c. 18.

Estates tail
forfeited for
treason.

estates tail were covertly included) are declared to be forfeited to the king upon any conviction of high treason.

The next attack which they suffered in order of time was by the statute 32 Hen. 8, c. 28, whereby certain leases made by tenants in tail, which do not tend to the prejudice of the issue, were allowed to be good in law, and to bind the issue in tail. This power of granting leases by simple deed without enrolment, has been extended so as to allow a tenant in tail to grant a lease * for any term not exceeding twenty-one years, from the date of the [* 229] lease, or from any time not exceeding a year from that date; so that not less than five-sixths of a rack rent shall be reserved(n).

But, in the meantime, a further means of destroying the efficacy of an estate-tail in preserving family property had been adopted. Fines, as they might be barred were called, which were, like common recoveries, in appearance by fine. a species of judicial action, had acquired under Edward I. (o) some validity in effecting this object, which, after being destroyed in the reign of Edward III. (p) was revived by acts of Richard III. (q) and Henry VII. (r), and extended first by judicial interpretation (s), and subsequently by statutory declaration, in the reign of Henry VIII. (t), to operate as a complete bar to all persons claiming under an entail.

Thenceforth fines continued to be in use as a means of barring all claim by the issue in tail until their abolition, which took place at the same time as that of common recoveries (u). In order, however, that the property of the crown might be in no danger of infringement, all estates-tail created by the crown, and of which the reversion remained in the crown, were excepted out of the statute; and with the like object, and for fear of ambiguity, another act (x) was passed (declaratory, however, only of the previous law (y)) which enacted, that a common recovery should not bar the reversion in the king of an estate-tail created by the crown. This special protection given to reversions in the crown has been preserved by the modern act (z).

* Lastly, by a statute of the succeeding year (a), all estates-tail are rendered liable to be charged for payment of debts due to the king [* 230] by record or special contract; as since, by the bankrupt laws (b), they are also subjected to be sold for the debts contracted by a bankrupt. And, by the construction put on the statute 43 Eliz. c. 4, an appointment (c) by tenant in tail of the lands entailed, to a charitable use, is good without fine or recovery. Estates-tail have also been recently rendered available to judgment creditors for the payment of their debts, in a manner similar to that applicable to estates in fee simple (d).

Estates-tail, having been thus by degrees unfettered, are now nearly as much

(n) 3 & 4 Will. 4, c. 74, ss. 15, 40, 41.
(o) 18 Edw. 1, stat. 4.
(p) 34 Edw. 3, c. 18.
(q) 1 Rich. 3, c. 7.
(r) 4 Hen. 7, c. 24.
(s) Bro. Ab. tit. *Fines*, pl. 1; Dyer, 3 a.
(t) 33 Hen. 8, c. 38.
(u) 3 & 4 Will. 4, c. 74.
(x) 34 & 35 Hen. 8, c. 20; Co. Litt. 373, where this statute is much discussed. Also, see Cruise on Recoveries, 255.
(y) Plowd. Com. 554.

(a) 3 & 4 Will. 4, c. 74, s. 18.
(b) 33 Hen. 8, c. 39, s. 75.
(c) Stat. 21 Jac. 1, c. 19; 6 Geo. 4, c. 16, s. 65. This was repealed by the 55th section of the Fines and Recoveries Abolition Act (3 & 4 Will. 4, c. 74), and other provisions were substituted, giving to the creditors the same benefit from the estate-tail which the bankrupt could have had before his bankruptcy. (See ss 56, 57, &c.)
(d) 3 Vern. 453; Chan. Proc. 10.
(e) See *post*, c. xix.

in the absolute control of their owner as estates in fee simple; except when the estate is not in possession but expectant upon the determination of prior estates, in which case, as we shall see, a partial restraint upon alienation exists. But with this exception the interests, both of the issue in tail and of those who possess an estate limited to commence after the expiration of the estate-tail, are placed in the absolute power of the tenant in tail. (231)

[* 231]

* CHAPTER VIII.

FREEHOLDS, NOT OF INHERITANCE.

WE are next to consider such estates of freehold as are not of inheritance, but for life only. And of these estates for life, some are conventional, or expressly created by the acts of the parties; others merely legal, or created by construction and operation of law (a). We will consider them both in their order.

I. Estates for life, expressly created by grant or devise (which alone are properly conventional), are where a grant or gift is made of lands or tenements to a man, to hold for the term of his own life, or for that of any other person, or for more lives than one: in any of which cases he is styled tenant for life; only when he holds the estate by the life of another, he is usually called tenant *pur autre vie* (b). These estates for life are, like inheritances, of a feudal nature; they were given or conferred by the same feudal rights and solemnities, the same investiture or livery of seisin, as fees themselves were; and they were held by fealty, if demanded, and such conventional rents and services, as the lord or lessor and his tenant or lessee, had agreed on. Estates for life, rendering rent, are now not uncommon in the case of lands belonging to ecclesiastical corporations, colleges and other similar proprietaries.

Estates for life may be created, not only by the express words before mentioned, but also by a general grant, * without defining or limiting any specific estate (c). As, if one grants to A. B. the manor of Dale, this makes him tenant for life (d). For though, as there are no words of inheritance or heirs mentioned in the grant, it cannot be construed to be a fee, it shall however be construed to be as large an estate as the words of the donation will bear, and therefore an estate for life. Also such a grant at large, or a grant for term of life generally, shall be construed to be an estate for the life of the grantee (e), in case the grantor has authority to make such a grant: for an estate for a man's own life is more beneficial and of a

(a) Wright, 190.

(d) Co. Litt. 42.

(b) Litt. s. 56.

(e) *Ibid.*(c) *Hawkins v. Shippam*, 5 B. & Cr. 221, 228.

(231) For the various statutes of the different States upon this subject, see 1 Washb. Real Prop. 99, note 3, 8d ed.

higher nature than for any other life; and the rule of law is, that all grants are to be taken most strongly against the grantor(*f*), unless in the case of the king. If the grantor has not power to make a grant for the life of the grantee, the rule is different; and therefore a grant by a tenant in tail, without words of limitation, and not enrolled so as to operate as a disentailing deed, is construed to be a grant for the life of the grantor(*g*).

Estates for life may be created by any of the modes of assurance or conveyance proper for passing freehold estates; of the various sorts of these we shall see more hereafter. The rule that a gift to a person, without any addition of words of inheritance, conferred on him only an estate for life, was formerly applied to the construction of wills as well as of deeds. It was found, however, that it very frequently had the effect of defeating the intention of testators, who little suspected when they made their wills, as must often happen, without professional assistance, that a devise to A. B. of all their lands gave only a life interest in them. The recent Wills Act (*h*), therefore, has abrogated this technical rule, and, * in order to create a life estate by will, it is now (since the year 1837) [* 233] necessary to declare by express words that the estate is to be limited for a life or lives.

Such estates for life will, generally speaking, endure as long as the life for which they are granted: but there are some estates for life, which may determine upon future contingencies, before the life for which they are granted expires. As, if an estate be granted to a woman during her widowhood, or to a man until he be promoted to a benefice; in these, and similar cases, whenever the contingency happens, when the widow marries, or when the grantee obtains a benefice, the respective estates are absolutely determined and gone (*i*). Yet, while they subsist, they are reckoned estates for life; because, the time for which they will endure being uncertain, they may by possibility last for life, if the contingencies upon which they are to determine do not sooner happen. And, moreover, in case an estate be granted to a man for his life, generally, it may also determine by his civil or upon natural death: as formerly if he entered a monastery, whereby he was or civil death. dead in law (*k*): for which reason in conveyances the grant is usually made "for the term of a man's natural life;" which can only determine by his natural death. (232)

(*f*) *Ibid.* 36.

(*g*) Co. Litt. 42 a.

(*h*) 7 Will. 4 & 1 Vict. c. 26, s. 26, governing all wills made since the 31st of December, 1837.

(*i*) Co. Litt. 42, 3 Rep. 20.

(*k*) 2 Rep. 48. It is scarcely necessary to

repeat that civil death by profession is not now recognised by the law of England. (*R. v. Lady Portington*, 1 Salk. 162; *Re Metcalfe's Trust*, 3 De G. J. & S. 123.) As to the cases of civil death which are still possible, *vide ante*, vol. i. p. 156.

(232) A life estate may be terminated by a *forfeiture* before the natural death of the tenant. And in some of the States where such tenant executes a conveyance of a greater estate than he has, this will work a forfeiture of his estate. *Redfern v. Middleton*, 1 Rice's S. C. 459; *Stump v. Findlay*, 2 Rawle, 168; *Lyle v. Richards*, 9 S. & R. 823, 870. But, the prevailing rule is that such a conveyance does not forfeit the estate, it passes such estate as the tenant has and nothing more. *McKee v. Pfout*, 3 Dall. 486; *Pendleton v. Vandevier*, 1 Wash. 381; *Rogers v. Moore*, 11 Conn. 558; *Bell v. Twilight*, 22 N. H. (2 Fost.) 500; *Stevens v. Winship*, 1 Pick. 818; see, also, *Jackson v. Van Hoesen*, 4 Cow. 825.

The incidents to an estate for life are principally the following; many of which are applicable not only to that species of tenancies for life, which are expressly created by deed or will; but also to those which are created by act and operation of law.

Incidents
thereto.

Every tenant for life, unless restrained by covenant or agreement, may, of common right, take upon the land demised to him reasonable estovers (*l*) or

Reasonable
estovers.

[* 234] botes (*m*), for he * has a right to the full enjoyment and use of the land, and all its profits, during his

Waste.

estate therein. He is not permitted to cut down timber or do other waste upon the premises (*n*), except for purpose of repairing houses or hedges (*o*); for the destruction of such things as are not the temporary profits of the tenement is not necessary for the tenant's complete enjoyment of his estate, but tends to the permanent and lasting loss of the person entitled to the inheritance. (233)

He may, however, continue the working of old mines and make new shafts or pits in mines already open in order to pursue the same vein of minerals (*p*). Waste, *vastum*, is a spoil or destruction of that which constitutes the corporeal hereditament, and is in a legal point of view both actual, such as that already mentioned, and permissive, as where houses are allowed to fall into ruin, or sea walls to fall in (*q*); but we may remark that, as regards tenants for life, the remedy at law for permissive waste appears to be doubtful (*r*), and in equity is none at all (*s*). Where the commission of acts of waste, such as cutting down timber that is falling into decay, is clearly for the benefit of all persons interested in the property, the courts have permitted a [* 235] * tenant for life to cut it, the proceeds being invested for the benefit of the remaindermen, but the annual interest being given to the tenant for life (*t*). But where the waste is wholly unauthorised, the proceeds of the waste or the things wasted belong to the owner of the first estate unimpeachable for waste, if there be one in existence at the time, and if there be none it belongs to the owner of the first estate of inheritance, and ought to be

(*l*) See ante, p. 22.

(*m*) Co. Litt. 41. An exception of timber in the lease is an exception of estovers, and the taking them is then trespass, not waste. (Vin. Ab., Waste, (M), pl. 26.)

(*n*) Ibid. 53. *Viner v. Vaughan*, 2 Beav. 486; *Lewis Bowles' Case*, 11 Rep. 82 b.; *Davis v. Duke of Marlborough*, 2 Swanst. 108, 145.

(*o*) Co. Litt. 54 b.; Vin. Ab., Waste, (M); *Darby v. Askwith*, Hob. 284; *Simmons v. Norton*, 5 Moo. & P. 645; he may not sell the timber even to pay the wages of the workmen who do the repairs.

(*p*) *Clavering v. Clavering*, 2 P. W. 888; *Viner v. Vaughan*, 2 Beav. 486. He may renew the working of abandoned mines; *Bagot v. Bagot*, 82 Beav. 509, where the right gen-

erally of tenant for life was much discussed; and as to windfalls, see further *Bateman v. Hotchkin*, 81 Beav. 486, and *Earl Conoley v. Wellesley*, L. R. 1 Eq. 656.

(*q*) 2 Inst. 145; Vin. Ab. Waste, D.

(*r*) *Gibson v. Wells*, 1 N. R. 291; *Horne v. Bombow*, 4 Taunt. 764; *Warren v. Rudall*, 1 J. & H. 1.

(*s*) *Lord Castlemaine v. Lord Craven*, 2 Vin. Ab. 523; *Powys v. Blagrave*, 4 De G. M. & G. 448; *Warren v. Rudall*, 1 J. & H. 1.

(*t*) *Tooker v. Annesley*, 5 Sim. 235; *Waldo v. Waldo*, 7 Sim. 261; see 12 Sim. 107; *Consett v. Bell*, 1 Y. & C. C. C. 569; *Peters v. Blake*, 6 L. J. Ch. 157; *Phillips v. Barlow*, 14 Sim. 268; *Gent v. Harrison*, John. 517; see also *Bateman v. Hotchkin*, 81 Beav. 486.

(233) Although a tenant for life is entitled to reasonable estovers, he has no right to dig up and use soil or wood on the demised premises for the purpose of manufacturing bricks for sale. *Livingston v. Reynolds*, 2 Hill, 157. He may cut timber for the necessary use of the farm, but not for the purpose of carrying it off to be used elsewhere, or to be sold. *Van Deusen v. Young*, 29 N. Y. (2 Tiff.) 9.

retained for his benefit, the annual interest in this case not being given to the tenant for life so improperly committing waste (*u*).

It is common, in modern settlements by which life estates are limited, to create them "without impeachment of waste." The effect of this is to give the tenant for life very enlarged powers as to doing acts of the nature of waste (*x*). Still his power, in this respect, is not even then equal to that which a tenant in fee simple possesses; because courts of equity have established **Equitable waste.** a doctrine that he may not commit any act which tends to the destruction of the thing settled (*y*); as, for instance, the pulling down of a castle (*z*) or family mansion, or even cutting any timber which has been planted or left standing for ornament (*a*). And it may be remarked that no question of *taste is allowed to influence the decision whether or not the trees [* 236] or other plantations are ornamental; the only point to be ascertained is, whether they were in fact planted or left standing for ornament (*b*); and if this fact be established trees may not be cut down, though they be two miles distant from the mansion (*c*). Neither is the test of what an owner would do in the prudent management of his property applicable to permit a tenant for life to commit equitable waste (*d*).

A tenant for life, or his representative, shall not be prejudiced by the contingent and uncertain nature which characterises the determination of his estate (*e*). Therefore, if a tenant for his own life sows the lands, and dies before harvest, his executors shall have the emblements (*f*) * or [* 237] profits of the crop, and they may enter for the purpose

(*u*) *Bagot v. Bagot*, 32 Beav. 509. The question to whom the corpus of such proceeds belongs, whether to the owner of a subsequent estate for life unimpeachable for waste, or to the owner of the first estate of inheritance, has been a good deal discussed. See *Gent v. Harrison*, John. 517, where the doctrine opposite to that in the text was expressed, though not decided.

(*x*) *Lewis Bowles' Case*, 11 Rep. 796; and see notes thereto in Tud. L. C. Conv. 19 *et seq.*, and *Davies v. Wescomb*, 2 Sim. 425.

(*y*) In an ordinance of Philip le Bel, in 1302, we find this prohibition:—"Ne fassent aucun gast et s'il y a aucun arbre qui ait esté gardé pour sa beauté ou pour sustentation de maisons, qu'il soit encore gardé," which shows the feeling regarding these acts of waste to have been in ancient times peculiarly strong.

(*z*) *Vane v. Lord Barnard*, 2 Vern. 738.

(*a*) *Aston v. Aston*, 1 Ves. S. 265; *Rolt v. Lord Somerville*, 2 Eq. Ca. Ab. 759. The cases upon the subject are very numerous; they will be found collected in the notes to *Garth v. Cotton*, 1 Wh. & Tud. L. C. Eq. 559, *et seq.* Ornamental timber in a park was protected from being felled, even though the mansion had been pulled down. *Wellesley v. Wellesley*, 6 Sim. 497.

(*b*) *Marquis of Downshire v. Lady Sandys*, 6 Ves. 110; *Ford v. Tynte*, 2 De G. J. & S. 127.

(*c*) *Marquis of Downshire v. Lady Sandys*, *ubi sup.*; *Day v. Merry*, 16 Ves. 375.

(*d*) It may be remarked that the term equitable waste is sometimes thought not very

appropriately used to denote cases of waste for which no action at law lies on account of technical difficulties. For instance, where the person having the first estate of inheritance cannot bring an action against the tenant for life, on account of there being an intermediate estate for life. See *Moore*, 554; *Tracy v. Tracy*, 1 Vern. 23; *Garth v. Cotton*, *ubi sup.*

(*e*) Co. Litt. 55.

(*f*) Emblements from *emblaer*, to sow with corn, are the corn and other growth of the earth produced annually, not spontaneously, but by labour and culture. They include hemp, flax, and the like, and even hops, which though growing from old roots require annual culture much the same as corn. Co. Litt. 55; *Latham v. Atwood*, Cro. Car. 515; Will. Exor. 597. Though perhaps the person who first plants hops is not necessarily entitled to the first crop whenever produced. See *Graves v. Weld*, 5 B. & Ad. 120, a case relating to clover, which, sown at the same time as barley, was mown after more than a year had elapsed. As to emblements in general, what they are, and who shall have them, see Com. Dig. Biens (G.) 1, 2; Vin. Ab., Emblements and Executors (U); Bac. Ab., Executors (H.), 3; Co. Litt. 55 a, b; 1 Williams on Executors, *ubi sup.*

With respect to the person who is entitled to emblements, Lord Ellenborough observed, in *West v. Moore*, 8 East, 343, that the distinction between the heir and devisee in this respect was capricious enough. In the testator himself, the standing corn, though part of

of carrying them away (*g*): for the estate was determined by the act of God, and it is a maxim in the law, that *actus Dei nemini facit injuriam*. (234) The representatives, therefore, of the tenant for life shall have the emblements to compensate for the labour and expense of tilling, manuring, and sowing the lands; and also for the encouragement of husbandry, which being a public benefit, tending to the increase and plenty of provisions, ought to have the utmost [* 238] security and privilege that the law can give it (*h*). * Therefore, by the feudal law, if a tenant for life died between the beginning of

the realty, subsists for some purposes, as a chattel interest, which goes on his death to his executors, as against the heir; though, as against the executors, it goes to the devisee of the land, who is in the place of the heir, unless otherwise directed. This is founded upon a presumed intention of the deviser in favour of the devisee. But this again may be rebutted by words which show an intent that the executor shall have it. A devise to the executor of all the testator's stock on the farm, entitles him to the crops, in opposition to the devisee of the estate. (*Cox v. Gonsalve*, 6 East, 604, n. (d); Com. Dig., Biens (G. 2).) The executor's claim is good against the heir of a tenant in tail. (Com. Dig., Biens (G. 2); but not against a dowress or a surviving joint-tenant. (*Id.*; Owen, 102; Dyer, 316 a.)

It was held formerly, that if a devise be to A. for life, remainder to B., and before severance A. dies, B. shall have them (*Anon.*, Cro. Eliz. 61; see *Spencer's Case*, Win. 51; Godb. 159); but the contrary has been long established, and the present rule is that the executor of the tenant for life shall have them, it being for the benefit of the kingdom, which is interested in the continual produce of corn, and will not suffer them to go to the remainderman. (*Lawton v. Lawton*, 3 Atk. 16.)

(*g*) Co. Litt. 56 a.

(*h*) If therefore the person whose estate determines has not himself been at the expense of the tillage and sowing, the rule does not necessarily apply; as, where A. having sown land, grants it to B. for life, remainder

(234) A tenant for life, or of any estate of uncertain duration has, in this country, a clear and well-established right to emblements. In determining what are emblements, the general rule is, that they include such crops as are produced by annual planting and culture, among which are wheat, rye, corn, oats, peas, barley, beans, potatoes, hemp, flax, tares, saffron, and the like.

On the other hand, the general rule is, that such products of the land as are not the result of annual labor or culture, do not fall within the definition of emblements. And among these articles are the various kinds of grasses which endure for more than one year; so of fruit growing, or of other things which grow naturally for several years. Hops are made an exception, for although they produce for more than one year, it is necessary to cultivate them annually to render the crop of any value. So of trees planted by nurserymen for the express purposes of sale. *Miller v. Baker*, 1 Metc. 27; and see *Penton v. Robart*, 2 East, 90; *Lee v. Rimdon*, 7 Taunt. 191; *Wyndham v. Way*, 4 id. 316.

At common law, it is essential to a claim of emblements that the crop should have been planted during the life of the tenant; for no degree of preparation of the soil will give to one the fruits of seed planted by another after the determination of his tenancy. *Stewart v. Doughty*, 9 Johns. 108; *Price v. Pickett*, 21 Ala. 741; *Gee v. Young*, 1 Hayw. 17; *Thompson v. Thompson*, 6 Munf. 514.

To sustain a claim of emblements, the estate of the tenant must be of uncertain duration; for, if it is certain that his estate will terminate before he can reap the crop, it will be his own folly if he sows it for the benefit of his successor. *Whitmarsh v. Cutting*, 10 Johns. 380; *Debow v. Colfax*, 5 Halst. 128; *Kittredge v. Woods*, 3 N. H. 503; *Chesley v. Welch*, 37 Me. 106; *Harris v. Carson*, 7 Leigh, 632; *Chandler v. Thurston*, 10 Pick. 205; *Hawkins v. Skegg*, 10 Humph. 31.

The termination of the tenancy must be by the act of God, or by the act of the lessor, for if the tenant voluntarily terminates the estate the right to emblements will be lost. A woman who is tenant during widowhood, will lose her rights to emblements if she marries. *Hawkins v. Skegg*, 10 Humph. 31; *Debow v. Colfax*, 5 Halst. 128.

A right to emblements gives a right to enter upon the land to cultivate a growing crop, and to cut and harvest it at the proper time. *Forsythe v. Price*, 8 Watts, 283; *Bevans v. Briscoe*, 4 Harr. & J. 139. The tenant is not entitled to the exclusive possession of the land, but merely a right of ingress and egress to secure the crop, which, for all other purposes, the owner of the land has the exclusive possession. *Humphries v. Humphries*, 3 Ired. 363.

September and the end of February, the lord, who was entitled to the reversion, was also entitled to the profits of the whole year; but if he died between the beginning of March and the end of August, the heirs of the tenant received the whole (i). From this our law of emblements seems to have been derived, but with very considerable improvements. So it is also, if a man be tenant for the life of another, and *cestui que vie*, or he on whose life the land is held, dies after the corn sown, the tenant *pur autre vie* shall have the emblements (k). The same is also the rule, if a life estate be determined by the act of law. Therefore, if a lease be made to husband and wife during coverture (which gives them a determinable estate for life,) and the husband sows the land, and afterwards they are divorced *a vinculo matrimonii*, the husband shall have the emblements in this case; for the sentence of divorce is the act

None, if estate
determine by
tenant's own
act.

of law (l). But if an estate for life be determined by the tenant's own act (as, by forfeiture for waste committed; or, if a tenant during widowhood thinks proper to marry), in these, and similar

What are emble-
ments.

own acts, shall not be entitled to take the emblements (m). (235)

The doctrine of *emblements extends not only to corn sown, but to roots planted (n), and other annual artificial profits, but it is otherwise [* 239] of fruit-trees, grass, and the like; which are not planted annually at the expense and labour of the tenant, but are either a permanent, or natural profit of the earth (o). For when a man plants a tree, he cannot be presumed to plant it in contemplation of any present profit; but merely with a prospect of its being useful to himself in future, and to future successions of tenants (p). (236) The advantages also of emblements are particularly extended to the parochial clergy by the statute 28 Hen. 8, c. 11 (q). For all persons, who are presented

to C., and B. dies before the crop is severed, C. shall have the crop and not B.'s executor. (*Grantham v. Hawley*, Hob. 135; Vin. Ab., Emblements (A).) But if a testator, having sown the land, devise it to A. for life, without any remainder over, and both the testator and A. die before the crop is severed, the executors of A. shall have the crop (Winch, 51; Co. Litt. 55 b); but if there had been a remainder over, the remainderman would have been entitled. The ground of this distinction may be collected from the preceding note. From a dictum in Hob. 132, it would appear that the rule is different in respect of a grant inter vivos; and that there, if the ultimate remainderman die before severance, the grantor's executors are entitled to the crops sown by such grantor.

(i) Feud. l. 2, t. 28.

(k) The rule applies to any uncertain estate or interest; as, for instance, to an estate for years, determinable with a life (Gilb. Ev. 215), or to an estate at will, determined by the lessor, or by the death of the lessee. (Co. Litt. 55 b).

(l) 5 Rep. 116.

(m) Co. Litt. 55. See *Davies v. Eytton*, 4 Moo. & P. 820, 7 Bingh. 154.

(n) This seems to be the better opinion, being that of Lord Coke (Co. Litt. 55 b.); but both Godolphin (pt. 2, c. 14, s. 1), and

Wentworth (Office of Exec. p. 152), assert that carrots, turnips, and other annual roots belong to the heir, because the executor is not at liberty to break the soil to reach them. In *Evans v. Roberts* (5 B. & Cr. 832), Bayley, J., founded his judgment on the assumption that potatoes were emblements. Sir E. V. Williams thinks that Coke's opinion would probably be upheld. Exors. 599.

(o) Co. Litt. 55, 56; 1 Roll. Abr. 728.

(p) Similar questions arise as to fixtures, put up by tenant for life of a mansion. See *D'Eyncourt v. Gregory*, L. R. 3 Eq. 382.

(q) That statute enables an incumbent to bequeath, by will, the corn and grain growing upon the glebe-land, manured and sown at his own cost (s. 6). But a parson who resigns his living is not entitled to emblements, although his tenant in such case would be entitled to them (*Bulwer v. Bulwer*, 2 B. & Al. 470); and by the stat. of Merton, 20 Hen. 8, c. 2, the executors of a tenant in dower are entitled to emblements,—an enactment which, according to the better opinion, was merely in affirmance of the common law. (Com. Dig., Biens (G. 2).) If the dowress marry, and her husband sow the land and die, his executors, and not the widow, are entitled to the crop; but it is otherwise if the land had been sown before marriage. (Bro. Ab., Emblements, pl. 26.

to any ecclesiastical benefice, or to any civil office, are considered as tenants for their own lives, unless the contrary be expressed in the form of donation.

A third incident to estates for life relates to the under-tenants, or lessees. For they have the same, nay greater indulgences than their lessors, the

Right of sub-lessee to emble- [* 240] original tenants * for life. The same; for the law of
ments. estovers and emblements, with regard to the tenant for

life, is also law with regard to his under-tenant, who represents him and stands in his place (*r*): and greater; for in those cases where tenant for life shall not have the emblements, because the estate determines by his own act, the exception shall not reach his lessee, who is a third person. As in the case of a woman who holds *durante viduitate*; her taking husband is her own act, and therefore deprives her of the emblements: but if she leases her estate to an under-tenant, who sows the land, and she then marries, this her act shall not deprive the tenant of his emblements, who is a stranger, and could not prevent her (*s*). (237) The lessees of tenants for life had also at

Apportionment of rent. the common law another most unreasonable advantage; for, at the death of their lessors, the tenants for life, these under-tenants might, if they pleased, quit the premises, and pay no rent to any body for the occupation of the land since the last quarter day, or other day assigned for payment of rent (*t*). To remedy which it is now enacted, that the executors or administrators of a tenant for life, on whose death any lease determined, shall recover of the lessee a rateable proportion of rent, from the last day of payment to the death of such lessor (*u*).

In order to promote the improvements of property, powers have been given by the legislature to tenants for life to charge the inheritance in certain cases where the money raised is laid out in draining, irrigation, embankment of rivers, erection of labourers' cottages, and in making other similar lasting improvements, and erecting permanent buildings calculated to enhance the value of the property (*x*). By these acts provisions are made for the [* 241] * sanction of any proposed works by the Inclosure Commissioners, and also, upon their sanction being obtained, for the execution of the works, the costs of which become a charge upon the inheritance of the land repayable by instalments (*y*).

Except when effected under the provisions of these enactments, a tenant for life will not have any allowance made to him for improvements effected upon the property (*z*). (238)

(*r*) Co. Litt. 55.

(*s*) The dictum in *Oland's Case* (5 Rep. 116 a), contra, is opposed by all the authorities. (See S. C., Cro. El. 460; Gouldsb. 189; 1 Roll. Ab. 727; *Bulwer v. Bulwer*, 2 B. & Al. 470.)

(*t*) 10 Rep. 127.

(*u*) *Ante*, p. 57.

(*x*) See 8 & 9 Vict. c. 56; 9 & 10 Vict. c. 101; 10 & 11 Vict. c. 11; 11 & 12 Vict. c. 119; 12 & 13 Vict. c. 100; 13 & 14 Vict. c. 31; 19 & 20 Vict. c. 9; 27 & 28 Vict. c. 114. See sect. 9, which enumerates the works authorised by the act.

(*y*) By 9 & 10 Vict. c. 101, advances of pub-

lic money can be made for the drainage of lands; repayable by instalments spread over twenty-two years.

(*z*) *Nairn v. Marjoribanks*, 3 Russ. 582; *Hübert v. Cooke*, 1 S. & S. 552; *Caldecott v. Brown*, 2 Hare, 144; *Ilorlock v. Smith*, 17 Beav. 572; *Dent v. Dent*, 30 Beav. 363; *Dunne v. Dunne*, 7 D. G. M. & G. 25. Sometimes, however, a permanent improvement is allowed to be made out of money which represents part of the corpus to the settled estate. See *Re Duke of Wellington's settled Estate*, 3 D. G. F. & J. 13. *Macnolly v. Fitzherbert*, 27 L. J. Ch. 272; *Re Dummer's will*, 2 D. G. J. & S. 515.

(237) *Bittinger v. Baker*, 29 Penn. St. 66, 70; *Bevans v. Briscoe*, 4 Har. & J. 139, are to the same effect.

(238) The same rule was applied in *Corbett v. Laurens*, 5 Rich. Eq. 301.

But if a tenant for life pays off an incumbrance upon the inheritance, he is *prima facie* entitled to that charge for his own benefit, and the burden of proving that he intended to benefit the inheritance is thrown upon the remainderman (*a*), though whilst such incumbrances exist the tenant for life is bound to keep down the interest (*b*). Lastly a tenant for life is entitled to the custody of the title deeds of the property, though he is bound to produce them when required by the remainderman for a proper purpose (*c*).

Under the provisions of one of the church building acts, *a tenant for life has power in a suitable case to dedicate a piece of the land to which he is so entitled as a site for a church or school, or other buildings for the promotion of religion or education (*d*). And under another act (*e*), he may, with the approbation of the court of chancery, dedicate lands to the public for roads or other similar purposes, if to do so will prove advantageous to the rest of the estate.

In other cases where land is purchased for public works under the authority of special acts of parliament, the tenant for life is empowered to enter into an agreement as to the price to be paid, and also to carry out the agreement by conveying the fee simple upon the price being paid into the court of chancery (*f*). Similar powers of dealing with the inheritance have been created by statute to meet the cases of settlements made by will when the lands are required for payment of the debts of the testator (*g*).

A tenant for life formerly could not (unless, as was commonly the case, the settlement under which he claimed gave him power to do so) make any disposition of the land which would continue valid after his death, for his own interest terminating then there could be nothing which his dealings could affect afterwards. The inconvenience of not being able to make a lease which would unquestionably endure throughout the term created by it, led to giving tenants for life a limited power of binding their successors by a lease. By the Leases and Sales of Settled Estates Act (*h*), every tenant for life *under an instrument of settlement which has come in force since 1st November, 1856, and does not contain an express declaration to the contrary, may demise any part of the settled estates other than the mansion house and the demesnes and lands usually occupied with it for any term not exceeding twenty-one years, to take effect in possession; but by every lease granted under the act the best procurable rent must be reserved, and no fine or premium may be paid for granting the lease, and it must contain a covenant to pay the rent and other usual and proper covenants. With the consent of the court of chancery other longer losses may be granted (*i*).

(*a*) *Burrell v. Lord Egremont*, 7 Beav. 205; *Bulwer v. Astley*, 13 L. J. c. 329. As to redemption of land tax by tenant for life under 38 Geo. 3, c. 6; 42 Geo. 3, c. 116; 16 & 17 Vict. c. 74; see *Ware v. Lord Egmont*, 4 D. G. M. & G. 480.

(*b*) *Hawkins v. Hawkins*, 6 L. J. Ch. 69; *Playfair v. Cooper*, 17 Beav. 187; *Sharshaw v. Gibbs*, Kay, 333.

(*c*) Sugd. V. & P. 444, 445, 14th ed.; *Davis v. Lord Dysart*, 20 Beav. 405; *Garner v. Hanington*, 22 Beav. 627; *Pennell v. Lord Dysart*, 27 Beav. 542.

(*d*) 58 Geo. 3, c. 45, s. 36.

(*e*) The Leases and Sales of Settled Estates Act, 19 & 20 Vict. c. 120, ss. 14, 15, & 16.

(*f*) See the provisions under which this is done in the Lands Clauses Consolidation Act, 1845, 8 Vict. c. 18. Where the amount is less than 20*l.*, the tenant for life takes the whole, s. 72.

(*g*) 11 Geo. 4 & 1 Will. 4, c. 47, s. 12; 2 & 3 Vict. c. 60; 13 & 14 Vict. c. 60, s. 29; and for those cases when the testator has charged the lands with his debts, see 22 & 23 Vict. c. 35, ss. 14—18.

(*h*) 19 & 20 Vict. c. 120; amended by 21 & 22 Vict. c. 77; and 27 & 28 Vict. c. 45.

(*i*) This part of the act applies to all cases whatever be the dates of the settlement. The terms authorised are twenty-one years for an occupation or agricultural lease, forty

The next estate for life is of the legal kind, as distinguished from conventional; viz. that of tenant in tail after possibility of issue extinct. This happens where one is tenant in special tail, and a person, from whose body the issue was to spring, dies without issue; or, having left issue, that issue becomes extinct. In either of these cases the surviving tenant in special tail becomes tenant in tail after possibility of issue extinct. As, where one has an estate to him and his heirs on the body of his present wife to be begotten, and the wife dies without issue (*k*): in this case the man has an estate-tail, which cannot possibly descend to any one; and therefore the law makes use of this long periphrasis, as absolutely necessary to give an adequate idea of his estate. For if it had called him barely tenant in fee-tail special, that would not have distinguished him from others; [* 244] and besides, he * has no longer an estate of inheritance, or fee (*l*), for he can have no heirs capable of taking *per formam doni*. Had it called him tenant in tail without issue, this had only related to the present fact, and would not have excluded the possibility of future issue. Had he been styled tenant in tail without possibility of issue, this would exclude time past as well as present, and he might under this description never have had any possibility of issue. No definition, therefore, could so exactly mark him out, as this of tenant in tail after possibility of issue extinct, which (with a precision peculiar to our own law) not only takes in the possibility of issue in tail, which he once had, but also states that this possibility is now extinguished and gone.

This estate must be created by the act of God, that is, by the death of that person out of whose body the issue was to spring, for no limitation, conveyance, or other human act can make it (*m*). If land be given to a man and his wife, and the heirs of their two bodies begotten, and they are divorced *a vinculo matrimonii*, they shall neither of them have this estate, but be mere tenants for life, notwithstanding the inheritance once vested in them (*n*). But a possibility of issue is always supposed to exist in law, unless extinguished by the death of the parties: even though the donees be each of them an hundred years old (*o*).

This estate is of an amphibious nature, partaking partly of an estate-tail, and partly of an estate for life. The tenant is, in truth, only tenant for life, but he enjoys many of the privileges of a tenant in tail; for instance, he is under no restriction as to committing waste (*p*): except such as is considered malicious, and would not be permitted in a tenant for life, who under the settlement is allowed to commit waste generally. If he violates this [* 245] * rule, as by cutting down ornamental trees, he will not be allowed to retain the proceeds, which will be impounded for the benefit of the owner of the first estate of inheritance in remainder (*q*).

years for a mining lease, sixty years for a repairing lease, and ninety-nine years for a building lease, and even longer periods if the court is satisfied that it is the custom of the district, and beneficial to the inheritance to grant longer leases.

(*k*) Litt. s. 32.

(*l*) 1 Roll. Rep. 184; 11 Rep. 80.

(*m*) 3 Leon. 341.

(*n*) Co. Litt. 28.

(*o*) Litt. s. 34; Co. Litt. 28.

(*p*) Co. Litt. 27.

(*q*) See Har. Co. Litt. 27 b, and 218 b. n. 2; 2 P. W. 241; *Williams v. Williams*, 15 Ves. 430; 12 East. 209; Bisset on Estates for Life, 20. The point, as to whose property the things wasted are, is not free from doubt: on the analogous question in the case of an ordinary tenant for life, see *ante*, p. 235.

We may also look upon this tenant in another point of view, as being a tenant in tail, subject to many of the restrictions of a tenant for life; thus he formerly forfeited his estate, if he aliened it in fee-simple (*r*): whereas such alienation by tenant in tail, though voidable by the issue, was no forfeiture of the estate to the reversioner: who cannot be concerned in interest, till all possibility of issue be extinct. But, in general, the law looks upon this estate as equivalent to an estate for life only; and, as such, will permit this tenant to exchange his estate with a tenant for life; which exchange can only be made, as we shall see hereafter, of estates that are equal in their nature. If this tenant convey his estate to another in the hands of the alienee, it is but an ordinary estate for the life of the alienor (*s*). We need scarcely add, the estate never could under the ancient law, and cannot under the modern law, be converted into a fee-simple.

Tenant by the curtesy of England, is where a man has been married to a woman who at any time during the coverture has been solely seised in possession of an estate of inheritance, that is, of lands and tenements (*t*) in *fee-simple or fee-tail; and has by her issue, born [*246] alive, which was capable of inheriting her estate. In this case he shall, on the death of his wife, hold the lands for his life, as tenant by the curtesy of England (*u*). (239)

This estate, according to Littleton, has its denomination, because it is used within the realm of England only, the word perhaps denoting that it was recognised by the courts of England (*x*); and it is said in the *Mirroure* (*y*) to have been introduced by king Henry I.; it appears also to have been the established law of Scotland, where it probably was introduced from England (*z*), and was there called *curialitas* (*a*). It is likewise used in Ireland, by virtue of an ordinance of king Henry III. (*b*.) But it appears (*c*) to have obtained in Normandy; and was likewise used among the ancient Almaines or Germans (*d*). And yet it is not generally apprehended to have been a consequence of feudal tenure (*e*), though some substantial feudal reasons may be given for its introduction. For, if a woman seised of lands hath issue by her husband, and

(*r*) *Ib.* 28. See *post*, c. 18.

(*s*) 3 Leon. 341.

(*t*) See a reference to some old instances of curtesy of titles and offices of honour, Co. Litt. 29 a. Mr. Hargrave says, "I cannot learn that there have been any claims of dignities by curtesy since Lord Coke's time; and from the want of modern instances of such claims, and from some late creations, by which women have been made peeresses in order that the families of their husbands might have titles, and yet the husbands themselves continue commoners, it seems as if the prevailing notion was against curtesy in titles of honour. However, I have not yet discovered whether this great question has ever formally received the judgment of the House of Lords." See *ante*, p. 215.

There is no curtesy of a copyhold, unless

by special custom. (Vin. Ab. (E), pl. 4). The custom, when there is one, will be construed strictly (*Savage's case*, 2 Leon. 109, 208, see 1 P. W. 69; 2 Raym. 1208.) There may be curtesy of rent-service or rent-charge, *Delthick v. Bradburn*, 1 Sid. 110, see 117; Co. Litt. 32 a.

(*u*) Litt. s. 35, 52.

(*x*) Tenant by the curtesy of England, is in Latin called *tenens per legem Angliæ*. (See stat. *pro Tenentibus per Legem Angliæ*, App. to Ruff. 29.)

(*y*) C. 1, s. 3.

(*z*) 2 Wood, d. 18.

(*a*) Crag, l. 2, c. 19, s. 4.

(*b*) Pat. 11, H. 3, m. 30, in 2 Bac. Abr. 659.

(*c*) Grand. Coustum. c. 119.

(*d*) Lindenbrog. LL. Alman. t. 92.

(*e*) Wright, 194.

(239) In this country an estate as tenant by the curtesy is firmly established, unless some statute prescribes a different rule. To give all the statutes relating to this subject is not important in this connection: and, as a general rule, nothing but the principles of the common law will be here noticed.

dies, the husband is the natural guardian of the child, and as such is in reason [* 247] entitled to the profits of the * lands in order to maintain it; for which reason the heir apparent of a tenant by the curtesy could not be in ward to the lord of the fee, during the life of such tenant (*f*). As soon, therefore, as any child was born, the father began to have a permanent interest in the lands, he became one of the *pares curtis*, did homage to the lord (*g*), and was called tenant by the curtesy initiate; and this estate being once vested in him by the birth of the child, was not suffered to determine by the subsequent death or coming of age of the infant.

There are four requisites necessary to make a tenancy by the curtesy; marriage, sole seisin of the wife, issue, and death of the wife (*h*). 1. The marriage must be canonical and legal. (240) 2. The seisin of the wife must be an actual seisin or possession of the lands; not a bare right to possess, which is a seisin in law, but an actual possession, which is a seisin in deed, or, what is for this purpose equivalent, an actual receipt of the rents and profits (*i*). A husband therefore cannot be tenant by the curtesy of a remainder or reversion (*k*); but the title of the husband is not displaced by the fact, that the estate of the wife is an equitable one, that is, where the wife is a beneficiary under a trust, for courts of equity deeming such equitable interest to be governed by all the same rules and subject to the same incidents as legal estates give the husband the same benefit out of them as he would take if they were legal (*l*). And a limitation of the equitable interest to the wife's separate use will not affect the husband's rights (*m*).

[* 248] *Again, the tenancy by curtesy is not defeated by the fact that the estate of the wife is by its limitation defeasible, that is to say, terminates through the happening of some event, such as her dying without leaving issue surviving her (*n*). Of course, if the lands have been aliened during the wife's lifetime, the husband cannot take as tenant by the curtesy, for they could not have been aliened without his consent, which would bind him (*o*). But of some incorporeal hereditaments a man may be tenant by the curtesy though there have been no actual seisin of the wife; as, in case of an advowson

(*f*) F. N. B. 143.

(*g*) 8 Rep. 36 a.

(*h*) Co. Litt. 30.

(*i*) Co. Litt. 29 a; 8 Rep. 96 a; 3 Atk. 469.

(*k*) 2 Saund. 382.

(*l*) *Cusburne v. Scarfe*, 1 Atk. 603; s. c. 2 Jac. & W. 194; *Watts v. Ball*, 1 P. W. 108; *Sweetapple v. Bindon*, 2 Vern. 535; *Cunningham v. Moody*, 1 Ves. S. 174.

(*m*) *Morgan v. Morgan*, 5 Mad. 408; but quære whether in such a case the wife could

not alien the property either by deed or will, and thus defeat the right of her husband. See *Taylor v. Meads*, 3 L. J. Ch. 204.

(*n*) *Buckworth v. Thirkell*, 3 B. & P. 652 n; s. c. 10 J. B. Moore, 235 n; where, however, the event which causes the defeasance is the birth of the issue, there is an exception to the rule, *Barker v. Barker*, 2 Sim. 249; 1 Jarm. Wills, 833.

(*o*) Unless the lands were settled to her separate use in fee. See *ante*, p. 247, n.

(240) No one can contract a valid marriage unless capable of giving an intelligent consent; and, therefore, the marriage of an idiot, a lunatic, or of any other person who has not the use of his or her understanding, is void. The test of capacity is such as is applied by the courts as to the fitness of a party to engage in the ordinary transactions of life, and, if found incapable as to such contracts, then there is the same incapacity to enter into a marriage contract. *Cole v. Cole*, 5 Sneed, 57; *Ward v. Dulaney*, 23 Miss. 410; *Atkinson v. Medford*, 46 Me. 510; *McElroy's Case*, 6 W. & S. 451; *Crump v. Morgan*, 3 Ired. Eq. 91; *Foster v. Means*, 1 Speer's Eq. 569. If the marriage is utterly void there can be no tenancy by the curtesy.

in gross, where the church has not become void in the lifetime of the wife; which a man may hold by the curtesy, because it is impossible ever to have
 3. Issue inherita- actual seisin of it, and *impotentia excusat legem* (p). 3. The
 ble born alive. issue must be born alive. (241) Some have had a notion that it
 must be heard to cry; but that is a mistake. Crying indeed is the strongest
 evidence of its being born alive; but it is not the only evidence (q). The issue
 must also be born during the life of the mother; for if the mother dies in
 labour, and the Cæsarean operation is performed, the husband in this case
 shall not be tenant by the curtesy: because, at the instant of the mother's death,
 he was clearly not entitled, as having had no issue born, but the land descended
 to the child, while he was yet in his mother's womb (r): (242) and the estate
 being once so vested, *shall not afterwards be taken from him (s). In [* 249]
 gavelkind lands, a husband may be tenant by the curtesy without
 having any issue (t); but the custom there is that he only has half the lands
 and loses these by a second marriage (u). In general there must be issue born:
 and such issue as is also capable of inheriting the mother's estate (x). There-
 fore, if a woman be tenant in tail male, and have only a daughter born, the
 husband is not thereby entitled to be tenant by the curtesy; because such issue
 female can never inherit the estate in tail male (y). And this suggests the
 principal reason, why the husband cannot be tenant by the curtesy of any
 lands of which the wife was not actually seised, (243) because, in order to
 entitle himself to such estate, he must have begotten issue that may be heir to
 the wife: but no one, by the old rule of law (z), could be heir to the ancestor
 of any land, whereof the ancestor was not actually seised; and therefore, as

(p) Co. Litt. 29.

(q) Dyer, 25; 8 Rep. 34. *Brock v. Kellack*,
 3 Giff. 58, and on appeal, 30 L. J. Ch. 498.

(r) For some purposes the law considers a
 child whilst in the mother's womb as being
 actually born, but this is only when the child
 obtains a benefit through the theory, *Blusson*
v. Blusson, 2 De G. J. & S. 665. In the case
 mentioned in the text, it might be to the
 material prejudice of the child to look upon
 it as born.

(s) Co. Litt. 29.

For a similar reason there can be no cur-
 tesy of a joint estate of inheritance. (Co.
 Litt. 183 a; 2 Roll. Ab. 90; 9 Mod. 150.)

(t) Co. Litt. 30.

(u) Robin. Gavelk. b. 2, c. 1.

(x) Litt. s. 56.

(y) Co. Litt. 29.

(z) Prior to the inheritance act, 3 & 4 Will.
 4, c. 106.

(241) See *Marsellis v. Thalheimer*, 2 Paige, 35; *Brock v. Kellock*, 3 Giff. 58; 7 Jur. N. S. 436;
 2 W. R. 939; 4 L. T. N. S. 280; affirmed, 7 Jur. N. S. 789; 30 L. J. Ch. 498; 8 W. R. 939.
 Any clear evidence of life, such as pulsation, is sufficient. *Ib.*

(242) An unborn child, after conception, if it is subsequently born alive, and so far
 advanced toward maturity as to be capable of living, is considered as in esse from the time
 of its conception, where it is for the benefit of the child that it should be so considered.
Hone v. Van Schaick, 3 Barb. Ch. 488.

(243) Where the wife has the legal estate, a constructive seisin is sufficient; as where the
 lands are vacant, or they are held under a lease by a tenant for years. *Davis v. Mason*, 1 Pct.
 506; *Jackson v. Johnson*, 5 Cow. 74; *Day v. Cochran*, 24 Miss. 261; *Stephens v. Hume*, 25
 Mo. 349; *Chew v. Commissioners, etc.*, 5 Rawle, 180; *Pierce v. Wanet*, 10 Ired. 446; *Wells*
v. Thompson, 13 Ala. 793; *Lowry v. Steele*, 4 Ohio, 170; *McCorry v. King*, 3 Humph. 267;
Powell v. Gosson, 18 B. Monr. 179.

Where the wife's seisin is merely that of a reversionary interest, after the determination
 of a prior freehold estate, which does not terminate during her life-time, her husband will
 not take as tenant by the curtesy. *Ferguson v. Tweedy*, 56 Barb. 168; *Taylor v. Gould*, 10
 id. 888; *Malone v. McLaurin*, 40 Miss. 163; *Redus v. Heyden*, 43 id. 614. There cannot be a
 tenant by the curtesy in a remainder or a reversion. *Prater v. Hoover*, 1 Cold. (Tenn.) 544.

the husband had never begotten any issue that could be heir to those lands, he could not be tenant of them by the curtesy (*a*), and this rule remains, although the law out of which it arose has been abrogated. It is not necessary, however, that the issue begotten by the husband should be heir apparent of the land, it is sufficient that there should be a possibility of its inheriting. Thus if a woman be solely seised of lands in fee-simple and have a son by a former marriage, yet her husband, if he have issue by her, shall be tenant by the curtesy, for possibly the child of the second marriage might have inherited the land (*b*). The same will happen if the wife be convicted of felony after the birth of the [* 250] issue (*c*). The time when the issue *is born is immaterial, provided it happens during the coverture; for, whether it were born before or after the wife's seisin of the lands, whether it be living or dead at the time of the seisin, or at the time of the wife's decease, the husband shall be tenant by the curtesy (*d*). The husband by the birth of the child becomes (as was before observed) tenant by the curtesy initiate (*e*), and may do many acts to charge the lands, but his estate is not consummate till the death of the wife: which is the fourth and last requisite to make a complete tenant by the curtesy (*f*). (244).

Tenant by
the curtesy
initiate.

4th, Death
of wife.

[* 251] Tenant in dower was anciently (*g*) where the *husband of a

(*a*) Co. Litt. 40.

(*b*) Prest. estates, 516.

(*c*) Co. Litt. 40 a. *Barker v. Barker*, 2 Sim. 249.

(*d*) Co. Litt. 29.

(*e*) *Ib.* 80.

(*f*) *Ib.*

(*g*) Besides the kind of dower described in the text, there were also other kinds of dower which are of little interest to any but the antiquary, having long fallen into disuse, and been abolished by the legislature, a short account of them is therefore all that is here necessary.

Littleton, ss. 48, 49, mentions a dower *de la plus belle*, where a man held lands, part of which was held by tenure of chivalry, and part by common socage, in which case the burden of the widow's dower seems to have been thrown by the land during the nonage of the heir, entirely upon the socage lands if of sufficient value. This dower fell with the other incidents of military tenure. It gained its name from the widow, as guardian

in socage, endowing herself of the fairest parts of the socage lands.

Another dower was that *ad ostium ecclesie* (Litt. 39), which was where a tenant in fee-simple of full age, openly at the church door, where all marriages were formerly celebrated, after affiance made and (Sir Edward Coke, in his translation of Littleton, adds) troth plighted between them, endowed his wife with the whole, or such quantity as he pleased of his lands; at the same time specifying and ascertaining the same; on which the wife, after her husband's death, entered without further ceremony. A third ancient dower was that *ex assensu patris* (s. 40); which was only a species of dower *ad ostium ecclesie*, made when the husband's father is alive, and the son, by his consent expressly given, endowed his wife with parcel of his father's lands. In either of these cases, they must (to prevent frauds) have been made *in facie ecclesie et ad ostium ecclesie*; *non enim valent facta in lecto mortali, nec in camera, aut alibi ubi clandestina fuere conjugia*. (Bracton, l. 2

(244) The interest of the husband as tenant by the curtesy initiate is such an estate as may be sold on an execution issued against him. *Litchfield v. Cudworth*, 15 Pick. 23; *Lancaster Co. Bank v. Stauffer*, 10 Penn. St. 398; *Watson v. Watson*, 18 Conn. 83; *Wickes v. Clarke*, 8 Paige, 161, 172; *Perkins v. Cottrell*, 15 Barb. 446, 448; *Canby's Lessee v. Porter*, 12 Ohio, 79; *Mattocks v. Stearns*, 9 Vt. 326; *Schneider v. Stahr*, 20 Mo. 269; *Williams v. Morgan*, 1 Litt. 167; *Brown v. Gale*, 5 N. H. 416; *Babb v. Perley*, 1 Me. (1 Greenl.) 6; *Nicholls v. O'Neill*, 2 Stockt. 88; *Montgomery v. Tate*, 12 Ind. 615; *Cheek v. Waldrum*, 25 Ala. 152. He has, at common law, the absolute control of the wife's lands during the joint lives of the husband and wife, and he may convey or mortgage it for that period. *Miller v. Shackelford*, 3 Dana, 289; *Barber v. Harris*, 15 Wend. 615; *Junction Railroad Co. v. Harris*, 9 Ind. 184. Upon a divorce from the bonds of matrimony for the adultery of the husband, his interest in the wife's land, as well as his power over it, ceases. *Vincent v. Parker*, 7 Paige, 65, 66; *Stearns v. Stearns*, 10 Vt. 540; *Mattocks v. Stearns*, 9 id. 326; *Burt v. Hurlburt*, id. 292; *Oldham v. Henderson*, 5 Dana, 255.

woman was solely (*h*) seised of an estate of inheritance, and died (*i*); in this case, with the exceptions presently noticed, the wife had the third part of all the lands and tenements whereof he was seised at any time during the coverture, to hold to herself for the term of her natural life. *Estate in dower.* Where the land was gavelkind, the widow was entitled to a moiety of the lands, but only so long as she remained chaste and unmarried (*k*); and of lands held by the tenure of borough English, she took the whole for her life. But over copyhold lands, which depend for all their incidents upon the customs of the manor of which they form part, the widow had no claim unless there was a special custom to that effect. Where such a custom has existed the widow's claim is usually called free-bench, and is regulated wholly by the customs. Sometimes she may take a third, sometimes half, and sometimes the whole of the lands for her life. But usually only those lands of which her husband was seised at the time of his death, and not, as in the case of dower, under the old law, of all lands of which at any time during the coverture he had been seised (*l*).

* The law of dower having been recently much changed by the legislature (*m*), it is necessary to distinguish the case of widows who [* 252] were married on or before the 1st of January, 1834, whose rights were unaffected by the statute, from that of those who were married after that date, who come under the operation of the new law. The statute extends to gavelkind lands (*n*), and it is presumed to those held in borough English, but not to copyhold lands (*o*); we will therefore examine the origin and rules of the ancient law, which though rapidly losing its practical importance, cannot yet be treated as obsolete, and afterwards show what modifications the legislature has introduced.

Dower is called in Latin by the foreign jurists *doarium*, but by Bracton and our English writers *dos*: which among the Romans signified the marriage portion, which the wife brought to her husband; but with us is applied to signify this kind of estate, to which the civil law, in its original state, had nothing that bore a resemblance; nor indeed is there anything in general more different, than the regulation of landed property according to the English and Roman laws. Dower out of lands seems also to have been unknown in the early part of our Saxon constitution; for, in the laws of king Edmund (*p*), the wife is directed to be supported wholly out of the personal estate. Afterwards, as we have seen, in gavelkind tenure, the

c. 39, s. 4.) These sorts of dower were abolished by 8 & 4 Will. 4, c. 105, s. 18, having, however, previously long fallen into disuse. See as to these species of dower, C. B. Gilbert's treatise.

(*h*) There was and is no dower of land held by the husband jointly with another, Litt. s. 37.

(*i*) The banishment of the husband by abjuration, or by act of Parliament, being a civil death, was held to entitle the wife to her dower immediately; but if a man became civilly dead by profession, it gave her no avail, without whose consent he could not have entered into religion, and therefore his wife, after such civil death, was not dowable until his natural death. (Co. Litt. 132 b.)

(*k*) Co. Litt. 33 b; Rob. Gavelk. 159; Bro. Dower, 70.

(*l*) *Godwin v. Winsmore*, 2 Atk. 525; *Hinton v. Hinton*, 2 Ves. Sen. 631; *Salisbury v. Hurd*, Cowp. 481. See also *Doe v. Sanders*, 3 Dougl. 363.

The manor of Cheltenham is an exception; there free-bench is allowed out of all lands, of which the husband has been seised during the coverture. See an act of 1 Car. 1, and *Doe d. Riddell v. Grinnell*, 1 G. & D. 181; *Riddell v. Jenner*, 10 Bing. 29. As to the widow's interest in the manor of Taunton Deane, see *Locke v. Southwood*, 1 M. & C. 411; *Norcott v. Gordon*, 14 Sim. 258.

(*m*) 8 & 4 Will. 4, c. 105.

(*n*) *Farley v. Bonham*, 2 J. & H. 177.

(*o*) *Powdrell v. Jones*, 2 Sm. & G. 407; *Smith v. Adams*, 5 De G. M. & G. 712.

(*p*) Wilk. 75.

widow became entitled to a conditional estate in one half of the lands with a proviso that she remained chaste and unmarried; this condition is common also in copyhold dowers, or free-bench. Yet some (*q*) have ascribed the introduction of dower to the Normans, as a branch of their local tenures; though we cannot expect any feudal reason for its invention, since it was not a part of the [* 253] pure, primitive, simple law of feuds, but was first of all * introduced into that system (wherein it was called *triens tertia* (*r*) and *dotalitium*) by the emperor Frederick II. (*s*); who was contemporary with our king Henry III. It is possible, therefore, that it might be with us the relic of a Danish custom: since, according to the historians of that country, dower was introduced into Denmark by Sweyn, the father of our Canute the Great, out of gratitude to the Danish ladies, who sold all their jewels to ransom him when taken prisoner by the Vandals (*t*). However this be, the reason which our law gives for adopting it is a very plain and sensible one; for the sustenance of the wife, and the nurture and education of the younger children (*u*).

In treating of this estate, let us consider, 1st, who may be endowed; 2ndly, of what she may be endowed; 3rdly, the manner how she shall be endowed; and 4thly, how dower may be barred or prevented, in each case distinguishing the ancient from the present law.

Who may be endowed. She must be the actual wife of the party at the time of his decease. If she be divorced *a vinculo matrimonii*, she shall not be endowed; for *ubi nullum matrimonium, ibi nulla dos* (*x*). (245.)
 Who may be endowed. But a divorce *a mensa et thoro*, or judicial separation only, does not destroy the dower (*y*); not even for adultery by the common law (*z*). But by the statute Westm. 2 (*a*), if a woman voluntarily leaves (which the laws calls eloping from) her husband, and lives with an adulterer, she loses her dower, unless her husband be voluntarily [* 254] reconciled to her (*b*). (246). * It was formerly thought that the wife

(*q*) Wright, 193.
 (*r*) Crag. l. 2, t. 22, s. 9.
 (*s*) *Id.*
 (*t*) Mod. Un. Hist. xxxii. 91.
 (*u*) Bract. l. 2, c. 39; Co. Litt. 30.
 (*x*) Bract. l. 2, c. 39, s. 4.
 (*y*) Co. Litt. 32.
 (*z*) *Sidney v. Sidney*, 3 P. W. 268; *Hetherington v. Graham*, 3 Moo. & P. 899, 408. Yet, among the ancient Goths, an adulteress was punished by the loss of her *dotalitii et trientis ex bonis mobilibus viri*. (Stiernh. l. 3, c. 2.)
 (*a*) 13 Edw. 1, c. 34; 2 Inst. 432-4.
 (*b*) And in a case where John de Camoys had assigned his wife, by deed, to Sir William

Paynel, knight, which Lord Coke calls *concessio mirabilis et inaudita*, it was decided in Parliament, a few years after the statute was enacted, notwithstanding the purgation of the adultery in the spiritual court, that the wife was not entitled to dower. (2 Inst. 435.) This is an indictable offence, being a great public misdemeanor. Moreover, conduct on the part of the husband is no excuse for adultery on the wife's part, and therefore she even in this case loses her dower. *Hetherington v. Hetherington*, 6 Bing. (o. s.) 135; *Woodward v. Douce*, 10 C. B. N. S. 722; *Bosstock v. Smith*, 34 Beav. 57.

(245) It has been held in several cases that the marriage relation must continue until the death of the husband, or the wife will not be entitled to dower; and that if she procures a divorce from the bonds of matrimony for the adultery of the husband she will lose her right of dower in his lands. *Rice v. Lumley*, 10 Ohio St. 596; *Given v. Marr*, 27 Me. 212; *McCafferty v. McCafferty*, 8 Blackf. 218; *Clark v. Clark*, 6 Watts & Serg. 85, 88; *Cunningham v. Cunningham*, 2 Ind. 233; *Burdick v. Briggs*, 11 Wis. 126; *Whitsell v. Mills*, 6 Ind. 229; *McCrancy v. McCrancy*, 5 Iowa, 232.

In New York the wife is allowed dower when the divorce was granted on account of the adultery of the husband. *Wait v. Wait*, 4 N. Y. (4 Comst.) 95, 109. For numerous statutes of the different States relating to this subject, see 1 Washb. Real Prop. 292 to 295, 3d ed.

(246) Although the wife be guilty of adultery, yet in some of the States she will not be barred of dower, unless the husband obtains a divorce. *Reynolds v. Reynolds*, 24 Wend.

of an idiot might be endowed, though the husband of an idiot could not be tenant by the curtesy (*c*): but, as an idiot cannot marry, being incapable of consenting to any contract, this doctrine has in fact no application (*d*). (247). By the ancient law the wife of a person attainted of treason or of felony could not be endowed; to the intent, says Staunforde (*e*), that if the love of a man's own life cannot restrain him from such atrocious acts, the love of his wife and children may; though Britton (*f*) gives it another turn: viz. that it is presumed the wife was privy to her husband's crime. However, the statute 1 Edw. 6, c. 12, abated the rigour of the common law in this particular, and allowed the wife her dower. But a subsequent statute (*g*) revived this severity against the widows of traitors, who are now barred of their dower (except in the case of certain modern treasons relating to the coin (*h*)), but not against the widows of felons. Formerly also an alien could not be endowed (*i*), unless she were queen consort, on the principle * that no alien could hold lands [* 255] (*k*); but the legislature has now given the same rights to alien women married to natural born subjects, or persons naturalized as English women possess (*l*). (248) The wife must be above nine years old at her husband's death, otherwise she shall not be endowed (*m*), though in Bracton's time the age was indefinite, and dower was then only due *si uxor*

(*c*) Co. Litt. 31.

(*d*) See stat. 15 Geo. 3, c. 30, & stat. 54 Geo. 3, c. 145.

(*e*) P. C. b. 3, c. 33.

(*f*) C. 110.

(*g*) 5 & 6 Edw. 6, c. 11.

(*h*) Stat. 5 Eliz. c. 11; 18 Eliz. c. 1; 8 & 9 W. 3, c. 26; 15 & 16 Geo. 2, c. 28.

(*i*) Lord Hale's MSS. contain the following note upon this subject:—"Notes. Anciently, a woman alien was not dowable; but by special act of Parliament not printed (Rot. Parl. 8 Hen. V. n. 15), all women aliens, who from thenceforth shall be married to Englishmen by licence of the king, are enabled to

demand their dower after the death of their husbands, to whom they should in time to come be married, in the same manner as English women." According to lord Coke, an infidel, the wife of a Christian, shall not be endowed; and the case which he mentions as authority for this is of a Jew in England who married a Jewess and was afterwards converted to the Christian faith, and died; the wife brought a writ of dower, but was held to be barred. (Co. Litt. 31 b.)

(*k*) Co. Litt. 31.

(*l*) 7 & 8 Vict. c. 66; besides the unprinted act mentioned by Lord Hale.

(*m*) Litt. s. 36.

193; *Cooper v. Whitney*, 3 Hill, 95; *Lakin v. Lakin*, 2 Allen, 45; *Bryan v. Batcheller*, 6 R. I. 543; *Rawlins v. Buttel*, 1 Houst. 224.

In some of the States the statute cited in the text, 13 Edw. I, ch. 34, is treated as a part of the common law of this country, and voluntary adultery on the part of the wife bars her dower without a previous divorce. *Walters v. Jordan*, 13 Ired. Law, 361; *Stigall v. Stigall* 2 Brock. 256, 260; *Bell v. Nealy*, 1 Bailey, 312.

(247) As to the capacity to contract a valid marriage. See note 240, *ante*, 568. A second marriage while the first wife is living is void. See note 140, *ante*, 439. And in such case the second wife is not entitled to dower.

In New York if the wife procures a divorce on account of the husband's adultery, and he then marries again during the life of the first wife, such second marriage will be void, and the second wife will not be entitled to dower. *Crosey v. Ogden*, 11 N. Y. (2 Kern.) 228.

A second marriage in such a case is entirely void. *Haviland v. Halstead*, 34 N. Y. (7 Tiff.) 643; *Smith v. Woodworth*, 44 Barb. 198.

(248) The alienage of the wife as a bar to dower is provided for by an act of congress, February 10, 1855, as follows: "That any woman who might lawfully be naturalized under

possit dotem promereri, et virum sustinere (n). (249). It is unlikely that any wife should now lose her dower by reason of her not satisfying this condition. No change in the law as to this branch of the subject was introduced by the recent act.

We are next to inquire of what a widow may be endowed. Herein is the great difference between the present and the ancient law of dower. A widow

not coming within the act is entitled to be endowed of all lands, Of what a widow may be endowed. tenements and hereditaments (o) of which her husband was solely seised for an estate of inheritance, i.e. in fee simple or fee

tail in possession at any time during the coverture, and of which any issue which she might have had might by possibility have been heir (p). There is, it may be observed, no necessity like that in the case of curtesy that any heritable issue should have been born. Therefore, if a man, seised in fee-simple, had a son by his first wife, and afterwards married a second wife, she [* 256] could be endowed of his lands; for her issue might by possibility * have been heir, on the death of the son by the former wife. But if there

were a donee in special tail who held lands to him and the heirs of his body begotten on Jane his wife; though Jane might be endowed of these lands, yet if Jane died, and he married a second wife, that second wife could never be endowed of the lands entailed; for no issue that she could have could by any possibility inherit them (q). A seisin in law of the husband will be as effectual as a seisin in deed, in order to render the wife dowable; for it is not in the wife's power to bring the husband's title to an actual seisin, as it is in the husband's power to do with regard to the wife's lands: which is one reason why he shall not be tenant by the curtesy, but of such lands whereof the wife, or

he himself in her right, was actually seised in deed (r). The Momentary seisin of husband. seisin of the husband, for a transitory instant only, when the same act which gives him the estate conveys it also out of him again, (as where land is granted to a man, to the use of another,) such a seisin will not entitle the wife to dower (s): for the land was merely *in transitu*, and no beneficial interest ever rested in the husband, the seisin being in him for the purpose of conveyance only. But if he takes any interest in the

(n) Litt. 2, c. 9, s. 3.

(o) Including rent service or rent-charge, commons, and tithes, Co. Litt. 31, 32 a. If, however, a rent be granted *de novo* to a man and the heirs of his body, and the grantee dies without issue, his widow will have no dower, for the rent terminates on his death. *Chaplin v. Chaplin*, 3 P. W. 229.

(p) See *Sumner v. Partridge*, 2 Atk. 47; *Buckworth v. Thirkell*, 8 B. & P. 652 n.;

Barker v. Barker, 2 Sim. 249. See *ante*, p. 247, as to the conditions regulating curtesy.

(q) Litt. s. 53.

(r) Co. Litt. 31. Where entry is requisite to perfect a common-law assurance, as in the case of an exchange or a partition between joint-tenants, the wife's title does not attach before entry. (Perk. s. 368.)

(s) Cro. Jac. 615; 2 Rep. 77; Co. Litt. 31.

the existing laws, married, or who shall be married to a citizen of the United States, shall be deemed and taken to be a citizen." 10 Stat. at Large, 604, ch. 71, § 2. The decisions relating to the rights of alien women to dower are quite numerous, and so there have been numerous statutes enacted by the different States. See 1 Scrib. on Dower, 149-174; Tyler on Inf. & Cov. 521-524; *Burton v. Burton*, 1 Keyes, 359.

(249) As to the age requisite to a legal marriage, see note 138, *ante*, 346.

land, for however brief an interval, it seems that the wife shall be endowed thereof (*t*). (250)

A widow has her dower also out of a defeasible fee in like manner as the husband takes his estate by curtesy by reason of a like estate in his wife (*u*). In short the widow * may be endowed of all her husband's lands, [* 257] tenements, and hereditaments, whether corporeal or incorporeal, with the exceptions and under the restrictions before mentioned; unless there be some special reason to the contrary. Thus, a woman could not be endowed of a castle, built for defence of the realm (*x*): nor of a common without stint; for, as the heir would then have one portion of this common, and the widow another, and both without stint, the common would be doubly stocked (*y*). And where dower is allowable, it matters not though the husband aliene the lands during the coverture; for he alienes them liable to dower (*z*).

(*t*) This doctrine was extended very far by a jury in Wales, where the father and son were both hanged in one cart, but the son was supposed to have survived the father, by appearing to struggle longest; whereby he became seised of an estate in fee by survivorship, in consequence of which seisin his widow had a verdict for her dower. (*Broughton v. Randell*, Cro. Eliz. 503.)

(*u*) *Ante*, p. 248.

(*x*) Co. Litt. 31; *Gerard v. Gerard*, 1 Lord Raym. 72; 3 Lev. 401. See also as to a mesuage *caput baronia*; 1 Salk. 54; 5 Mod. 64; Bracton, l. 2, fo. 97b.

(*y*) Co. Litt. 32; 1 Jon. 815.

(*z*) Co. Litt. 32.

(250) The law does not require a seisin by the husband for any particular length of time; and it is of no consequence how brief the time is if it is for the husband's own use and benefit. *Stanwood v. Dunning*, 14 Me. 290; *Gage v. Ward*, 25 id. 101; *McCauley v. Grimes*, 2 Gill. & J. 318; *McClure v. Harris*, 12 B. Monr. 261; *Douglass v. Dickson*, 11 Rich. L. 417. It makes no difference whether the seisin of the husband be one in law or one in deed. Ib.

If the seisin be merely instantaneous, and intended to accomplish some ulterior purpose, but without intent to clothe the husband with a beneficial interest, the wife will not have a right of dower. *Stanwood v. Dunning*, 14 Me. 290; *Wooldridge v. Wilkins*, 8 How. (Miss.) 360, 369; *Gully v. Ray*, 18 B. Monr. 107; *McCauley v. Grimes*, 2 Gill. & J. 318. It is not important whether the transaction consists of one conveyance or of several, nor whether they are executed between two parties only, or more. *Hasleton v. Lesure*, 9 Allen, 24, 26; *King v. Stetson*, 11 id. 407.

Upon the question whether an instantaneous seisin will confer a right of dower, more depends upon the character of the seisin than upon its duration. *McCauley v. Grimes*, 2 Gill. & J. 318; *Mayburry v. Brien*, 15 Pet. 39; *Webster v. Campbell*, 1 Allen, 314; *Pendleton v. Pomeroy*, 4 id. 510.

Where lands are conveyed to one person, and a third party advances the purchase-money upon an agreement by the purchaser to give a mortgage upon the lands to raise the money, and the mortgage is executed at the same time with the deed, the wife's dower will be subject to such mortgage. *Smith v. Stanley*, 37 Me. 11; *Kittle v. Van Dyck*, 1 Sandf. Ch. 76; *Clark v. Munroe*, 14 Mass. 351; *Mayburry v. Brien*, 15 Pet. 21, 39; *Gilliam v. Moore*, 4 Leigh, 30; *Cunningham v. Knight*, 1 Barb. 399.

So a mortgage executed by the purchaser to secure the purchase price of the land will render the wife's dower right subject to such mortgage. *Brackett v. Baum*, 50 N. Y. (5 Sick.) 8; *Mills v. Van Voorhies*, 20 N. Y. (6 Smith) 412; *Stow v. Tift*, 15 Johns. 458; *Reed v. Morrison*, 12 S. & R. 18; *Holbrook v. Finney*, 4 Mass. 566; *Bullard v. Bowers*, 10 N. H. 500; *Hinds v. Ballou*, 44 id. 620; *Griggs v. Smith*, 7 Halst. 22; *Bogie v. Rutledge*, 1 Bay, 312. If it is intended to cut off the wife's right of dower by a foreclosure, she ought to be made a party to the proceedings. Ib. If the mortgage is paid off by the husband during his life, or if it is done after his death by his executors or administrators, or by the husband's assigns, the wife will be endowed as though the mortgage had never existed. *Brown v. Lapham*, 3 Cush. 551; *Bullard v. Bowers*, 10 N. H. 500; *Künck v. Keckley*, 2 Hill's Ch. (S. C.) 250; *Coates v. Cheever*, 1 Cow. 460; *Hitchcock v. Harrington*, 6 Johns. 290; *Mathewson v. Smith*, 1 R. I. 22.

We may here notice a case of some importance, in which the widow, whose rights we are describing, was never entitled to dower; she had no claim to any dower of an equitable estate (a). This is, we may remember, contrary to what obtains in a like case as to a husband's curtesy. The reason (not a very satisfactory one) which has been assigned for there being no dower of an equitable estate is that at common law she had no dower of a use, and courts of equity in conformity with this rule of uses out of which equitable estates sprung, refused to allow her to claim dower: but inasmuch as the doctrine has been extended to equitable estates not arising out of uses, for instance so as to deprive her of dower if the estate happened to be mortgaged, in which case the husband had merely an equity of redemption in place of a legal estate (b) there was often considerable hardship.

Under the former law no dower of an equitable estate.

[* 258] It * has accordingly, as we shall see, been remedied by the act.

The other principal inconvenience arising out of the ancient law was the peculiarity of the widow's dower attaching, notwithstanding that the husband had parted with the land before his death (c). Therefore dower could never be released without the expensive process of a fine, and cannot now (when governed by the old law) be released during the husband's life, except by a deed acknowledged by the wife pursuant to the Fines and Recoveries Abolition Act.

Let us now see what changes the act we have alluded to introduced into the law of dower. In the first place the widow's right to dower is extended to equitable estates (d), so that the widow of a husband, entitled to any equitable interest in land equal to an estate of inheritance in possession, is entitled in a court of equity to dower out of such land. Next the act provides (e) that a right of entry or action only shall give the widow a title to dower, although the husband shall not have recovered possession of the land, provided that she sues for the dower within the period during which such right of entry or action might have been enforced.

Changes introduced by the act.

This gain on the part of the wife is, however, more than compensated by the power which is given to the husband of preventing the widow enjoying her right. For no widow coming within the act (f) can be endowed of any land (which word includes all hereditaments, whether corporeal or incorporeal, except such as are not liable to dower (g)), *which shall have been disposed of by her husband in his life-time, or by his will (h). Moreover all partial dispositions, such as mortgages or contracts made by the husband, and even his debts, shall be good against her dower (i). Her dower may be barred by any declaration that his widow shall not be entitled to dower made by the husband either in the deed by which lands have been conveyed by him, or in any deed (k), or even in his will (l): and her right to dower may be subjected to any restrictions which he may impose by his will (m), and lastly a

(a) *Chaplin v. Chaplin*, 3 P. W. 229; *Godwin v. Winsmore*, 3 Atk. 525.

(b) *Dixon v. Saville*, 1 Bro. C. C. 826. It is perhaps hardly necessary to state that if the husband was seised of a mere legal estate in trust for others, a widow would be restrained by a court of equity from claiming her dower. *Bevant v. Pope*, 2 Freem. 74; 2 Ves. Sen. 684.

(c) As to the extent of the widow's rights, when the land has been alienated, see *Doe d. Riddell v. Grinnell*, 1 G. & D. 181.

(d) 3 & 4 Will. 4, c. 105, s. 2.

(e) Sect. 3. On the construction of this section, see *Garrard v. Tuck*, 8 C. B. 231.

(f) That is who was married since the 1st Jan. 1834.

(g) 3 & 4 Will. 4, c. 105, s. 1.

(h) 3 & 4 Will. 4, c. 105, s. 4.

(i) *Ib.* s. 5.

(k) *Ib.* s. 6.

(l) *Ib.* s. 7.

(m) *Ib.* s. 8.

devise of any land or any interest in any land out of which she might have been endowed, to her or for her benefit, will bar her dower not only of that but of all his other land, unless a contrary intention shall be declared by his will (*n*). Thus it appears that the wife's title to dower is put absolutely within the control of her husband, and now she can only be endowed out of lands of which he has died intestate and concerning which he has made no declaration against her dower. And her dower even of these lands may be lost by a devise to her of some interest in other lands (*o*).

We proceed to consider the method of endowment, or assigning dower. By the old law, grounded on the feudal exactions, a woman could not be endowed without a fine paid to the lord; neither could she marry again without his licence; lest she should contract herself, and ^{so} [* 260] convey part of the feud to the lord's enemy (*p*). This licence the lords took care to be well paid for; and, as it seems, would sometimes force the dowager to a second marriage, in order to gain the fine. But to remedy these oppressions, it was provided, first by the charter of Henry I. (*q*), and afterwards by *magna carta* (*r*), that the widow shall pay nothing for her marriage (*s*), nor shall be distreined to marry afresh, if she chooses to live without a husband, but shall not, however, marry against the consent of the lord; and farther, that nothing shall be taken for assignment of the widow's dower, but that she shall remain in her husband's capital mansion-house for forty days after his death, during which time her dower shall be assigned. These forty days are called the widow's quarentaine; a term made use of in law to signify the number of forty days, whether applied to this occasion, or any other (*t*), (251) The particular lands, to be held in dower, must be assigned (*u*) by the heir of the husband, or his guardian; not only for the sake of notoriety, but also to entitle the lord of the fee to demand his services of the heir, in respect of the lands so holden. For the heir by this entry becomes tenant thereof to the lord, and the widow is immediate tenant to the heir, by a kind of subinfeudation or under tenancy completed by this investiture or assignment; which tenure may still be created, notwithstanding the statute of *quia* *emplores*, because the heir parts not with the fee simple, but only with an estate for life. If the heir or his guardian do not assign her dower within the term of quarentaine, or assign it

If heir neglects,
sheriff assigns
dower.

(*n*) *Id.* s. 9.

(*o*) It has been held that a conveyance made prior to 1834 to the old uses to bar dower (as to which, see page 267), with an express declaration that the intention was that the purchaser's then present or any future wife should not be endowed, did not as against the heir-at-law bar the dower of a second wife married subsequently to the act. *Fry v. Noble*, 20 Beav. 598. In other words the declaration against dower must be in a deed executed subsequently to the act. By s. 14 the same necessity exists as to the will (dealing with dower) being executed after the 1st Jan. 1834.

(*p*) *Mirr.* c. 1, s. 8.

(*q*) *Ubi supra*.

(*r*) *Cap.* 7.

(*s*) See a note on this passage, by Mr. Justice Coleridge, in which it is contended that the word *maritagium*, here translated marriage, was used in the ordinary sense of that word for the portion or estate given to a husband with a wife, i.e., in *frankmarriage*.

(*t*) It signifies, in particular, the forty days, which persons coming from infected countries are sometimes, though rarely now, obliged to wait, before they are permitted to land in England.

(*u*) *Co. Litt.* 84, 85.

(251) The widow's right of quarantine is well settled in this country, although the statutes of the different States have modified the rule as to the time of its duration, and as to the widow's rights until it is assigned. In many of the States she may remain in the mansion-house until her dower is assigned. See 1 Washb. Real Prop. 255, 256, note, 3d ed.

[* 261] *unfairly, she has her remedy at law and the sheriff is appointed to assign it (x). Or if the heir (being under age) or his guardian assign more than she ought to have, it may be afterwards remedied by writ of admeasurement of dower (y). If the thing of which she is endowed be divisible, her dower must be set out by metes and bounds; but if it be indivisible, she must be endowed specially; as of the third presentation to a church, the third toll-dish of a mill, the third part of the profits of an office, of tithe, and the like (z).

A suit in equity is now the more usual mode of the widow's asserting her right to dower when disputed, the costs of which, if her claim be improperly resisted, are thrown upon the person so acting, though where there is no improper resistance each party pays his own costs (a).
 Suit in equity now the usual remedy. (252.)

Tenancy in dower, even before the alteration of the law by the recent statute was not very common, for upon preconcerted marriages and in estates of considerable importance, the rights which the wife should enjoy as a widow, in respect of her husband's lands, were usually provided for by a settlement. This leads us to consider the methods by which dower may be barred or prevented, — a subject much more important formerly than it is now. A widow may be barred of her dower not only by elopement, divorce, the treason of her husband, [* 262] and other disabilities before mentioned (b), but also temporarily by *detaining the title deeds, or evidences of the estate from the heir, until she restores them (c). By the statute of Gloucester (d), if a dowager aliened the land assigned her for dower, she forfeited it *ipso facto*, and the heir might recover it by action (e). But now an attempted alienation only carries the estate for life of the dowager, and no forfeiture ensues. A woman also might be barred of her dower, by levying a fine, or suffering a recovery of the lands, during her coverture (f), when fines and recoveries were in use;

(x) Co. Litt. 84, 85. The writ of dower and plaints in the nature of a writ for dower or freebench were retained by 3 & 4 Will. 4, c. 27, s. 36, which abolished most of the ancient real and mixed actions.

(y) F. N. B. 148; Finch, L. 814; stat. Westm. 2, 13 Ed. 1, c. 7.

(z) C. Litt. 82; Doe d. Riddell v. Grinnell, 1 G. & D. 180.

(a) Lucas v. Calcraft, 1 Bro. C. C. 133; Mundy v. Mundy, 3 Ves. Jun. 128; Worgan v. Ryder, 1 Ves. & B. 20, and note; Bamford v. Bamford, 5 Hare, 203; Fry v. Noble, 20 Beav. 593; Harris v. Harris, 1 New Rep. 43.

(b) By the custom of Kent, the wife's dower of the moiety of gavelkind lands was in no case forfeitable for the felony of the husband, but where the heir should lose his inheritance. Noy's Max. 28. But this custom does not extend to treason. Wright's Tenures, 118; Rob. Gavelk. 292.

(c) Co. Litt. 39; 9 Rep. 15.

(d) 6 Edw. 1, c. 7.

(e) "The mischief, before the making of this statute (Gloucester, c. 7), was not where a gift or feoffment was made in fee or for term of life (of a stranger), by tenant in dower; for, in that case, he in the reversion might enter for the forfeiture, and avoid the estate. But the mischief was, that when the feoffee, or any other, died seised, whereby the entry of him in the reversion was taken away, he in the reversion could have no writ of entry *ad communem legem* until after the decease of tenant in dower, and then the warranty contained in her deed barred him in the reversion if he were her heir, as commonly he was; and for the remedy of this mischief this statute gave the writ of entry *in casu proviso* in the lifetime of tenant in dower." 2 Inst. 309. But the statute was not intended to restrain tenant in dower from aliening for her own life, for alienation for such an estate wrought no wrong. *Id.*

(f) Pig. of Recoveries, 66.

(252) If the heir or tenant does not assign to the widow her legal dower, she has ample remedies, as in a common-law action of dower, or by ejectment, or by proceedings in equity, or by proceedings authorized by courts exercising probate jurisdiction. The particular practice in this respect must be sought in the statutes and decisions of the several States. See Tyler on Inf. & Cov. 589 to 601, 1 Washb. Real Prop. 259, etc., 8d ed.

and now a wife, who was married on the 1st January, 1834, whose dower it is desired to bar, may effect that object by a deed duly acknowledged by her. (253) But the most usual method of barring dowers for along time was by jointures, as regulated by the statute 27 Hen. 8, c. 10.

A jointure, which, strictly speaking, signifies a joint estate, limited to both husband and wife, but in common acceptation extends also to a sole estate, limited to the wife on her surviving her husband, is thus defined by sir Edward Coke (g): "a competent livelihood of freehold for the wife, of lands and tenements; to take effect, in profit or possession, presently after the death of the husband; for the life of the wife at least." This *description is framed from the purview of the statute 27 Hen. 8, c. 10, [* 263] before mentioned, commonly called the statute of uses, of which we shall speak fully hereafter. At present we have only to observe, that before the making of that statute, the greatest part of the land of England was conveyed to uses; the property or possession of the soil being vested in one man, and the use, or profits thereof, in another; whose directions, with regard to the disposition thereof, the former was in conscience obliged to follow, and might be compelled by a court of equity to observe. Now, though a husband had the use of lands in absolute fee-simple, yet the wife was not entitled to any dower therein: he not being seised thereof: therefore it became usual, on

(g) 1 Inst. 36.

(253) In this country the usual mode of barring dower is for the wife to join in the deed of conveyance, which ought to contain proper words of grant and release on her part, which shows an intention to release her dower. *Fowler v. Shearer*, 7 Mass. 14; *Burge v. Smith*, 27 N. H. 332; *Kirk v. Dean*, 2 Binn. 341; *Learned v. Cutler*, 18 Pick. 9; *Smith v. Handy*, 16 Ohio, 191, 236.

It is indispensable in most of the States that words expressive of such an intent should be used, or the right of dower will not be barred. *Stevens v. Owen*, 25 Me. 94; *Leavitt v. Lamprey*, 18 Pick. 882; *Cutlin v. Ware*, 9 Mass. 218; *Witter v. Biscoe*, 13 Ark. 423.

The wife must be of full age or she cannot bar her dower by joining in the deed with her husband. *Priest v. Cummings*, 20 Wend. 338; *Jones v. Todd*, 2 J. J. Marsh. 359; *Oldham v. Sale*, 1 B. Monr. 76; *Markham v. Merrett*, 7 How. (Miss.) 437; *Cason v. Hubbard*, 33 Miss. 46; *Thomas v. Gammel*, 6 Leigh, 9; *Hughes v. Watson*, 10 Ohio, 127.

In many of the States the deed must be separately acknowledged by the wife, after a private examination apart from her husband, and generally the requirements of the law must be strictly complied with or the right of dower will not be barred. *Kirk v. Dorn*, 2 Binn. 341; *Sheppard v. Wardell*, Coxe, 452; *Clark v. Redman*, 1 Blackf. 379; *Scanlan v. Turner*, 1 Bailey, 421; *Rodgers v. Woody*, 23 Mo. 548; *Lewis v. Coxe*, 5 Harring. 402; *Jackson v. Stevens*, 16 Johns. 110; *Elwood v. Klock*, 13 Barb. 50; *Sibley v. Johnson*, 1 Mich. 390; *Jordan v. Corey*, 2 Ind. 385; *Manning v. Labores*, 33 Me. 340.

A release of dower by the wife directly to the husband, during coverture, will not bar her right of dower. *Carson v. Murray*, 3 Paige, 433; *Crain v. Cavana*, 36 Barb. 410; 62 id. 109; *Rowe v. Hamilton*, 3 Me. 63; *Martin v. Martin*, 22 Ala. 104.

A contract between husband and wife and her trustee, during coverture, for the release of her dower, is not binding. *Townsend v. Townsend*, 2 Sandf. 711.

So an agreement to forbear dower, or a covenant not to claim it, is not a release of it, when made before marriage, and does not bar the claim. *Croade v. Ingraham*, 13 Pick. 33; *Hastings v. Dickinson*, 7 Mass. 153; *Vunce v. Vunce*, 21 Me. 364.

The rule at common law is very general that the husband must join with the wife in the deed which relinquishes her right of dower, and if he does not the right is not barred. *Shaw v. Russ*, 14 Me. 432; *Powell v. Monson*, 3 Mason, 353, 354; *Stearns v. Swift*, 8 Pick. 532; *Page v. Page*, 6 Cush. 196; *Ulp v. Campbell*, 19 Penn. St. 361; *Moore v. Tisdale*, 5 B. Monr. 352.

marriage, to settle by express deed some special estate to the use of the husband and his wife, for their lives, in joint-tenancy, or jointure: which settlement would be a provision for the wife in case she survived her husband. At length the statute of uses ordained, that such as had the use of lands should, to all intents and purposes, be reputed and taken to be absolutely seised and possessed of the soil itself. In consequence of which legal seisin, all wives would have become dowable of such lands as were held to the use of their husbands, and also entitled at the same time to any special lands that might be held in jointure: had not the same statute provided that upon making such an estate in jointure to the wife before marriage, she shall be for ever precluded from her dower (*h*). But then these four requisites must be punctually observed: 1. The jointure must be limited to take effect (*i*) immediately on the death of the husband. 2. It must be for her own life at least, and not *pur autre vie*, or for any term of years, or other smaller estate (*k*).

Four requisites
to jointure.

[* 264] *3. It must be made to herself, and no other in trust for her — though this condition is not very material, as courts of equity will uphold as a good jointure a limitation of an equitable estate (*m*). 4. It must be made, and so in the deed particularly expressed to be (*n*), in satisfaction of her whole dower, and not any particular part of it. If the jointure be made to her after marriage, she has her election after her husband's death, and may either accept it or refuse it, and betake herself to her dower at common law; for she was not capable of consenting to it during coverture (*o*). And if, by any fraud or accident, a jointure though made before marriage proves to be on a bad title, and the jointress is evicted, or turned out of possession, she shall then (by the provisions of the same statute) have her dower *pro tanto* at the common law. Though even in this case and notwithstanding the statute, if the wife was of full age when she married, she will be held, in a court of equity, bound by the contract then made by her (*p*). We may notice that dower may also be barred even when at the time of marriage the wife is an infant, by a settlement made, with that object, of personal property (*q*).

(*h*) *Vernon's Case*, 4 Rep. 1, 2.

(*i*) Co. Litt. 36.

(*k*) Although the estate must be in point of quantity for her life, yet it may be such as may be determined sooner by her own act. Thus, an estate *durante viduitate* is a good jointure, because unless sooner determined by herself, it continues to her for life. 4 Rep. 8.

(*m*) *Lacy v. Anderson*, 1 Swan. 445; *Gladstone v. Ripley*, 2 Eden. 59; *Corbett v. Corbett*, 1 S. & S. 612; 5 Russ. 254.

(*n*) Where the assurance limiting the estate is not express as to its being in bar of dower, parol evidence to show that this was its intention seems not since the statute of Frauds to be admissible. (*Tinney v. Tinney*, 8 Atk. 8, though previously it was held otherwise; *Vernon's Case*, 4 Rep. 8; *Tracy v. Ivies*, 1 Leon. 311.) But it may be collected from the general tenor of the instrument that it was intended to be a jointure in bar of dower. *Vizard v. Longdale*, stated 8 Atk. 8; 1 Ves. Sen. 55; 2 Ed. 66; *Crouch v. Stratton*, 4 Ves. 394; *Walker v. Walker*, 1 Ves. Sen. 54; *Garthshore v. Chalie*, 10 Ves. 1; *Hamilton v. Jackson*, 2 Jo. & Lat. 295.

(*o*) This power of election is given by the statute. See as to its effect, *Frank v. Frank*, 3 M. & Cr. 171; *Slatter v. Slatter*, 1 Scott, 82; *Beard v. Nuttall*, 1 Vern. 427.

(*p*) *Simpson v. Gutteridge*, 1 Mad. 609. See also *Parker v. Harvey*, 4 Bro. P. C. 604; *Carruthers v. Carruthers*, 4 Bro. C. C. 499; *Gladstone v. Ripley*, 2 Eden. 59, 73.

(*q*) *Williams v. Chitty*, 3 Ves. Jun. 545; *Carruthers v. Carruthers*, 4 Bro. C. C. 499; *Smith v. Smith*, 5 Ves. 188; *Corbett v. Corbett*, 1 S. & S. 612; 5 Russ. 254. Where through the default of the husband, the wife lost the benefit of a settlement, it still was held to bar her dower as against a purchaser. *Dyke v. Rendall*, 2 D. G. M. & G. 209.

These settlements, previous to marriage, seem to have been in use among the ancient Germans, and their kindred nation the Gauls. Of the former Tacitus gives us this account: "*Dotem non uxor marito, sed uxori maritus affert; intersunt parentes et propinqui, et munera probant.*" (De Mor. Germ. c. 18.) And Cæsar (de Bello Gallico, l. 6, c. 18) has given us the terms of a marriage settlement among the Gauls, as nicely calculated as any modern jointure: "*Viri, quantas pecunias ab*

* There are some advantages attending tenants in dower that do not extend to jointresses; and so *vice versa*, jointresses are in some respects more privileged than tenants in dower. Tenant in dower by the old common law was subject to no tolls or taxes; and hers is almost the only estate on which, when derived from the king's debtor, the king cannot distrain for rent, if contracted during the coverture (*r*). But, on the other hand, a widow may enter at once, without any formal process, on her jointure land: whereas no small trouble, and a very tedious method of proceeding, is necessary to compel a legal assignment of dower (*s*). And, what is more, though dower be forfeited by the treason of the husband, yet lands settled in jointure remain unimpeached to the widow (*t*). Moreover, a jointure is not forfeited by the adultery of the wife, as dower is, and the court of chancery will specifically enforce against the husband the performance of articles for a settlement in lieu of dower, even though he proves * that she has separated herself from him and lived in adultery (*u*). [* 265]

Comparative
advantages of
dower and
jointure.

Besides the method of barring dower by jointure or settlement, a widow might be, and often was, practically deprived of her specific claim for dower by her husband's will even before the statute: for if he by his will gave her any benefits which, either by clear expression or necessary implication, were intended to be in lieu of her dower, a court of equity would restrain her from both taking the benefits under the will and claiming the dower. She was put to her election which she would take (*x*). (254). [* 266]

uxoribus dotis nomine acceperunt, tantas ex suis bonis, aestimatione factâ, cum dotibus communicant. Hujus omnis pecunia conjunctim ratio habetur, fructusque. Uter eorum vita superavit, ad eum pars utriusque cum fructibus superiorum pervenit." The dauphin's commentator on Cæsar supposes that this Gaulish custom was the ground of the new regulations made by Justinian (Nov. 97) with regard to the provision for widows among the Romans; but surely there is as much reason to suppose, that it gave the hint for our statutable jointures.

(*r*) Co. Litt. 81 a; F. N. B. 150.

(*s*) Co. Litt. 86.

(*t*) *Ib.* 37.

(*u*) *Blount v. Winter*, 8 Cox's P. W. 276 n.; *Jee v. Thurlow*, 2 B. & C. 547; and see *Dorner v. Knight*, 1 Taunt. 417.

(*x*) Harg. Co. Litt. 86, 6. "The question in these cases is whether the testator meant to give away his wife's dower, which he could not do directly. For that it must be seen clearly that he meant to dispose, so that if she should claim dower, it would disappoint the will. It must appear there is a repugnancy," per Sir W. Grant, *Greatorex v. Cary*, 6 Ves. 614. For cases where the question as to this repugnancy has been discussed, see *Harrison v. Harrison*, 1 Keen, 765; *Ellis v. Lewis*, 3 Hare, 310; *Gibson v. Gibson*, 1 Drew. 42; *Warbuton v. Warbuton*, 2 Sm. & G. 163; *Parker v. Sowerby*, 4 De G. M. & G. 321; *Notley v. Palmer*, 2 Drew. 98; *Sopwith v. Maughan*, 30 Beav. 285; *Wetherell v. Wetherell*, 4 Giff. 51.

(254) A widow may be barred of her dower by a testamentary provision made by the husband, if she chooses to accept it, which she may do, or she may decline it and claim her dower. In some cases she may claim both such provision and dower; but where, by the terms of her husband's will, she cannot take both, she may elect which she will take. This right of election is strictly a personal one, and is not transmissible by descent. *Bubier v. Roberts*, 49 Me. 460, 463; *Welch v. Anderson*, 28 Mo. 293.

The intention of the testator that the wife shall elect must be gathered from the will, and it cannot be established by parol evidence. *Stark v. Hunt*, Salk. 216; *Herbert v. Wren*, 7 Cranch, 370, 378; *Hall v. Hall*, 8 Rich. (S. C.) 407; *Whilden v. Whilden*, Riley's Ch. (S. C.) 205; *Higginbotham v. Cornwell*, 8 Gratt. 83.

Where a provision in a will declares in terms that it is in lieu of dower, the widow may take either, but she cannot take both. *Van Orden v. Van Orden*, 10 Johns. 30; *Jackson v. Churchill*, 7 Cow. 287; *Chapin v. Hill*, 1 R. I. 446; *Raines v. Corbin*, 24 Ga. 185; *Pemberton v. Pemberton*, 29 Mo. 408.

In the case of a testamentary provision if the intention to bar dower is not clear, the

A jointure then, or, what is equivalent in its effect, a settlement upon the wife with the intention of barring her right to dower, has long been in use, to such an extent that few widows have been able to claim dower under their general right. But inasmuch as, in order to establish a free power of alienation of his lands, it was necessary (before the statute) for a married man to show that by some of these methods his wife was barred of her dower, a necessity which was no inconsiderable clog upon his title, it became desirable that upon purchasing an estate of inheritance some means should be devised whereby the property could be conveyed to him so as to be under his absolute disposal, and yet that the right of dower should not attach. Various modes [* 267] were formerly * in use for this purpose. Sometimes the estate was conveyed to a trustee for the purchaser, in which case, as we have seen, the widow could claim no dower: but this method was not much liked, inasmuch as a natural objection existed to giving a third person any power by being seised of the legal estate. Another method was to have the land conveyed to the purchaser and another as joint tenants, the interest of the other being merely a trust for the purchaser. In this case, so long as the joint tenancy existed, the wife could not be endowed, but, as the trustee might die before the husband, the latter might become solely seised, and the dower would attach. The method was therefore imperfect, in addition to having the same objection as in the previous method of the legal estate being vested in a trustee. At last, a method was invented (y) which was free from all objection, which was as follows:—

Uses to bar
dower.

To limit a life estate to the purchaser, and after the determination of this estate, by forfeiture or otherwise, a remainder was limited to trustees during the life of the purchaser in trust for him, and after his death a remainder in fee was given to him. This method of limitation will be better understood hereafter when we treat of remainders; it will be sufficient here to observe, that the intermediate remainder to the trustee, however little likely to have any operation, was considered sufficient to prevent his having at any moment during his lifetime a fee simple in possession, and therefore his wife could claim no dower (z). The last improvement to this scheme was to give the husband, by the aid of the statute of uses, a power of appointing the fee simple in such manner as he might please in priority to his own life interest and the remainders. The mode by which this took effect will be understood when we shall have considered the operation of powers (a).

[* 268] This method of conveying property to uses to bar dower *(as it was called) became general, and is still the daily practice on conveyance of property to a married man whose marriage took place on or before the 1st of January, 1834. It is obvious that no necessity arises for the adoption of

(y) The form, as finally adopted, was settled by Mr. Fearne.

(z) 18 Viner, 413; 9 Lev. 487.

(a) *Ray v. Pung*, 5 B. & Al. 561.

widow will be held entitled to both, unless some statute prohibits it. *Tobias v. Keitchum*, 32 N. Y. (5 Tiff.) 319; *Herbert v. Wren*, 7 Cranch, 370, *Higginbotham v. Cornwell*, 8 Gratt, 83; *Kennedy v. Andrew*, 1 Dall. 418; *Williard v. Binford*, 10 Ala. 977, 987; *Pickett v. Peay*, 3 Brev. 545; *Ostrander v. Spickard*, 8 Blackf. 227; *Tooke v. Hardeman*, 7 Ga. 20; *Norris v. Clark*, 2 Stockt. 51; *Clark v. Griffith*, 4 Iowa, 405; *Yancy v. Smith*, 2 Metc. (Ky.) 408; *Thomas v. Wood*, 1 Md. Ch. Decis. 296; *Sturgis v. Ewing*, 18 Ill. 176; *Fulton v. Fulton*, 30 Miss. 596.

any such method where the marriage of the purchaser has taken place since that date, and indeed the limitation to uses to bar dower would not in that case effect their object (*b*). If it be desired by a purchaser coming within the act to prevent his wife having her dower against his heir in case of his own intestacy, on which alone, as we have seen, the wife could claim (a not very reasonable desire it may be thought), by inserting a simple declaration in the purchase deed, he effectually debars her.

We mentioned at the beginning of this chapter the case of a life estate, held not for the life of the tenant but of some other person, called an estate *pur autre vie*, the person for whose life it is held being called *cestui que vie*. This estate, since it may determine before the death of the tenant for life, is considered in law to be inferior to an estate for his own life, and yet it may prove to be more valuable, for the *cestui que vie*, or the person for whose life the estate is holden, may outlive the tenant. The estate may be limited to a man and his heirs, or to a man without any addition of words of limitation, or in various other modes. Formerly much importance was attached to these modes of limitation. If the estate were granted to a man without words of limitation, he could not take an interest to endure longer than his own life, and therefore during the interval between the death of the grantee and that of the *cestui que vie*, there was no person entitled, as the grantor having parted with his property for the whole period of the life of the *cestui que vie*, had no right to enter, and no one was entitled under the grant; he, therefore, who first entered upon the land might retain * possession until the *cestui que vie* died, and was called general occupant. [* 269]

This seems to have been recurring to first principles, and calling in the law of nature to ascertain the property of the land, when left without a legal owner. For it did not revert to the grantor, though it formerly (*c*) was supposed so to do; for he had parted with all his interest, so long as *cestui que vie* lived: it did not escheat to the lord of the fee, for all escheats must be of the absolute entire fee, and not of any particular estate carved out of it: much less of so minute a remnant as this: it did not belong to the grantee; for he was dead; it did not descend to his heirs; for there were no words of inheritance in the grant: nor could it vest in his executors; for no executors could succeed to a freehold. Belonging therefore to nobody, like the *hæreditas jacens* of the Romans, the law left it open to be seized and appropriated by the first person that could enter upon it, during the life of *cestui que vie*, under the name of an occupant. But there was no right of occupancy allowed, where the king had the reversion of the lands; for a special privilege, that of treating the grant as at an end, was, in this as in many other similar instances, given to, or at least successfully claimed by the crown. Where, however, the estate *pur autre vie* had been granted to a man and his heirs during the life of *cestui que vie*, the heir might, and still may, enter and hold possession, and is called in law a special occupant: as having a special exclusive right, by the terms of the original grant, to enter upon and occupy this *hæreditas jacens*, during the residue of the estate granted; though some have thought him so called with

(b) *Ante*, p. 259, n.

(c) Bract. 1. 2, c. 9; 1. 4, tr. 3, c. 9, s. 4; *Flet.* 1. 3, c. 12, s. 6; 1. 5, c. 5, s. 15.

no very great propriety (*d*), and that such estate is rather a descendible freehold.

[*270] *If an estate *pur autre vie* be given to a man and the heirs of his body, he takes what is called a quasi entail, the estate descending (so long as it exists) like an ordinary estate tail, and is similar to one in all respects, except that the owner may bar the entail and dispose of the estate, without the necessity of enrolling the deed of disposition, under the Fines and Recoveries Abolition Act (*e*).

This theory of common occupancy could have no application to incorporeal hereditaments, as rents, advowsons, commons, or the like (*f*), because there could be no actual entry upon such species of property. Originally, therefore, a grant *pur autre vie* of such hereditaments seems to have been thought absolutely to determine on the death of the grantee, unless it were limited to heirs or some other persons, who by virtue of the grant might take possession (*g*). That the possession of the heir was recognised as lawful seems rather contradictory to the theory of special occupancy, but he was, nevertheless, called a [*271] special occupant. We may here observe that there can *be no occupancy of a trust estate, for the trustee is, of necessity, in possession (*h*).

The doctrine of occupancy has been much modified by successive statutory enactments: the first (*i*) gave the tenant *pur autre vie* power to devise the estate when there was no special occupant, and directed that, in default of such devise, it should go to his executors, or administrators, and be assets in their hands for payment of the debts of the deceased tenant.

The next statute (*k*) gave to the tenant *pur autre vie* an unrestricted power of devising the estate. It also rendered the estate, when not devised, but in the hands of the heir as a special occupant, liable as assets by descent to the same extent as lands in fee simple. Further, it made the estate, in case of there being no special occupant, assets in the hands of the executor or administrator, to be administered not only in payment of debts, but in all respects as other personal estates. A still later act (*l*) has re-enacted these provisions, giving both ample power of devising the estate and providing for intestacy in every possible

(*d*) See *Atkinson v. Baker*, 4 T. R. 229, and *Vaugh.* 201. They were not descendible freeholds because the heir-at-law does not take by descent. If an action at common law had been brought against the heir on the bond of his ancestor, he might have pleaded *riens per descent*, for these estates were not liable to the debts of the ancestor before the statute of Frauds.

(*e*) *Ferne*, Cont. Rem. 495. If the estate tail be in remainder after an estate for life, the consent of the latter is necessary to bar the *quasi entail*. Such a quasi estate is a mere expectancy. *Allen v. Allen*, 3 Dr. & War. 307, 335; *Edwards v. Champion*, 3 D. G. M. & G. 202.

(*f*) Co. Litt. 41; *Vaugh.* 201.

(*g*) Lord Keeper Harcourt has declared, there is no difference since the 29 Car. 2, c. 3. between a grant of corporeal and incorporeal hereditaments *pur autre vie*; for by that statute every estate *pur autre vie* is made devisable, and, if not devised, it shall be as-

sets in the hands of the heir, if limited to the heir; if not limited to the heir, it shall go to the executors or administrators of the grantee, and be assets in their hands; and the statute, in the case of rents and other incorporeal hereditaments, does not enlarge, but only preserves the estate of the grantee. (3 P. Wms. 264.) And this opinion has been confirmed by decision, *Bearpark v. Hutchinson*, 4 Moo. & P. 848; and corroborated by legislative declaration, stat. 7 Will. 4 & 1 Vict. c. 26, s. 6.

(*h*) *Penny v. Allen*, 7 D. G. M. & G. 409, in which case much discussion was had on the nature of occupancy, and the following authorities were relied on, *Castle v. Dod*, Cro. Jac. 200; Com. Dig. Estates by Grant, F. 2. See however, *contra*, *Reynolds v. Wright*, 30 L. J. Ch. 381.

(*i*) 29 Car. 2, c. 3.

(*k*) 14 Geo. 2, c. 20.

(*l*) 7 Will. 4 & 1 Vict. c. 26, ss. 3, 6.

case(m). It has, moreover, removed all questions arising where the subject of the estate is an incorporeal hereditament, by declaring that estates *pur autre vie* in these shall also, where there is no special occupant, go to the executor or administrator, in order to be distributed by him. Under this act it has been held that the crown *on taking out letters of administration to a [* 272] bastard intestate becomes entitled to an equitable estate *pur autre vie* belonging to him (n).

We see then that, at the present day, the importance of the mode of limitation of these peculiar estates, is confined to the determination, in cases of intestacy, whether the heir, or special heir, or the statutory next of kin, becomes entitled to the beneficial interest in the estate subject to the paramount obligation of providing for the payment of the debts of the deceased. For we may in conclusion note that as lands in fee simple when devised are now fully subject in the hands of the devisee to this same obligation, so also are estates *pur autre vie*.

*CHAPTER IX.

[* 273]

ESTATES LESS THAN FREEHOLD.

Of estates that are less than freehold, there are three sorts: 1. Estates for years; 2. Estates at will; 3. Estates by sufferance.

An estate for years (a) is an interest entitling the owner to the possession of lands or tenements, for some determinate period; and it takes place where a man demises or lets them to another for the term of a certain number of years, agreed upon between the lessor and the lessee, and the lessee enters thereon (b). (255). The estate may also be created by

(m) A doubt has arisen whether the former act applied, when the executor or administrator took as special occupants named in the grant. The last act expressly includes all such cases. Under the act, moreover, a devise by a tenant in *quasi tail* would doubtless be held valid as barring the *quasi tail*. The act has no application to cases where the *cestui que vies* died before the 1st Jan. 1838, see s. 84.

(n) *Reynolds v. Wright*, 30 L. J. Ch. 381. The reasoning of Lord Campbell is not very

conclusive, and quære whether the decision is right. The parties claiming against the crown were the trustees, who contended that they were entitled to the estate discharged of any trust.

(a) On this subject the student is recommended to study the admirable article on "Leases and terms for years," printed in Bacon's Abridgement, and attributed to the pen of Chief Baron Gilbert.

(b) Litt. s. 58.

(255) It is a general rule that any thing corporeal or incorporeal, lying in livery or in grant, may be the subject of a demise. And, therefore, not only lands, but commons, ways, fisheries, estovers, annuities, rent charges, and all other incorporeal hereditaments are included in the common-law rule. The corporation of the city of New York is authorized by law to lease the wharves within the city. *Taylor v. Beebe*, 3 Rob. 262; *Commissioners of Pilots v. Clark*, 33 N. Y. (6 Tiff.) 251. A railroad corporation may lease its franchises and property if authorized to do so by the legislature. *Troy and Rutland R. R. Co. v. Kerr*, 17 Barb. 581, 601; *Commonwealth v. Smith*, 10 Allen, 448, 455.

It is quite common to include in a lease of real estate certain articles of personal property, such as sheep, cows, horses and other live stock, as well as farming implements, or of

will. If the lease be made for half a year or a quarter, or any less time, this lessee is respected as a tenant for years, and is styled so in legal proceedings: a year being the shortest term which the law in this case takes notice of (c). And this may, not improperly, lead us into a short digression, concerning the division and calculation of time by the English law.

The space of a year, by which we mean a civil or legal year, is an artificial period fixed by law to suit the convenience of mankind, for which two essen-

Legal meaning
of a year.

tial requisites had to be observed; first, that the length of it should be measured by an exact number of days; and secondly, [* 274] that it should never deviate much from the year which nature * suggests, viz. the tropical year, which does not consist of an exact number of days. In order to satisfy as far as was practicable these conditions, it is ordained by law (d) that every year, except bissextile or leap-years, should contain 365 days, and that leap-years should contain 366 days, the additional day being, it is almost needless to add, the 29th of February. Leap-years, moreover, occur every fourth year, i. e. in every year the name of which referred to the birth of Jesus Christ is divisible by 4, except that the years which are divisible by 100 are not leap-years unless they are divisible by 400. Thus the year A. D. 1868 was a leap-year, the year A. D. 1900 will not be a leap-year, but the year A. D. 2000 will be so. The law takes no account of fractions of a day, therefore half an ordinary year consists only of 182 days (e); so a quarter of a year consists of 91 days only, the extra 6 or 12 hours being rejected (f): though where justice imperatively requires it, as when it is necessary to ascertain which of two events first happened, courts will of course regard any subdivision of time that may be necessary (g). But * inasmuch as certain feasts or holidays, Lady-day, [* 275] Midsummer-day, Michaelmas-day (h), and Christmas have been used

(c) *Ib.* 67.

(d) 24 Geo. 2, c. 23, which, in the year 1752, introduced the new style into England. For a full account of the present (the Gregorian) calendar, and its relation to the true astronomical period, the reader may consult Sir John Herschel's *Outlines of Astronomy*, p. 672. The law as to bissextile years seems first to have been declared by statute in the year 1236, 21 Hen. 3.

(e) Co. Litt. 185 b; *Bishop of Peterborough v. Catesby*, Cro. Jac. 166; *Clayton's Case*, 5 Rep. 1.

(f) Co. Litt. 185 b; 2 Roll. 521; Com. Dig. Ann. A.

(g) *Smallcomb v. Buckingham*, 1 Salk. 320; *Combe v. Pitt*, 3 Burr. 1423, 1434; *Thomas v. Desanges*, 2 B. & Ald. 596; *Sadler v. Leigh*, 4 Camp. 195; *Chick v. Smith*, 8 Dowl. P. C. 337. As to how the law deals with presumptive evidence in such points, see *Underwood v. Wing*, 4 De G. M. & G. 633, where questions

arose who were the last survivors of several who were drowned in the same ship. An instance is given by Sir Henry Nicolas of parts of a day being noticed in formal instruments. The surrender of the Scotch crown of Baliol, in the early part of the 20th Nov. 1292, was said to have taken place at the end of the 20 Edw. 1. (Edward I. was proclaimed king, it will be remembered, on the 20th Nov. 1272.) Proceedings later in the same day were said to have happened "*anno regni speius domini nostri Edwardi vicesimo finiente et vicesimo primo incipiente*." *Chronology of History*, p. 312.

(h) Old Lady-day is the 6th April; Old Michaelmas day the 11th October; and evidence is sometimes admitted to show that these are intended. *Furley v. Wood*, 1 Esp. 198; *Doe d. Hinde v. Vince*, 2 Camp. 256; *Doe d. Willis v. Perrin*, 9 C. & P. 467; *Doe d. Hall v. Benson*, 4 B. & Ald. 588; *Rogers v. Dock Company of Hull*, 34 L. J. Ch. 165.

household furniture or other chattels in the house, and such leases are valid. *Putnam v. Wyley*, 8 Johns. 432; *Allen v. Culver*, 8 Denio, 484; *Newton v. Wilson*, 3 Hen. & M. 470; *Billings v. Tucker*, 6 Gray, 368. It is usual to include a schedule of the articles in the lease, and to insert a covenant for their return at the end of the term, and without such covenant it is said that the lessor has no remedy but trover, detinue or replevin, after the expiration of the lease. *Ib.*

as marking with considerable exactness the division of the year into four quarters, these have been adopted by the law for many purposes, and particularly with reference to the relation existing between lessor and lessee (*i*). In other cases the civil year commences at midnight between the 31st of December and the 1st of January (*k*).

There is greater ambiguity as to the legal meaning of the word month, because there are two intervals which ordinarily receive the name, one an interval of 28 days, the conventional period of the revolution of the moon, of which there are thirteen in a year; the other the calendar months, according to the Julian division in our common almanacks, commencing at the calends of each month, of which, as all know, there are twelve in each year.

Month.

In law, unless calendar months are expressly named, it is, with a few exceptions, presumed that lunar months are intended (*l*). (256) Thus, in construing a deed or contract, *the word "month" standing unexplained means [*276] four weeks. A lease for "twelve months" is only for forty-eight weeks; though if the expression used be "a twelvemonth" in the singular number, it is good for the whole year (*m*). The word "twelvemonth" being universally intended to mean a year, no ambiguity can arise in interpreting it.

The exceptions to this general rule are, first, in *quare impedit*, and in ecclesiastical cases generally (*n*); secondly, in commercial matters, in which the obvious convenience of reckoning from month to month by the calendar has led to the adoption of this meaning of the word (*o*). Lastly, in acts of parliament passed since the beginning of the session 1851, unless otherwise expressed (*p*).

In the space of a day, all the twenty-four hours are usually reckoned, the law

(*i*) A notice given on the 29th of Sept. to quit on the 25th March, is considered as a good half-year's notice, although that interval includes only 178 days. *Doe d. Matheuson v. Wrightman*, 4 Esp. 5; *Doe d. Harrop v. Green*, *ib.* 198; *Doe v. Lea*, 11 East, 312; *Roe d. Durant v. Doe*, 4 Moo. & P. 391, 6 Bing. 574; *Papillon v. Brunton*, 5 H. & N. 518.

(*k*) 24 Geo. 2, c. 23. Previously the year commenced on the 25th March.

(*l*) "I confess, I wish it had been decided, that months should be understood to mean calendar and not lunar months; but the contrary has been determined so long and so frequently, that it ought not again to be brought in question. In the instance indeed of a *quare impedit*, the computation of time is by calendar months, but that depends on the words of an act of parliament (18 Edw. 1, st. 1, c. 5), *tempus semestris*. See *Bishop of Peterborough v. Catesby*, Cro. Jac. 167. But for all other purposes, and in all acts of parliament

where months are spoken of without the word 'calendar,' and nothing is added from which a clear inference can be drawn that the legislature intended calendar months, it is understood to mean lunar months." *Per Lord Kenyon, Lacon v. Hooper*, 6 T. R. 224, 226. The court will, however, if the general context warrants such a construction, vary this interpretation, and, founding its opinion upon the apparent intention of the parties, hold a month to be a calendar month. See *R. v. Chawton*, 1 Q. B. 247; *Hipwell v. Knight*, 1 Y. & C. 401. In orders of courts the word "month" always means four weeks. *A.-G. v. Newbury*, Coop. Ch. C. 888. See Consolidated Chancery Orders, xxxvii. r. 10; *Soper v. Curtis*, 2 Dowl. P. C. 237.

(*m*) *Catesby's Case*, 6 Rep. 61.

(*n*) *Crooke v. M' Twish*, 1 Bing. 309.

(*o*) *Cockell v. Gray*, 3 Br. & B. 186; *Hart v. Middleton*, 2 Car. & K. 9.

(*p*) 13 & 14 Vict. c. 21.

(256) Although by the English law a lunar month is intended by the term "month," a contrary rule prevails in this country, and a calendar month will be considered as the time designed in the lease. *Avery v. Pixley*, 4 Mass. 460; *Hardin v. Major*, 4 Bibb, 105; *Gross v. Fowler*, 21 Cal. 392; *Strong v. Birchard*, 5 Conn. 361; *Brewer v. Harris*, 5 Gratt. 285, 298; *Sheets v. Selden's Lessee*, 2 Wall. (U. S.) 177; *Kimball v. Lamson*, 2 Vt. 138; *Williamson v. Farrow*, 1 Bailey, 611.

generally rejecting all fractions of a day, in order to avoid disputes (*g*). (257) Therefore, if I am bound to pay money on any certain day, I discharge the obligation if I pay it before twelve o'clock at night; after which the following day commences (*r*).

[* 277] [* 278] * To return to estates for years.

These estates were originally granted to mere farmers * or husbandmen, who every year rendered some equivalent in money, provisions, or other rent, to the lessors or landlords, but, in order to encourage them to manure and cultivate the ground, they had a permanent interest granted them, not determinable at the will of the lord. And yet their possession was esteemed of so little consequence, that they were rather considered as the bailiffs or servants of the lord, who were to receive and account for the

(*g*) Co. Litt. 185.

(*r*) It was formerly held, that where an act was agreed to be done within a certain number of days, "from the date" of the instrument, the day of the date was to be included in the computation; but not when the words were "from the day of the date" (see *Clayton's Case*, 5 Rep. 1); but since the case of *Pugh v. The Duke of Leeds*, Cowp. 714, these formal distinctions have been done away. *Watson v. Pears*, 2 Camp. 294. And when the computation is to be made from an act done, it was formerly said that the day in which the act is done is included in the reckoning. *Castle v. Burditt*, 8 T. R. 623; *Glassington v. Rawlins*, 8 East, 407; but this doctrine has been overruled. "It is not necessary to lay down any general rule upon this subject; but upon technical reasoning, I should rather think it would be more easy to maintain, that the day of an act done or an event happening ought in all cases to be excluded, than that it should in all cases be included. Our law rejects fractions of a day more generally than the civil law does. The effect is to render the day a sort of indivisible point, so that any act done in the compass of it is no more referrible to any one than to any other portion of it; but the act and the day are co-extensive; and therefore, the act cannot properly be said to be passed until the day is passed. But it is not necessary to lay down any general rule. Whichever way it should be laid down, cases would occur, the reason of which would require exceptions to be made." *Per* Sir W. Grant, M. R., *Lester v. Garland*, 15 Ves. 248, 257. Upon this reasoning, and upon consideration of the effect of applying a contrary rule to the extreme case of a single day, it appears to be settled, that the day on which the act was done from which the period is to be computed, must be excluded from the com-

putation. 6 Mee. & W. 49; *Williams v. Burgess*, 12 Ad. & El. 635; 11 Sim. 434; *In re Wilmot*, 1 Curteis, 1. And where a person has a certain time from an act done to deliberate, upon the expiration of which another person may do some act, the period is in general to be calculated exclusively of the days in which both the precedent and the subsequent acts are done. *Id.*; *Blunt v. Heslop*, 8 Ad. & E. 577. And a lease for a term of years includes the whole anniversary of the day it was granted. *Ackland v. Luitley*, 9 Ad. & E. 879.

Where property was directed to be transferred to a party on her attaining her twenty-fifth year, it was held that the time had arrived when she became twenty-four years old. *Grant v. Grant*, 4 You. & C. 256. And the word "till" has been held to include the day to which it is prefixed. *Dakins v. Wagner*, 3 Dowl. P. C. 535. There was a difference of opinion in the court upon the question, whether a bill of exchange could be protested for non-payment on the same day that it was due, or the acceptor had the whole of the day to discharge it in. *Leftley v. Mills*, 4 T. R. 170. It is now settled, that refusal to pay on demand made within business hours, is a *prima facie* dishonour of a bill of exchange; but that, notwithstanding, the acceptor has the whole day to pay in. *Ex parte Moline*, 19 Ves. 216; *Burbridge v. Manners*, 3 Camp. 194; *Hartley v. Case*, 1 Car. & P. 556. The holder of a bill payable at a banker's must present it within banking hours, or take the risk of there being no one at the office. *Parker v. Gordon*, 7 East, 385; *Whittaker v. Bank of England*, 1 Cr. M. & R. 744. And in other cases, the presentment must be within a reasonable time; but 8 or 9 o'clock in the evening has been held reasonable. *Wilkins v. Jades*, 2 B. & Ad. 188.

(257) The law takes no account of the fractions of a day, unless it should be to prevent injustice. *Duffy v. Ogden*, 64 Penn. St. 240; *Clute v. Clute*, 3 Denio, 263; *Blydenburgh v. Cothéal*, 4 N. Y. (4 Comst.) 418.

Ordinarily a week means seven full days. But in New York, where sales of real estate on executions are required to be advertised six weeks before the sale, an advertisement, if inserted once in each week, for the six weeks before the sale is valid, although full six weeks should not have elapsed between the date of the first publication and the sale. *Wood v. Morschouse*, 45 N. Y. (6 Hand) 368; *Olcott v. Robinson*, 21 N. Y. (7 Smith) 150.

profits at a settled price, than as having any property of their own. And therefore they were not allowed to have a freehold estate: but their interest (such as it was) vested after their deaths in their executors, who were to make up the accounts of their testator with the lord, and the other creditors, and were entitled to the stock upon the farm. The lessee's estate might also, by the ancient law, be at any time defeated by a common recovery suffered by the tenant of the freehold (s); which annihilated all leases for years then subsisting, unless afterwards renewed by the recoveror, whose title was supposed superior to his by whom those leases were granted.

While estates for years were thus precarious, it is no wonder that they were usually very short, like our modern leases upon rack rent; and indeed we are told (t) that by the ancient law no leases for more than forty years were allowable, because any longer possession (especially when given without any livery declaring the nature and *duration of [* 279] the estate) might tend to defeat the inheritance. (258). Yet this law, if ever it existed, was soon antiquated; for we may observe in Madox's collection of ancient instruments, some leases for years of a pretty early date, which considerably exceed that period (u): and long terms, for three hundred or a thousand years, were certainly in use in the time of Edward III. (x), and probably of Edward I. (y). But certainly, when by the statute 21 Hen. 8, c. 15, the termor (that is, he who is entitled to the term of years) was protected against these fictitious recoveries, and his interest rendered secure and permanent, long terms began to be more frequent than before; and were afterwards extensively introduced, being found extremely convenient for family settlements and mortgages: continuing subject, however, to the same rules of succession, and with the same inferiority to freeholds, as when they were little better than tenancies at the will of the landlord. (259).

- (s) Co. Litt. 46.
 (t) Mirror, c. 2, s. 27; Co. Litt. 45, 46.
 (u) Madox Formulæ Anglicanæ n^o. 289, fol. 140. Demise for eighty years, 21 Ric. 2. *Ib.*
 n^o. 245, fol. 146, for the like term, A. D. 1429.
Ib. n^o. 248, fol. 148, for fifty years, 7 Edw. 4.
 (x) 33 Ass. pl. 6; Bro. Abr. tit. *Mordaunt*, 42, *Spoliation*, 6.
 (y) Stat. of Mortmain, 7 Edw. 1.

(258) In this country long leases have always been held valid unless some constitutional or statutory provisions declared otherwise, and leases in perpetuity were long very common in New York. Long leases of agricultural lands, reserving annual rents, have been prohibited in some of the States by constitutional provisions. See Arkansas, Art. 1, § 24; Minnesota, Art. 1, § 15; Iowa, Art. 1, § 24; New York, Art. 1, § 14; Wisconsin, Art. 1, § 14. See Hough's American Constitutions, a work of the highest value to the bench, the bar and to students.

(259) It is a rule of very extensive application, that a tenant who has accepted a lease of lands and possession under it from a landlord, shall not afterward be permitted to dispute the landlord's title. *Jackson v. Hinman*, 10 Johns. 292; *Ingraham v. Baldwin*, 9 N. Y. (5 Seld.) 45; *Bailey v. Kilburn*, 10 Metc. 176; *Jackson v. Harper*, 5 Wend. 246; *Willison v. Watkins*, 8 Pet. 43; *Milhollin v. Jones*, 7 Ind. 715; *Ryerson v. Eldred*, 18 Mich. 12; *Gray v. Johnson*, 14 N. H. 414; *Hodges v. Shields*, 18 B. Monr. 830; *Moore v. Beasley*, 3 Ohio, 294; *Caldwell v. Harris*, 4 Humph. 24; *Pope v. Harkins*, 16 Ala. 321.

The rule extends to a tenant who holds over, as well as to an under-tenant, an assignee or other person who claims under the lessee. *Jackson v. Stiles*, 1 Cow. 575; *Graham v. Moore*, 4 S. & R. 467; *Ingraham v. Baldwin*, 9 N. Y. (5 Seld.) 45; *Binney v. Chapman*, 5 Pick. 124; *Shelton v. Doe*, 6 Ala. 280; *Russell v. Erwin*, 38 Ala. 50; *Falkner v. Beers*, 2 Doug. (Mich.) 117; *Eister v. Paul*, 54 Penn. St. 196; *Phillips v. Rothwell*, 4 Bibb, 33; *Harker v. Gustin* 7 Halst. 42; *Rose v. Davis*, 11 Cal. 135; *Funk's Lessee v. Kincaid*, 5 Md. 404.

Every estate which must expire at a period certain and prefixed, by whatever words created, is an estate for years. And therefore this estate is frequently called a term, *terminus*, because its duration or continuance is bounded, limited, and determined: for every such estate must have a certain beginning, and certain end (z). But *id certum est, quod certum reddi protest*: therefore, if a man make a lease to another, for so many years as J. S. shall name, it is a good lease for years (a); for though it is at present uncertain, yet when J. S. hath named the years, it is then reduced to a certainty. If no day of commencement is named in the creation of this estate, it begins from the making, or delivery, of the lease (b). A lease for so many [* 280] *years as J. S. shall live, is void from the beginning (c); for it is neither certain, nor can ever be reduced to a certainty, during the continuance of the lease. And the same doctrine holds, if a parson make a lease of his glebe for so many years as he shall continue parson of Dale; for this is still more uncertain. But a lease for twenty or more years, if J. S. shall so long live, or if he should so long continue parson, is good (d); for there is a certain period fixed, beyond which it cannot last; though it may determine sooner, on the death of J. S., or his ceasing to be parson there (e).

We have before remarked, and endeavoured to assign the reason of, the inferiority in which the law places an estate for years, when compared with an estate for life, or an inheritance: observing, that an estate for life, even if it be *pur autre vie*, is a freehold: but that an estate for a thousand years is only a chattel, and reckoned part of the personal estate (f). Hence it follows, that a lease for years may be made to commence

(a) Co. Litt. 45.

(b) 6 Rep. 35.

(c) Co. Litt. 46. If an impossible time is mentioned for the commencement of the term, the date of the delivery of the lease is taken; but if an uncertain time, as, the

month without the year, is specified, the lease is void. Co. Litt. 46; 6 Rep. 35.

(d) Co. Litt. 45.

(e) Co. Litt. 45.

(f) *Ib.* 46.

(f) *Ib.* 45.

It also includes every species of tenancy, whether for years, at will or by sufferance. *Love v. Dennis*, 1 Harper, 70; *Williams v. The Mayor*, 6 Har. & J. 529, 533; *Trustees of First Presb. Cong. Salem v. Williams*, 9 Wend. 147; *Coburn v. Palmer*, 8 Cush. 124.

A tenant cannot ordinarily acquire a title by an adverse possession against his landlord, if such title is acquired during the tenancy. *Elster v. Paul*, 54 Penn. St. 196; *Galloway v. Ogle*, 2 Binn. 472; *Jackson v. Whitford*, 2 Caines, 215; *Jackson v. Miller*, 6 Cow. 751; *Lecatt v. Stewart*, 2 Stew. 474; *Byrns v. Beeson*, 1 Doug. (Mich.) 179; *Allen v. Chatfield*, 8 Minn. 435.

But a tenant may acquire and set up a title consistent with that admitted by the demise, as where he purchases the premises at a tax sale, or on a sale on execution against the lessor, made during the term. *Miller v. McBrier*, 14 S. & R. 382; *Isaac v. Clarke*, 2 Gill. 1; *Miller v. Bonsadon*, 9 Ala. 317; *Bettison v. Budd*, 17 Ark. 546; *Camley v. Stanfield*, 10 Texas, 546; *Elliott v. Smith*, 28 Penn. St. 181; *George v. Putney*, 4 Cush. 351; *Nellis v. Lathrop*, 22 Wend. 121; *Simers v. Saltus*, 3 Denio, 217.

The estoppel continues only during the term. *Page v. Kinsman*, 43 N. H. 331; *Jackson v. Collins*, 11 Johns. 1; *Zeller's Lessees v. Eckert*, 4 How. (U. S.) 286; *Duke v. Harper*, 6 Yerg. 280; *Doe v. Reynolds*, 27 Ala. 376; *Jackson v. Rowland*, 6 Wend. 666; *Wild's Lessees v. Serpell*, 10 Gratt. 415; *Tilghman v. Little*, 13 Ill. 241.

The tenant may show that the landlord's title has expired, as by selling the lands, or by an eviction by a title paramount. *Moore v. Beasley*, 3 Ohio, 292; *Marley v. Rodgers*, 5 Yerg. 217; *Jackson v. Rowland*, 6 Wend. 666; *Wells v. Mason*, 4 Scam. 84; *Swann v. Wilson*, A. K. Marsh. 99; *Den v. Ashmore*, 2 Zab. 261; *Tilghman v. Little*, 13 Ill. 241; *Towns v. Butterfield*, 97 Mass. 105; *Giles v. Ebnworth*, 10 Md. 333; *Wolf v. Johnson*, 30 Miss. 513; *Pope v. Harkins*, 16 Ala. 323; *Russell v. Allard*, 18 N. H. 222.

in futuro, though a lease for life cannot. (260). As, if A. grants lands to B. to hold from Michaelmas next for twenty years, this is good; but to hold from Michaelmas next for the term of his natural life, it is void. For Though no estate of freehold can. no estate of freehold can commence *in futuro*; because it could not be created at common law without livery of seisin, or corporal possession of the land; and corporal possession cannot be given of an estate now, which is not to commence now, but hereafter (*g*), unless indeed the freehold estate is to commence at the expiration of other freehold estates already limited, the first of which commences in possession, for then it takes effect as a remainder, of which we shall hereafter see more (*h*). And because no livery of *seisin is necessary to a lease for years, such lessee is not said to be [*281] seised, or to have true legal seisin of the lands. Nor indeed does the

Interesse termini. bare lease vest any estate in the lessee; but only gives him a right of entry on the tenement, which right is called his interest in the term, or *interesse termini*: but when he has actually so entered, and thereby accepted the grant, the estate is then, and not before, vested in him, and he is possessed, not properly of the land, but of the term of years (*i*); the possession or seisin of the land remaining still in him who has the freehold (*k*). But even before actual entry the lessee has many rights of property under the lease, for he may assign his interest or may validly grant an underlease: and his assignee or under-lessee may by entry complete the title as effectually as he could have done by his own entry (*l*). (261) Again, if the lessee died before entry, the *interesse termini* passed to his executors (*m*).

The word term, then, does not merely signify the time specified in the lease, but the estate also and interest that passes by the lease: and therefore the term may expire, during the continuance of the time; as by surrender. Difference between term and forfeiture, and the like. (262) For which reason, if A. grant time. a lease to B. for the term of three years, and after the expiration

(*g*) 5 Rep. 94.

(*h*) The common law rule, stated in the text, as to the limitation of estates of freehold, is daily evaded by the aid of the Statute of Uses.

(*i*) Co. Litt. 46.

(*k*) "To many purposes he is not tenant for years until he enter; as a release made to him is not good to increase his estate before entry, but he may release the rent reserved before entry, in respect of the privity." See Co. Litt. 270 a. "Neither can the lessor grant away the reversion by the name of the reversion before entry. But the lessee be-

fore entry hath an interest, *interesse termini*, grantable to another. And albeit the lessor die before the lessee enter, yet the lessee may enter into the lands. And so, if the lessee dieth before he enter, yet his executors or administrators may enter, because he presently by the lease hath an interest in him, and if it be made to two, and one die before entry, his interest shall survive." Co. Litt. 46 b.

(*l*) *Williams v. Bosanquet*, 1 Br. & B. 238, 248; see *Doe d. Parsley v. Day*, 2 Q. B. 147, 156.

(*m*) See Bac. Abr. Leases, M.; *Miller v. Green*, 1 Moo. & Sc. 199.

(260) A lease for years, which is to commence in future, is valid. *Young v. Dake*, 5 N. Y. (1 Seld.) 463; *Taggard v. Roosevelt*, 8 How. Pr. 141; 2 E. D. Smith, 100; *Whitney v. Allaire*, 1 N. Y. (1 Comst.) 305.

(261) Although a tenant, not in actual possession, cannot maintain trespass, yet he may maintain ejectment. *Whitney v. Allaire*, 1 N. Y. (1 Comst.) 305, 311; *Trull v. Granger*, 8 N. Y. (4 Seld.) 115; *Gardner v. Keteltas*, 3 Hill, 332.

(262) It is essential to a lease that some reversionary interest should remain in the lessor, for if he parts with his whole interest in the premises, it will amount to an assignment of the term. If, however, a lessee disposes of the term granted to him, but he reserves some portion, however small, this will be an under-lease. *Van Rensselaer v. Gallup*, 5 Denio, 454; *Piggot v. Mason*, 1 Paige, 412; *Davis v. Morris*, 36 N. Y. (9 Tiff.) 569; *Collamer v. Kelley*, 12 Iowa, 319.

[*282] *of the said term to C. for six years, and B. surrenders or forfeits his lease at the end of one year, C.'s interest shall immediately take effect: but if the remainder had been to C. from and after the expiration of the said three years, or from and after the expiration of the said time, in this case C.'s interest will not commence till the time is fully elapsed, whatever may become of B.'s term (n).

Tenant for term of years has incident to and inseparable from his estate, unless by special agreement, the same estovers which we formerly observed (o) that tenant for life was entitled to; that is to say, house-bote, fire-bote, plough-bote, and hay-bote (p); terms which have been already explained (q). (263) With regard to emblements, or the profits of lands sowed by tenant for years, there is this difference between him and tenant for life: that where the term of a tenant for years depends upon a certainty, as if he holds from midsummer for ten years, and in the last year he sows a crop of corn, and it is not ripe and cut before midsummer, the end of his term, the landlord shall have it; for the tenant knew the expiration of his term, and therefore it was his own folly to sow what he never could reap the profits of (r). But where the lease for years depends upon an uncertainty: as, upon the death of the lessor, being himself only tenant for life, or being a husband seised in right of his wife; or if the term of years be determinable upon a life or lives; in all these cases the estate for years not being certainly to expire at a time foreknown, but merely by the act of God, the tenant shall have the emblements in the same manner that a tenant for life or his executors is entitled thereto. Except a tenant at rack-rent,

(n) Co. Litt. 45.
(o) Page 233.
(p) Co. Litt. 53.

(q) Page 23.
(r) Litt. s. 68.

(263) An agreement or a contract by a landlord to make repairs, will bind him to do so; but if there is no agreement upon his part to make repairs, he cannot be compelled by the tenant to make any repairs; nor can the tenant make them and charge the expense to the landlord, or deduct it from the rent. In the absence of any agreement to repair, the tenant takes the premises in the condition in which they may happen to be, and the landlord is not bound to put them in tenantable condition. *Mumford v. Brown*, 6 Cow. 475; *Casad v. Hughes*, 27 Ind. 141; *Elliott v. Aiken*, 45 N. H. 36; *Foster v. Peyser*, 9 Cush. 242; *Howard v. Doolittle*, 3 Duer, 464.

In case the buildings leased are injured or destroyed by fire, or other cause, without the fault of the landlord, he is not bound to repair or rebuild them, unless he has expressly covenanted to do so. *Doupe v. Genin*, 45 N. Y. (6 Hand) 119; *Carter v. Rockett*, 8 Paige, 437; *Gates v. Green*, 4 id. 355; *Welles v. Castles*, 3 Gray, 323; *Gibson v. Perry*, 29 Mo. 245; *Proctor v. Keith*, 12 B. Monr. 252, 254; *Lamott v. Sterett*, 1 Harr. & J. 42; *Cross v. Button*, 4 Wis. 468; *Hallett v. Wylie*, 3 Johns. 44.

In such cases the tenant is bound to pay the rent if there is no clause in the lease which protects him. *Ib.*

By a statute, in New York, the lessors or occupants of buildings destroyed, or injured by the elements so as to be untenable, without any fault of the tenant, may remove therefrom and surrender the premises, and will not afterward be liable for rent. Laws of 1860, ch. 245. Under this statute, if a dwelling becomes untenable by reason of the filth from a privy on the same or adjoining premises, the tenant may leave the premises, and he will not thereafter be liable for the rent. *Fash v. Kavanagh*, 24 How. Pr. 347. This statute applies to those cases only in which the injury or destruction occurs after the tenant's entry, and not where it exists at the time of making the lease. *Bloomer v. Merrill* 29 How. Pr. 259; 1 Daly, 485.

who now, instead of taking emblements, continues in possession till the end of the current year of his tenancy (*s*). Not so, if it *determine by the [* 283] act of the party himself: as if tenant for years does anything that amounts to a forfeiture: in which case the emblements shall go to the lessor and not to the lessee, who hath determined his estate by his own default (*t*).

With regard to fixtures, a tenant for term of years may remove any of those fixtures which having been put up by tenants are ordinarily removable by them (*u*) at any time during his term, or during such period as he lawfully remains in possession as a tenant (*v*). (264.) If he neglect to remove them before the expiration of his term, and he gives up possession, his right to the fixtures is gone (*x*). If, however, he forfeits his term, it seems that he is allowed a reasonable time for the removal of his fixtures after the lessor gives notice of his intention to enforce the forfeiture. This, after much discussion and some adverse opinions (*y*), at last received a judicial decision in favour of the tenant (*z*).

We may here notice some points respecting certain leases or leasehold interests which are very common. Where a tenant is in possession of land paying rent, whether annually, half-yearly, or quarterly, but without any express agreement regulating the duration of his tenancy, the law presumes, independently of any local *custom, that the tenancy is from year to year, [* 284] that is to say, a tenancy which, until determined by notice or surrender, is impliedly renewed at the commencement of each year, and can be determined at the option of either party, but only on the anniversary of the day on which it commenced, and after half a year's

Estate from
year to year.

(*a*) Co. Litt. 56; 14 & 15 Vict. c. 25.

(*c*) Co. Litt. 55. See, however, the law as to fixtures, stated below, and query how far this would now be held to extend to emblements.

(*u*) It will be remembered that there are two classes of fixtures—ordinary tenants' fixtures and trade fixtures—the law giving greater latitude to a lessee using the property for purposes of trade as to what he may remove. For an account of what articles constitute fixtures of the various kinds, see Amos and Ferrard on Fixtures, Ch. II.; Woodfall's Landlord and Tenant, p. 494, *et*

seq.; and as to agricultural fixtures, see 14 & 15 Vict. c. 25.

(*v*) *Penton v. Robart*, 2 East, 88; *Weeton v. Woodcock*, 7 M. & W. 14; *Leader v. Homewood*, 5 C. B. N. S. 546.

(*x*) *Leader v. Homewood*, 5 C. B. N. S. 546.
(*y*) *Minshall v. Lloyd*, 8 M. & W. 45; *Mackintosh v. Trotter*, 8 M. & W. 184; *Weeton v. Woodcock*, 7 M. & W. 14; *Stansfeld v. Mayor of Portsmouth*, 4 C. B. N. S. 120.

(*z*) *Sumner v. Bromilow*, 84 L. J. Q. B. 180. A still more recent case, *Pugh v. Arton* (Weekly Notes, 8 July, 1869), seems, however, adverse to this view.

(264) In this country the general rule is, that any tenant, whether for life, for years, or at will, is permitted to remove all such fixtures of a chattel nature, as he has himself erected upon the demised premises, for the purpose of ornament, domestic convenience, or to carry on trade, when such removal can be effected without material injury to the freehold. *Elwes v. Maw*, 3 East, 88; 2 Smith's Lead. Cas. 228 (177, 7th Am. ed.); *Holmes v. Tremper*, 20 Johns. 29; *Cook v. Champlain Transp. Co.*, 1 Denio, 91; *Leland v. Gassett*, 17 Vt. 403; *Mason v. Fenn*, 13 Ill. 529, 535; *Finney v. Walkins*, 13 Mo. 291; *Whiting v. Brastow*, 4 Pick. 810; *Van Ness v. Pacard*, 2 Pet. 137; *Brooks v. Stinson*, 1 Busbee, 72; *McCracken v. Hall*, 7 Ind. 80; *Lawrence v. Kemp*, 1 Duer, 863.

But this right of removal must be exercised before the tenant's term expires, or at least before he gives up the possession. *Preston v. Briggs*, 16 Vt. 124; *Stockwell v. Marks*, 17 Me. 455; *Overton v. Williston*, 81 Penn. St. 155; *Pemberton v. King*, 2 Dev. 376; *Beer v. St. John*, 16 Conn. 323; *Shepard v. Spaulding*, 4 Metc. 416; *Haflick v. Stober*, 11 Ohio St. 483; *Lawrence v. Kemp*, 1 Duer, 878; *Beckwith v. Boyce*, 9 Mo. 560; *State v. Elliot*, 11 N. H. 540; *McCracken v. Hall*, 7 Ind. 80.

previous notice (a). Thus, if A. on the 1st of August enters upon land as tenant of B. the owner, and on or after the 1st November pays 10*l.* as a quarter's rent up to November, these facts alone, without further evidence, will establish a tenancy from year to year, commencing on the 1st of August; and since such a tenancy can only be determined by giving a half year's notice, to terminate on the 31st July, therefore if no notice be given on the 1st of February after the first commencement of the tenancy, it will continue for two whole years at least, and so on in other years (b). Of course the parties may at their pleasure, by contract, vary the terms of the tenancy (c). And in certain places custom has established a variation. By the custom of London a quarter's notice is sufficient where the rent is less than 2*l.* (d). When the letting is expressly for a shorter period than a year, by the quarter, month or week, if the tenancy continue beyond the first period, then a notice equal to the period of the letting is requisite in order to determine the [*285] tenancy (e). But of *course, the tenant may quit at the end of the first period without notice (f). If the notice be waived, the tenancy continues as if none had been given (g). If a tenant for a term certain under a lease keep possession after the expiration of the term and pay rent, this will constitute a tenancy from year to year, subject to the conditions contained in the lease so far as applicable (h).

The second species of estates not freehold are estates at will. An estate at will is where lands and tenements are let by one man to another, to have and to hold at the will of the lessor; and the tenant by force of this lease obtains possession (i). (265) Such tenant has no certain

(a) *Right d. Flower v. Darby*, 1 T. R. 159; *Ibbs v. Richardson*, 1 P. & D. 618; *Doe d. Thomson v. Amey*, 12 A. & E. 476; *Braithwaite v. Hitchcock*, 10 M. & W. 494; *Tress v. Savage*, 4 E. & B. 86; *Doe d. Cornwall v. Matthews*, 11 C. B. 675. This kind of lease was in use at least as long ago as the reign of Henry VIII., when half-a-year's notice seems to have been required to determine it. T. 13 Hen. 8, 15, 16.

(b) See, as to the notice, *Gulliver v. Burr*, W. Bl. 596; *Kemp v. Derrett*, 8 Camp. 510; *Papillon v. Brunton*, 5 H. & N. 518; *Humphreys v. Franks*, 18 C. B. 323; *Walker v. Godé*, 6 H. & N. 594; *Doe d. Williams v. Smith*, 5 A. & E. 350; *Cadby v. Martinez*, 11 A. & E. 720.

(c) See *Doe d. King v. Grafton*, 21 L. J. Q. B. 276.

(d) *Skinn*, 449; *Harg. Co. Litt.* 270 b.

(e) *Atherstone v. Bostock*, 3 Scott, N. R. 637; *Huffell v. Armitstead*, 7 C. & P. 66. There it was said that a weekly tenant might quit at the expiration of any week without notice; but see *Jones v. Mills*, 10 C. B. N. S. 788, where a week's notice was thought to be proper.

(f) *Ib.*

(g) As to what is waiver in such a case, see

Jones v. Sheares, 6 N. & M. 428; *Blyth v. Dennett*, 13 C. B. 178.

(h) *Digby v. Atkinson*, 4 Camp. 275; *Johnson v. Churchwardens, &c.*, 6 N. & M. 106.

A lease for years, without more, is a lease for two years. 6 Rep. 35. A lease "for one year and so on from year until the tenancy hereby created shall be determined as hereafter mentioned," followed by a proviso that either party might determine the tenancy by giving three months' notice, was held to be a lease for two years certain, on account of the rule already mentioned, that a tenancy from year to year can only be put an end to on the expiration of the current year, unless there be an express stipulation to the contrary. *Doe d. Chadborn v. Green*, 1 Per. & Dav. 454. So, a letting from one half-year and so on from half-year to half-year until determined, is a letting for a year certain. 4 Nev. & P. 535. So, a lease for three years, and after for three years, and so from three years to three years, is a lease for nine years certain. *Bac. Ab., Leases (L.)*, 8.

(i) *Litt. s. 68*; *Doe d. Tones v. Chamberlaine*, 5 M. & W. 14; *Doe d. Burgess v. Thompson*, 5 A. & E. 532.

(265) Strictly speaking, an estate at will is where one man lets land to another to hold at the will of the lessor, and where the agreement expressly provides that it shall be held at the will of the lessor; but if a tenant is placed on land without any term being prescribed, or any rent reserved, and as a mere occupier, he is a tenant at will. *Sarsfield v. Healy*, 50 Barb. 245; *Post v. Post*, 14 Barb. 253; *Harris v. Frink*, 49 N. Y. (4 Sick.) 24, 32; *Dame v. Dame*, 88 N. H. 429.

indefeasible estate, nothing that can be assigned by him to any other; because the lessor may determine his will, and put him out whenever he pleases. But every estate at will is at the will of both parties, landlord and tenant; so that either of them may determine his will, and quit his connexions with the other at his own pleasure (*k*). (266) Yet this * must be understood with [* 286] some restriction. For, if the tenant at will sows his land, and the

landlord, before the corn is ripe, or before it is reaped, puts him out, yet the tenant shall have the emblements, and free ingress, egress, and

Emblements. regress, to cut and carry away the profits (*n*). (267) And this for the same reason, upon which all the cases of emblements turn; viz. the point of uncertainty: since the tenant could not possibly know when his landlord would determine his will, and therefore could make no provision against it; and having sown the land, which is for the good of the public, upon a reasonable presumption, the law will not suffer him to be a loser, by it. But it is otherwise, and upon reason equally good, where the tenant himself determines the will; for in this case the landlord shall have the profits of the land (*o*). (268)

What act does, or does not, amount to a determination of the will on either side, has formerly been matter of great debate in our courts. But it is now settled, that (besides the express determination of the lessor's Determination of the will. will, by declaring that the lessee shall hold no longer; which must either be made upon the land (*p*), or notice must be given to the lessee (*q*)) the exertion of any act of ownership by the lessor, as entering upon the premises and cutting timber (*r*), taking a distress for rent and impounding it thereon (*s*), or making a feoffment, or lease for years of the land to commence immediately (*t*), or any act of desertion by the lessee, as assigning his estate to another, or committing waste, which is an act inconsistent with such a tenure (*u*); or which is *instar omnium*, the death or outlawry of either lessor or lessee (*x*): puts an end to or determines the estate at will. (269)

(*k*) Co. Litt. 55.

(*n*) Co. Litt. 56; but see *Wallis v. Delmar*, 29 L. J. Ex. 276.

(*o*) Co. Litt. 55.

(*p*) *Ib.* 55.

(*q*) 1 Vent. 248.

(*r*) Co. Litt. 55; 9 Mea. & W. 648.

(*s*) *Ib.* 57.

(*t*) 1 Roll. Abr. 860; 2 Lev. 88.

(*u*) Co. Litt. 57.

(*x*) 5 Rep. 116; Co. Litt. 57, 62.

(266) So held in *Cheever v. Pearson*, 16 Pick. 266, 272; *Doe v. Richards*, 4 Ind. 374.

(267) To the same effect are *Davis v. Thompson*, 13 Me. 209; *Sherburne v. Jones*, 20 Id. 70; *Stewart v. Doughty*, 9 Johns. 108.

(268) The same rule applied in *Debow v. Titus*, 5 Halst. 128.

(269) The rule stated in the text is generally the rule in this country; and a tenancy at will is held to be terminated in the following cases: Upon a notice to quit. *Davis v. Thompson*, 13 Me. 209; *Ellis v. Paige*, 1 Pick. 43.

Upon a demand of possession of the premises. *Howell v. Howell*, 7 Ired. 491, 496.

An entry upon the land with an intent to terminate the lessee's estate; and the intent is a question of fact. *Holly v. Brown*, 14 Conn. 255; which intent must come to the knowledge of the tenant. *Rising v. Stannard*, 17 Mass. 281.

Doing such acts upon the premises as would be a trespass in any one but such lessor, as by carrying off stone or trees from the premises against the tenant's will. *Doe v. Turner*, 7 M. & W. 226.

Making a feoffment on the land to a third party. *Rising v. Stannard*, 17 Mass. 281, 286.

[*287] *The law is, however, careful, that no sudden determination of the will by one party shall tend to the manifest and unforeseen prejudice of the other. This appears in the case of emblements before mentioned; and, by a parity of reason, the lessee, after the determination of the lessor's will, shall have reasonable ingress and egress to fetch away his goods and utensils, and to remove his fixtures (y). (270). And, upon the same principle, courts of law have of late years leaned as much as possible against construing tenancies from year to year. demises, where no certain term is mentioned, to be tenancies at will; but have rather held them to be tenancies from year to year so long as both parties please, especially where an annual rent is reserved.

Under the provisions of the Statute of Frauds (z) (an enactment passed for a purpose indicated by its name), all leases and estates made by parol, and not put in writing and signed by the parties making the same, or their agents lawfully thereto authorized, in writing, have the force and effect of leases or estates at will only, an exception, however, being made (a) of all leases for terms not exceeding three years from the making thereof whereon the rent reserved is at least two-thirds of the annual value. The courts, following the principle above noticed, have, whilst giving effect to the spirit of this act, so far deviated from its strict letter, as to hold that where a lease is made by parol for more than three years, followed by a payment of rent, or promise to pay rent, the tenancy is one from year to year, upon the terms (except as to the duration of the lease) contained in the parol lease, and is not a tenancy at will (b.)

[*288] *Hence a tenancy at will, being, as is obvious, an inconvenient mode of possessing land, rarely occurs in practice, except in certain cases where it exists by operation of law rather than by express intendment of the parties (c), and except the large number of tenancies at will which con-

(y) *Cole*, Eject. 346; *Heap v. Barton*, 12 C. B. 274; *Martin v. Roe*, 7 E. & B. 287.

(z) 29 Car. 2, c. 3, s. 1.

(a) B. 3.

(b) *Doe d. Riggs v. Bell*, 5 T. R. 471; *Olayton v. Blakey*, 8 Ib. 3; *Beale v. Sanders*, 5 Scott, 58. Of course, before any such payment, or promise of payment, the tenancy is merely at will. *Doidge v. Bowers*, 2 M. & W. 365.

(c) For instance, where a mortgagor remains in personal possession of the mortgagee land with the consent of the mortgagee, he is in the eye of the law (where no express contract exists) a tenant at will, but his equitable rights carry his position substantially far higher. We shall revert to this point presently.

Selling the land to a third party. *Jackson v. Aldritch*, 18 Johns. 106; *Alton v. Pickering*, 9 N. H. 494; *Howard v. Merriam*, 5 Cush. 568; *Esty v. Baker*, 50 Me. 325; *Curtis v. Galvin*, 1 Allen, 215.

Leasing the lands to another. *Hildreth v. Conant*, 10 Metc. 298; *Kelly v. Waite*, 12 id. 800; *Pratt v. Farrar*, 10 Allen, 519.

Acts of forfeiture by the tenant, as by assigning his interest to another. *Cooper v. Adams*, 6 Cush. 87; *Phillips v. Covert*, 7 Johns. 1; *Warner v. Page*, 4 Vt. 291; *Doak v. Donelson*, 2 Yerg. 249.

Or by conveying the land. *Ib.* *Howell v. Howell*, 7 Ired. 491, 496.

Abandoning the premises, and especially where the tenant declares that he will no longer hold them. *Chandler v. Thurston*, 10 Pick. 205.

Or by the death of either party. *Rising v. Stannard*, 17 Mass. 282; *Howard v. Merriam*, 5 Cush. 568; *Robie v. Smith*, 21 Me. 114; *Manchester v. Doddridge*, 8 Ind. 360; *Oody v. Quarerman*, 12 Ga. 386, 400.

(270) In accordance with the text. See *Folsom v. Moore*, 19 Me. 252; *Ellis v. Paige*, 1 Pick. 43.

stitute copyholds, of which we have already spoken at some length. They are, as will sufficiently appear from what we have said, when considered as estates in law, merely tenancies at will, but being regulated and made permanent by custom, it is rather in theory than in substance that they are so to be regarded (*d*).

An estate at sufferance, is, where one comes into possession of land by lawful title, but keeps it afterwards without any title at all. As, if a man takes a lease for a year, and, after the year is expired, continues to hold the premises without any fresh leave from the owner of the estate. (271). Or, if a man makes a lease at will and dies, the estate at will is thereby determined; but if the tenant continueth possession, he is tenant at sufferance. But no man can be tenant at sufferance against the king, to whom no laches, or neglect, in not entering and ousting the tenant, is ever imputed by law; but his tenant, so holding over, is considered as an absolute intruder (*e*). But, in the case of a subject, this estate may be destroyed whenever the true owner shall make an actual entry on the lands and oust the tenant; for, before entry, he cannot maintain an action of trespass against the tenant by sufferance, as he might against a stranger (*f*): and the reason is, because the tenant being once in by a lawful title, the law (which presumes no wrong in any man) will *suppose him to continue upon a title equally lawful; [* 289] unless the owner of the land by some public and avowed act, such as entry is, will declare his continuance to be tortious, or, in common language, wrongful.

A distinction is sometimes taken between those cases where the tenant comes to the particular estate by act of the parties, and where by act of law. In the latter case there can be no presumption of the owner's assent which may exist in the former case (*g*); the distinction, whatever force it can have, is rarely called into consideration.

The principal distinction between tenant at will and tenant at sufferance is, that the landlord in the former case must give notice before his title to recover possession is complete, whereas in the latter he may, without any notice, bring ejectment, there being in the former case a privity of contract, express or implied, between the parties, but none in the latter case. A tenant at sufferance in fact only has this privilege, that he is excused from liability as a trespasser in respect of his past occupation.

If the tenant (after due notice) do not quit the land when requested to do so by the landlord, the latter may enter forcibly into the premises and, if neces-

(*d*) See *ante*, p. 187.

(*e*) Co. Litt. 57.

(*f*) *Ib.*

(*g*) Co. Litt. 271 a.

(271) Among those who have been considered tenants at sufferance, are tenants at will whose estates were determined by alienation or by the death of the lessor. *Kinsley v. Ames*, 2 Metc. 29; *Benedict v. Morse*, 10 id. 223.

Or by the happening of some contingent event upon which the determination of an estate at will depended. *Elliott v. Stone*, 1 Gray, 571; *Creech v. Crockett*, 5 Cush. 133.

A tenant at sufferance is not entitled to emblements. *Doe v. Turner*, 7 M. & W. 226. And in Massachusetts it has been held that he is not liable at common law for use and occupation. *Flood v. Flood*, 1 Allen, 217; *Delano v. Montague*, 4 Cush. 42. Though it is otherwise by some of the English cases. *Harding v. Crethorne*, 1 Esp. 51; *Bayley v. Bradley*, 5 C. B. 396; *Christy v. Tancred*, 7 M. & W. 127; *Ibbs v. Richardson*, 9 Ad. & E. 849.

sary, use violence (but only so much as is absolutely requisite) to expel the tenant, without being liable for trespass or assault (*h*), (272) though if the entry have been forcible he may render himself liable to an indictment (*i*). The other remedy is an action of ejectment, by which, under process [* 290] * of law, he recovers possession (*k*). By the common law a tenant contumaciously holding over after his tenancy had expired was at the utmost liable to account for the profits of the land so detained by him. But by the statute 4 Geo. 2, c. 28, in case any tenant for life or years, or other person claiming under or by collusion with such tenant, shall willfully (*l*) hold over after the determination of the term, and demand made and notice in writing given by him to whom the remainder or reversion of the premises shall belong, for delivering the possession thereof; such person, so holding over or keeping the other out of possession, shall pay for the time he detains the lands, at the rate of double their yearly value. And, by stat. 11 Geo. 2, c. 19, in case any tenant, having power to determine his lease, shall give notice of his intention to quit the premises, and shall not deliver up the possession at the time contained in such notice, he shall thenceforth pay double the former rent, for such time as he continues in possession. These statutes have almost put an end to the practice of tenancy by sufferance, unless with the tacit consent of the owner of the tenement (*m*).

(*h*) *Jones v. Chapman*, 2 Ex. 803, 821; *Harvey v. Bridges*, 14 M. & W. 437, 442; *Davis v. Burrell*, 10 C. B. 821; *Pollen v. Brewer*, 7 C. B. N. S. 371. The cases have gradually established the doctrine in the text, the ancient opinion being that not even by a peaceable entry could the landlord recover lawful possession. See *Taunton v. Costar*, 7 T. R. 431; *Newton v. Harland*, 1 Scott, N. R. 474; s. c. 1 M. & R. 220; *Turner v. Meymott*, 1 Bing. 158; s. c. 7 Moo. 574; *Butcher v. Butcher*, 7 B. & C. 399; also stat. 5 Rich. 2; stat. 2, c. 8; 8 Hen. 6, c. 9; 1 Hawk. P. C. c. 64; *Cole, Ejec.* 70, 71.

(*i*) *Davison v. Wilson*, 11 Q. B. 890.

(*k*) See, as to the modern proceedings in ejectment, 15 & 16 Vict. c. 76.

(*l*) That is, contumaciously, knowing that he has no title. For if he be under a mistaken belief as to his right of possession, he will not be liable under the statute for double value. *Swinfen v. Bacon*, 6 H. & N. 184, 848. It is only the lessor, or the person who stands in the position of landlord, who can sue. See *Blatchford v. Cole*, 5 C. B. N. S. 514.

(*m*) The proceedings of landlords to recover possession are facilitated in cases where the term does not exceed seven years, and the rent is not above twenty pounds a year, by the Small Tenements Act, 1 & 2 Vict. c. 74. See *Delany v. Fox*, 1 C. B. N. S. 166.

(272) The American cases hold that if the owner of land is wrongfully held out of possession by another, he may enter and expel the occupant, if he does not use more force than is reasonably necessary to accomplish this purpose, and he will not be liable to a civil action brought by such occupant, whether he sue for a trespass *quare clausum*, for an assault and battery, or for an injury to his goods. *Hyatt v. Wood*, 4 Johns. 150; *Ives v. Ives*, 18 id. 285; *Beecher v. Parmele*, 9 Vt. 352; *Johnson v. Hannafan*, 1 Strobh. 318; *Overdeer v. Lewis*, 1 Watts & Serg. 90; *Sampson v. Henry*, 18 Pick. 36; 4 id. 379; *Meador v. Stone*, 7 Metc. 147; *Minor v. Stevens*, 1 Cush. 482; *Moore v. Mason*, 1 Allen, 406; *Todd v. Jackson*, 2 Dutch. (N. J.) 525; *Tribble v. Frame*, 7 J. J. Marsh. 601; *Hoots v. Graham*, 23 Ill. 81, 84.

The contrary has also been held. *Dustin v. Coudry*, 23 Vt. 631, 647; *Reeder v. Purdy*, 41 Ill. 279; 48 id. 261.

* CHAPTER X.

[* 291]

ESTATES UPON CONDITION.

WE have hitherto considered estates as classified in respect of their duration according to their intrinsic qualities, but the law recognizes divers modes by which any of these estates may themselves be held: their possession being qualified by some restriction depending usually upon the happening or not happening of some uncertain event, whereby the estate may be either originally created or enlarged or finally defeated (*a*). Hence arises a distinct system of classification; estates being in this view commonly called estates upon condition, and their difference of species depending upon the various conditions which regulate their possession. Any of the former classes of estates, a fee, or other freehold, or a term of years, may depend upon these provisional restrictions.

Viewed, then, according to this basis of classification, estates are of two sorts: first, estates upon condition implied: secondly, estates upon condition expressed; under which last may be included estates held in *vadio*, gage, or pledge; estates by statute merchant, or statute staple; and estates held by *legit*.

Estates upon condition implied in law, are where a grant of an estate has a condition annexed to it inseparably from its essence and constitution, although no condition be expressed in words. (273) As, if a grant be made to a man of an office, generally, without adding other words; the law tacitly annexes hereto a secret condition, that the grantee shall duly execute his office (*b*), on breach of which condition it is lawful for the grantor, or his heirs, to oust him, and grant it to another person (*c*). For an office, either public or private, may be forfeited by mis-user or non-user, both of which are breaches of this implied condition. 1. By mis-user, or abuse; as if a judge takes a bribe, or a park-keeper kills deer without authority. 2. By non-user, or neglect; which in public offices, that concern the administration of justice, or the commonwealth, is of itself a direct and immediate cause of forfeiture; but non-user of a private office is no cause of forfeiture, unless some special damage is proved to be occasioned thereby (*d*). For in the one case delay must necessarily be occasioned in the affairs of the public, which require a constant attention: but private offices not requiring so regular and unremitted a service, the temporary neglect of

(a) Co. Litt. 201.

(c) *Ib.* ss. 378, 379.(b) Litt. s. 378. See *Bartlett v. Downes*, 8 B. & Cr. 616.

(d) Co. Litt. 233.

(273) A condition is a qualification or restriction annexed to a conveyance. The words must not only be such as of themselves import a condition, but must be so connected with the grant in the deed as to qualify or restrain it. *Laberes v. Carleton*, 53 Me. 211, 213.

Whether words in a devise constitute common-law conditions annexed to an estate, a breach of which, or of any one of which, will work a forfeiture, defeat the estate, and let in the heirs, or whether they are regulations for the management of the estate, and explanatory of the terms under which it was intended to have it managed, is a matter to be gathered, not from a particular expression in the devise, but from the whole instrument. *Stanley v. Colt*, 5 Wall. 119.

them is not necessarily productive of mischief: upon which account some special loss must be proved, in order to vacate these. Franchises also, being regal privileges in the hands of a subject, are held to be granted on the same condition of making a proper use of them; and therefore they may be lost and forfeited, like offices, either by abuse or by neglect (e). (274.)

Upon the same principle proceeded all the forfeitures which have been given by law of life estates and others, for any acts done by the tenant himself, that are incompatible with the estate which he holds. As if tenants for life or years enfeoffed a stranger in fee simple: this was, by the common law, a forfeiture of their several estates; being a breach of the condition which the law annexes thereto, viz. that they shall not attempt to create a greater estate than [* 293] they themselves are entitled to (f). So, if any tenant for life, or in fee, commit treason, the king is entitled to have their tenements, because their estate is determined by the breach of the condition that they shall be loyal, which the law tacitly annexes to every feudal donation (g).

(e) 9 Rep. 50.

(f) Co. Litt. 215; see *post*, c. 18.

(g) *A.-G. v. Sir George Sands*, Hard. 488; the lands are in all cases forfeited to the crown. *Burgess v. Wheats*, 1 Ed. 200. See 17 Ed. 2, st. 1, c. 11; 3 Inst. 37, 3 *lb.* 47; *R. v. Bridger*, 1 M. & W. 145. Leaseholds accrue to the crown by forfeiture on the felony of the lessee. Where the tenant commits treason, the subject of forfeiture and the allied doctrine of escheat will be discussed in a subsequent chapter — c. 18.

(274) It is a tacit condition of a grant of incorporation, that the grantees shall act up to the end or design for which they were incorporated; and, therefore, by a neglect or an abuse of its franchises, a corporation may forfeit its charter as for a condition broken, or for a breach of trust. *People v. Bank of Niagara*, 6 Cow. 196; *Lehigh Bridge Co. v. Lehigh Coal and Nav. Co.*, 4 Rawle, 9; *State Bank of Indiana v. State*, 1 Blackf. 267, 279; *Commonwealth v. Commercial Bank of Penn.*, 28 Penn. St. 383; *People v. River Raisin and Lake Erie R. R. Co.*, 12 Mich. 389; *Hamtramck v. Bank of Edwardsville*, 2 Mo. 169.

A corporate franchise may be lost by non-user or neglect. *Matter of Jackson Marine Ins. Co.*, 4 Sandf. Ch. 559, 564; *People v. Bank of Pontiac*, 12 Mich. 527, 537; *State v. Commercial Bank, etc.*, 10 Ohio, 535. The New York Code of Proc., § 430, provides for cases of failure to exercise corporate powers. See *People v. Williamsburgh Turnp. and Bridge Co.*, 47 N. Y. (2 Sick.) 536; *Gilman v. Greenpoint Sugar Co.*, 4 Lans. 432; 61 Barb. 9.

In some cases it has been held that a mere omission by a corporation to exercise its corporate powers, when not connected with any acts, may not work a forfeiture. *Attorney-General v. Bank of Niagara*, 1 Hopk. 861; *State v. Pawtuzet Turnp. Co.*, 8 R. I. 182; *Regents of University of Maryland v. Williams*, 9 Gill. & Johns. 365; *Commercial Bank of Natchez v. State of Mississippi*, 6 Sm. & Marsh. 615, 616; *State v. Urbana Ins. Co.*, 14 Ohio, 6.

But a suspension of specie payments by a bank may be carried so far as to extinguish its chartered privileges; and by willfully refusing for a single day to make such payments, it may expose its charter to forfeiture. *Commonwealth v. Commercial Bank of Penn.*, 28 Penn. St. 383, 391; *Commercial Bank of Natchez v. State of Mississippi*, 6 Sm. & Marsh. 617, 624; *Attorney-General v. Bank of Michigan*, Harr. Ch. (Mich.), 315; *State v. Bank of South Carolina*, 1 Speers, 441.

No one but the State can enforce the forfeiture against a corporation for a breach of the condition upon which it was created; and this must be done by a direct, not by a collateral proceeding. *Vermont and Canada R. R. Co. v. Vermont Central R. R. Co.*, 34 Vt. 57; *Cooper v. Shaver*, 41 Barb. 151, 158; *Commonwealth v. Union Ins. Co.*, 5 Mass. 230; *Enfield Toll Bridge Co. v. Connecticut R. R. Co.*, 7 Conn. 46; *Myers v. Manhattan Bank*, 20 Ohio, 283; *Cahill v. Kalamazoo Mutual Ins. Co.*, 3 Doug. (Mich.) 124, 141; *Brookville Turnp. Co. v. McCarty*, 8 Ind. 392; *Crump v. U. S. Mining Co.*, 7 Gratt. 352; *Planters' Bank v. Bank of Alexandria*, 10 Gill. & Johns. 346; *Smith v. Mississippi R. R. Co.*, 6 Sm. & Marsh. 179; *Bank of Gallipolis v. Trimble*, 6 B. Monr. 599; *Hudgins v. State*, 46 Ala. 208.

The State may waive the forfeiture. *People v. Manhattan Co.*, 9 Wend. 351; *State v. Bank of Charleston*, 2 McMullan, 439.

An estate on express condition is where an estate is granted either in fee simple or otherwise, with an express qualification or condition contained either in the grant itself, or even, in some cases, in a separate deed (*h*), whereby the estate granted shall either commence, be enlarged, or be defeated, upon performance or breach of such qualification or condition. (275) Though there is a difference between inheritances executed and inheritances executory, in respect of the condition being contained in the same or a separate deed, for where the land is conveyed by livery of seisin, or in similar executed fashion, there can be no defeasance or effective condition in a separate deed. And in other cases, such as a release, the indenture of defeasance if separate must be simultaneous, so as, in the eye of the law, to be the same deed, *quæ incontinenti fiunt in esse videntur*. Other inheritances, such as rents, annuities, conditions, or warranties that are executory in their nature, may be defeated by separate deeds made simultaneously with the deed creating the inheritance, or at any time after (*h*). Usually, however, in practice, the deed creating the estate contains the defeasance.

Conditions are either precedent, or subsequent. (276) Precedent are such as must happen or be performed before the estate can vest or be enlarged: subsequent are such, by * the failure or non-performance [* 294] of which an estate already vested may be defeated. Thus, if an estate for life be limited to A., upon his marriage with B., the

(*h*) Co. Litt. 286 b; 5 Rep. 90 b; Shep. Touchst. 125.

(275) Various forms of expression are employed to imply a condition in a grant, as "on condition,"—"if it shall so happen,"—"provided always,"—or, "so that he the grantee pay, etc., within a specified time;" and every such grant made upon any of these terms vests a conditional estate in the grantee. So there are other words which may create a condition, as where there is added a conclusion containing a clause of re-entry; or even without such a clause, if it is declared that if the grantee does or does not do a specified act, his estate shall cease or be void. 4 Kent, 124. A conveyance on condition that the grantee shall keep a saw-mill and a grist-mill doing business on the premises, is a valid one, and if the grantee fails to perform the condition he forfeits the estate. *Sperry v. Pond*, 5 Ohio, 388; and see *Hadley v. Hadley Manuf. Co.*, 4 Gray, 140; *Randall v. Latham*, 36 Conn. 48.

A condition in a deed that the grantee, his heirs and assigns shall not, at any time, manufacture or sell, to be used as a beverage, any intoxicating liquor, or permit the same to be done on the premises conveyed, unless the grantor, his heirs or assigns, shall sell other lands in the same village without such restriction, or shall themselves manufacture or sell, or permit on their lands in the same village to be manufactured or sold, such liquor to be used as a beverage, is a valid condition, not repugnant to the grant; and upon a breach of the condition, which gave a right of the entry for a breach, the grantor may recover in ejectment for the land. *Plumb v. Tubbs*, 41 N. Y. (3 Hand) 442; *Catt v. Tourle*, L. R., 4 Ch. App. 654.

Reasonable restraints upon the mode in which the premises shall be used may be made conditions which are valid. *Gellis v. Bailey*, 21 N. H. (1 Fost.) 149.

(276) Whether the words of a devise or a conveyance create a condition precedent or one subsequent is not always easily determined. No technical words are necessary to the determination of the question, and the construction must depend upon the intention of the parties as gathered from the instrument and the existing facts.

If the act or condition required does not necessarily precede the vesting of the estate, but may accompany or follow it, and if the act may be as well done after as before the vesting of the estate, or if from the nature of the act to be performed and the time required for its performance, it is evidently the intention of the parties that the estate shall vest, and the grantee perform the act after taking possession, then the condition is subsequent. *Under-*

marriage is a precedent condition, and, till that happens, no estate (i) is vested in A. Or, if a man grant to his lessee for years, that upon payment of a hundred pounds within the term he shall have the fee, this also is a condition precedent, and the fee simple does not pass till the hundred pounds be paid (k). But, if a man grant an estate in fee simple, reserving to himself and his heirs a certain rent; and that if such rent be not paid at the times appointed, it shall be lawful for him and his heirs to re-enter, and avoid the estate: in this case the grantee and his heirs have an estate upon condition subsequent, which is defeasible if the condition be not strictly performed (l). (277) To this class may also be referred the ancient fee simples conditional which existed at the common law before the statute *de Donis* (m). Thus, an estate to a man and his heirs, tenants of the manor of Dale, is an estate on condition that he and his heirs continue tenants of that manor. And so, if a personal annuity be granted at this day to a man and the heirs of his body, as this is no tenement within the statute, it remains, as at common law, a fee simple on condition that the grantee has heirs of his body. Upon the same principle depend all the determinable estates of freehold, which we mentioned

(i) Show. Parl. Cas. 83, &c.

(k) Co. Litt. 217.

(l) Litt. s. 325.

(m) See pp. 109, 110, 111. Estates on condition strictly so called are not, except in leases or terms, now very common, modern conveyancers preferring usually to rely upon an agreement, enforceable specifically in a

court of equity, for reconveyance on performance of the condition; much of the learning on these matters is therefore now antiquated, but inasmuch as it is not entirely obsolete, and is sometimes applicable under the provisos for re-entry contained in modern leases, it is still worthy of notice.

hill v. Saratoga and Washington R. R. Co., 20 Barb. 455, 460; *Blacksmith v. Fellows*, 7 N. Y. (3 Seld.) 401, 414; 19 How. (U. S.) 366; *Parmele v. Oswego and Syracuse R. R. Co.*, 6 N. Y. (2 Seld.) 74, 80; *Rogan v. Walker*, 1 Wis. 527; *Burnett v. Strong*, 26 Miss. (4 Cush.) 116; *Sheppard v. Thomas*, 26 Ark. 617.

Conditions subsequent, especially when relied on to work a forfeiture, must be created by express terms or by clear implication, and they are strictly construed. *Hadley v. Hadley Manuf. Co.*, 4 Gray, 140, 145; *Ludlow v. New York and Harlem R. R. Co.*, 12 Barb. 440; *Gadberry v. Sheppard*, 27 Miss. (5 Cush.) 203; *Hoyt v. Kimball*, 49 N. H. 322; *Varis v. Renshaw*, 49 Ill. 425.

And, therefore, where a condition applies in terms to a grantee or lessee without mentioning his heirs, executors or assigns, the condition cannot be broken after the death of such grantee or lessee. If heirs and executors are named, but not assigns, the condition will not be broken by any act or omission of an assignee. *Page v. Palmer*, 48 N. H. 385; *Emerson v. Simpson*, 43 id. 475; see *Gadberry v. Sheppard*, 27 Miss. (5 Cush.) 203; *Bradstreet v. Clark*, 21 Pick. 389.

Where no particular time is specified for the performance of a condition it ought to be complied with or performed in a reasonable time. *Hamilton v. Elliott*, 5 S. & R. 375; *Hayden v. Stoughton*, 5 Pick. 528; *Ross v. Tremain*, 2 Met. 495.

(277) The same rule prevails in this country. *Van Rensselaer v. Ball*, 19 N. Y. (5 Smith) 100; *Central Bank of Troy v. Heydorn*, 48 N. Y. (3 Sick.) 260. A condition in a deed that the conveyance shall be void unless a specified sum of money is paid by a particular day, is valid, and the non-payment at that time will forfeit the estate. *Brannan v. Mesick*, 10 Cal. 95, 108. A devise to B and C of a certain estate "they jointly and severally paying to E and F" a specified sum of money "within one year after the testator's decease," creates an estate which is defeasible upon a failure to pay the money according to the condition. *Wheeler v. Walker*, 2 Conn. 196. A conveyance of land upon the condition that the grantee shall support a particular person in a specified manner is valid, and an omission to support that person in the manner prescribed will forfeit the estate. *Willard v. Henry*, 3 N. H. 120.

in the eighth chapter: as, *durante viduitate*, &c.: these are estates upon condition that the grantees do not marry, and the like. And, on the breach of any of these subsequent conditions, by the *failure of these contin- [* 295] gencies; by the grantee's not continuing tenant of the manor of Dale, by not having heirs of his body, or by not continuing sole; the estates which were respectively vested in each grantee are wholly determined and void. (278)

A distinction is however made between a condition in deed and a limitation, which Littleton (n) denominates also a condition in law. For when an estate is so expressly confined and limited by the words of its creation, that it cannot endure for any longer time than till the contingency happens upon which the estate is to fail, this is denominated a limitation (o): as when land is granted to a man so long as he is parson of Dale, or while he continues unmarried, or until out of the rents and profits he shall have made 500*l.* and the like (p). In any such case the estate determines as soon as the contingency happens (when he ceases to be parson, marries a wife, or has received the 500*l.*), and the next subsequent estate, which depends upon such determination, becomes immediately vested, without any act to be done by him who is next in expectancy. (279) But when an

(n) Sect. 880; 1 Inst. 234. nor that used in the text, has acquired a perfectly settled meaning.
(o) Often also, at the present day, called a conditional limitation; but neither this term, (p) 10 Rep. 41.

(278) Although the law permits a condition which imposes a reasonable restraint upon marriage, as that the grantee or devisee shall not marry without the consent of parent, guardian or trustee; or not marry a particular person, or a native of a particular country, or the like; yet a condition subsequent in general restraint of marriage is void. A devise to a son and a daughter of the testator, with a provision that "if the said daughter should marry or die," the land should belong exclusively to the son, is a condition which is void because in restraint of marriage. *Williams v. Cowden*, 18 Mo. 211; *Morley v. Rennoldson*, 2 Hare, 570.

As between husband and wife the law permits either of them to devise property to the other, and to qualify the devise by a condition that if the survivor marries, the devise shall be void and of no effect after such marriage, and, therefore, a grant or a devise by a husband to his wife upon condition that she shall not marry again after his death, is valid, and upon such subsequent marriage the estate so given will be forfeited. *Gough v. Manning*, 26 Md. 347; *Little v. Birdwell*, 21 Texas, 597; *Doyal v. Smith*, 28 Ga. 262; *Dumey v. Schaffler*, 24 Mo. 170; *Vaughn v. Lovejoy*, 34 Ala. 437; *Pringle v. Dunkley*, 14 Sm. & M. 16; *Commonwealth v. Stauffer*, 10 Penn. St. 385; *Lloyd v. Lloyd*, 2 Sim. N. S. 255; 16 Jur. 306; 10 Eng. Law & Eq. 139; see *Dumey v. Schaffler*, 24 Mo. 170, for a full discussion of the question.

(279) A condition determines an estate after breach, upon entry or claim by the grantor or his heirs, or the heirs of the deviser. A limitation marks the period which determines the estate, without any act on the part of him who has the next expectant interest. Upon the happening of the prescribed contingency, the estate first limited comes at once to an end, and the subsequent estate arises. If it were otherwise, it would be in the power of the heir to defeat the limitation over, by neglecting or refusing to enter for breach of the condition. This distinction was originally introduced in the case of wills, to get rid of the embarrassment arising from the rule of the ancient common law, that an estate could not be limited to a stranger, upon an event which went to abridge or destroy an estate previously limited. A conditional limitation is therefore of a mixed nature, partaking both of a condition and of a limitation; of a condition, because it defeats the estate previously limited; and of a limitation, because upon the happening of the contingency, the estate passes to the person having the next expectant interest, without entry or claim. *Proprietors of the Church, etc. v. Grant*, 69 Mass. (8 Gray) 142, 147.

Words of *limitation* mark the period which is to determine the estate; but words of *con-*

estate is, strictly speaking, upon condition in deed (as if granted expressly upon condition to be void upon the payment of 40*l.* by the grantor, or so that the grantee continues unmarried, or provided he goes to York, &c. (*g*)), the law permits it to endure beyond the time when such contingency happens, unless the grantor or his heirs or assigns take advantage of the breach of the condition, and make either an entry or a claim in order to avoid the [* 296] estate (*r*). (280) Yet, though *strict words of condition be used in the creation of the estate, if on breach of the condition the estate be limited over to a third person, and does not immediately revert to the grantor or his representatives, (as if an estate be granted by A. to B., on condition that within two years B. intermarry with C., and on failure thereof then to D. and his heirs), this the law construes to be a limitation and not a condition (*s*): because, if it were a condition, then, upon the breach thereof, since a condition of entry can only be reserved in favour of the grantor and his heirs, only A. or his representatives could

Between a limitation and condition.

(*g*) *Ib.* 42.

(*r*) Litt. s. 347; Co. Litt. 214 b; stat. 33 Hen. 8, c. 84. In the case of a condition to determine a freehold estate, entry or claim is requisite; but in case of a condition in a lease for years, declaring that it shall be void in a certain event, the reversioner may treat the term as having absolutely determined when the event happens, without any entry; but if he recognize the existence of the term, after the event, he cannot subsequently take advantage of the forfeiture; nor can the

tenant treat his lease as having become void by his own default, until the lessor has declared his option; and it is immaterial whether the word void or voidable is used. But of course, if the lease is to be voidable by entry, the lessor must make an entry. Wms. Saund. 287 d; *Doe v. Banks*, 4 B. & Al. 401; *Griffith v. Pritchard*, 5 B. & Ad. 765; *Roberts v. Davy*, 4 B. & Ad. 664.

(*s*) 1 Vent. 202; see *Avelyn v. Ward*, 1 Ves. S. 420.

dition render the estate liable to be defeated in the intermediate time, if the event expressed in the condition arises before the determination of the estate, or the completion of the period described by the limitation. The one specifies the utmost time of continuance, and the other marks some event, which, if it takes place in the course of that time, will defeat the estate. The material distinction between a condition and a conditional limitation consists in this: That a condition does not defeat the estate, although it be broken, until entry by the grantor or his heirs; and when the grantor enters, he is in as of his former estate. His entry defeats the delivery made on the creation of the original estate, and, consequently, all subsequent estates or remainders dependent thereon. 4 Kent's Com. 127; see, also, *Den v. Hance*, 6 Halst. 244; *Fifty Associates v. Howland*, 11 Metc. 99; *Mayor, etc., of N. Y. v. Stuyvesant*, 17 N. Y. (3 Smith) 84; *Clark v. Jones*, 1 Denio, 516; *Tallman v. Snow*, 35 Me. 342.

(280) Until re-entry by the grantor, or his heirs, for the breach of a condition, the estate is not forfeited, but remains in the grantee. A mere neglect to perform the condition is not sufficient to work a forfeiture. *Fonda v. Sage*, 46 Barb. 110, 128; 48 N. Y. (3 Sick.) 173; *Tallman v. Snow*, 35 Me. 342; *Chesapeake, etc., Canal Co. v. Baltimore, etc., R. R. Co.*, 4 Gill & Johns. 1, 121; *Willard v. Henry*, 2 N. H. 120; *Warner v. Bennett*, 81 Conn. 468, 477; *Throp v. Johnson*, 8 Ind. 343.

This right of entry for a breach of a condition may be waived by the party entitled to make such entry. *Ireland v. Nichols*, 46 N. Y. (1 Sick.) 413; *Bleeker v. Smith*, 13 Wend. 530; *Jackson v. Allen*, 8 Cow. 220; *Coon v. Brickett*, 2 N. H. 163; *Sharon Iron Co. v. City of Erie*, 41 Penn. St. 341, 349; *Chalker v. Chalker*, 1 Conn. 79; *Hooper v. Cummings*, 45 Me. 359.

The right to enter for a condition broken is one which cannot be aliened or assigned, or pass by a grant of the reversion at the common law. *Van Rensselaer v. Ball*, 19 N. Y. (5 Smith) 100, 103; *Hooper v. Cummings*, 45 Me. 359; *Cross v. Carson*, 8 Blackf. 138; *Southard*

avoid the estate by entry; and if he or they entered, the seisin upon which the limitation was founded would be defeated and A. or his heirs would be in of his former seisin and estate (t). Whether, therefore, A. took advantage of the condition or neglected to do so, the limitation in D.'s favour would equally fail. But, when it is a limitation, the estate of B. determines, and that of D. commences, and he may enter on the lands the instant that the failure happens. So also, if a man by his will devises land to his heir at law, on condition that he pays a sum of money, and for non-payment devises it over; this shall be considered as a limitation; otherwise no advantage could be taken of the non-payment, for none but the heir himself could have entered for a breach of condition (u).

* We may here notice that anciently, if the lessor of a freehold or leasehold estate upon condition granted away his reversion, the right [* 297]

to re-enter upon breach of the condition was gone, for the stranger could not enter, and the lessor having parted with his reversion could not enter, not possessing his former estate (x).
Grantee of a reversion upon a term has same rights as grantor.

But, by a statute passed in the year 1540 (y) the grantee of the reversion upon a lease for years or for life by indenture, has the same power of re-entry upon breach of conditions contained in the lease as the lessor or his heirs (z).

In all these instances of limitations or conditions subsequent, it is to be observed that, so long as the condition, either express or implied, either in deed or in law, remains unbroken, the grantee may have an estate of freehold, provided the estate upon which such condition is annexed be in itself of a freehold nature; as if the original grant express either an estate of inheritance, or for life, or no estate at all, which is constructively an estate for life. For the breach of these conditions being contingent and uncertain, this uncertainty preserves the freehold (a); because the estate is capable to last forever, or at least for the life of the tenant, supposing the condition to remain unbroken. But where the estate is at the utmost a chattel interest, which must determine at a time certain, and may determine sooner, (as a grant for ninety-nine years, provided A., B., and C., or the survivor of them, shall so long live), this still continues a mere chattel, and is not, by such its uncertainty, ranked among estates of freehold.

(t) Litt. s. 847.

(u) Cro. Eliz. 205; 1 Roll. Abr. 411. The student should bear in mind, that the rules as to conditions, remainders, &c., laid down in this part of the work, have reference to estates subsisting at common law, and do not apply to executory limitations under the

statutes of uses and wills, of which we shall presently treat.

(x) Litt. 847.

(y) 32 Hen. 8, c. 84.

(z) 1 Wms. Saund. 287.

(a) Co. Litt. 42.

v. *Central R. R.*, 2 Dutch. 18; *Kellam v. Kellam*, 2 Pat. & Heath, 357; *Morris v. Milner*, 20 Ga. 568.

Conditions which tend to avoid estates are not regarded with favor by the courts, and they are therefore construed strictly as against the lessor or grantor. *Jackson v. Silvernail*, 15 Johns. 278; *Livingston v. Stickles*, 7 Hill, 253; *Lynde v. Hough*, 27 Barb. 415, 423; *Southard v. Central R. R.*, 2 Dutch. 18; *Thompson v. Thompson*, 9 Ind. 328; *Hadley v. Hadley Manuf. Co.*, 4 Gray, 140; *Emerson v. Sampson*, 43 N. E. 475.

These express conditions, if they be impossible at the time of their creation, or afterwards become impossible by the act of God or the act of the feoffor himself, or if they be contrary to law, or repugnant to the nature of the estate, are void. (281) In any of which cases, if they be conditions subsequent, that is, to be performed after the estate is vested, the estate shall become absolute in the tenant. (282) [* 298] As, if a feoffment be made to a man in fee simple, on condition that, unless he goes to Rome in twenty-four hours, or unless he marries with Jane S by such a day, (within which time the woman dies, or the feoffor marries her himself), or unless he kills another, or in case he alienes in fee; that then and in any of such cases the estate shall be vacated and determined: here the condition is void, and the estate made absolute in the feoffee. For he has by the grant the estate vested in him, which shall not be defeated afterwards by a condition either impossible, illegal, or repugnant (b). But if the condition be precedent, or to be performed before the estate vests, as a grant to a man that, if he kills another or goes to Rome in a day, he shall have an estate in fee; here, the void condition being precedent, the estate which depends thereon is also void, and the grantee shall take nothing by the grant; for he hath no estate until the condition be performed (c).

If subsequent,
estate becomes
absolute in
feoffee.

If precedent,
grant void.

We pass on to some particular species of estates defeasible upon condition

(b) Co. Litt. 206. The condition against alienation has been often tried, but of course ineffectually, it being contrary to the principles and policy of law that a man should have property and not to be able to alienate it. See

ante, p. 213. A solitary exception to this rule exists in the case of a married woman, whose power of dealing with property settled to her separate use may be restrained.

(c) Co. Litt. 206.

(281) Conditions may be impossible, unlawful, or incompatible with the nature of the estate to which they are annexed. They are not sustained when they are repugnant to the nature of the estate granted, nor when they infringe upon the essential enjoyment and the independent rights of property, and when they manifestly tend to the public inconvenience. A condition annexed to a conveyance in fee, or by a devise, that the purchaser or the devisee shall not alien, is unlawful and void. *Schermerhorn v. Negus*, 1 Denio, 448; *Oxley v. Lane*, 35 N. Y. (8 Tiff.) 840, 846; *Walker v. Vincent*, 19 Penn. St. 369; *Brothers v. McCurdy*, 86 Id. 407; *Taylor v. Sutton*, 15 Ga. 103; *Blackstone Bank v. Davis*, 21 Pick. 43. But a condition against alienation may be valid in a grant or lease for life or for years because the limited nature of the interest lessens the inconvenience, and there is no tendency to a perpetuity. 4 Kent's Com. 181; see note to *Dumport's Case*, 1 Smith's Lead. Cas. (101), 117, 7th Am. ed.

Property granted or devised for the support of one whom the grantor or deviser elects as the object of his bounty, may be given subject to the condition that such beneficiary shall not alien it or apply it to other purposes; and the creditors of such beneficiary cannot sell the property upon executions issued against him or his property. *Campbell v. Foster*, 85 N. Y. (8 Tiff.) 861; 16 How. 275; *Locke v. Mabbett*, 8 Abb. Ct. App. 68; 2 Keyes, 457; *Perkins v. Dickerson*, 8 Gratt. 335; *Hill v. McRae*, 27 Ala. 175; *Eyrich v. Hattrick*, 18 Penn. St. (1 Harris) 488; *Pope v. Elliott*, 8 B. Monr. 561; *Beaman v. States*, 2 Pick. 463; *Rife v. Geyor*, 59 Penn. St. 893; *White v. White*, 80 Vt. 888.

How far these decisions conflict with the rule that creditors are entitled to the benefit of every right which the debtor could enforce is discussed in *Nichol v. Handley*, 10 Gratt. 386; *Blackstone Bank v. Davis*, 21 Pick. 43; *Hall v. Tufts*, 18 Id. 455; *Brandon v. Robinson*, 18 Vesey, 429; *Tullett v. Armstrong*, 4 Mylne & Craig, 877.

(282) As to what conditions are precedent, and what subsequent, and as to their validity, see, *ante*, note 276.

subsequent, which require, from the practical interest attending them, more especial notice. Such are:—

Estates held in *vadio*, in gage or pledge. (283) These are commonly divided into two classes, *vivum vadium*, or living pledge, and *mortuum vadium*, dead pledge, or mortgage, as it is usually called (*d*).

[* 299] * Upon the former of these, *vivum vadium*, which is now to a great extent out of use, we need not dwell long. It is where a man borrows

Estate in *vivo vadio*. a sum of money and grants an estate to the lender to hold until the rents and profits shall repay the sum so borrowed, together with interest. This is an estate conditioned to be void as soon as the sum advanced is, together with interest, recouped to the lender. The land is said to be living because it survives the debt, on the discharge of which it results to the borrower (*e*). A particular form of this kind of pledge is that called

Welsh mortgage. a Welsh mortgage, where the land is conveyed to the lender who receives the rents and profits in lieu of interest, the borrower retaining the right at any time to redeem the land on payment of the principal only. In this case there is considered to be no debt on the part of the borrower (*f*). But as, if the rent be excessive, it would be hard upon the borrower that no part of it should be applied in discharge of the principal; courts of equity have established that, even in the case of a Welsh mortgage, there shall be an account of the rents, if they be excessive, and it has been held that an annual profit of 13*l*. was excessive where the loan was only 90*l*. (*g*). Consequently there is not much substantial difference between a *vivum vadium* proper and a "Welsh mortgage" (*h*). Pledges of these kinds are distinguished from those which are presently to notice, or mortgage (properly [* 300] * so called) by, amongst other qualities, this fundamental difference, that the lender has no right to foreclose, and time is no bar to the borrower to redeem (*i*).

(*d*) The name "mortgage" is now used without much regard to the exact character of the pledge, to describe incumbrances of nearly all kinds. See *Taylor v. Emerson*, 4 Dru. & War. 117; *Balfe v. Lord*, 2 Dru. & War. 480.

(*e*) Co. Litt. 205. Where land is sold in consideration of a perpetual rentcharge, a practice common in Lancashire, there is usually given to the vendor, in case of default in payment of the rentcharge, a power to re-enter, and hold the lands until the rents and profits shall have paid up all arrears of the rentcharge. The land when so held by the vendor on the exercise of the power, is in *vivo vadio*.

(*f*) *Yates v. Hambley*, 2 Atk. 359; *Lawley v. Hooper*, 3 Atk. 277, 280. Usually a pledge or mortgage implies a debt. See Lord Thurlow's remarks, 1 Bro. C. C. 464, 465, and *Quarrell v. Beckford*, 1 Mad. 278; *King v. King*, 3 P. W. 358.

(*g*) *Frithrope v. Foster*, 1 Vern. 476.

(*h*) The expression "mortgage, in the nature of a Welsh mortgage," has been used to describe a *vivum vadium*.

(*i*) *Talbot v. Braddil*, 1 Vern. 183, 395; *Orde v. Heming*, *ib.* 418; *Fenwick v. Reed*, 1 Mer. 114; 5 B. & Al. 233; *Hartpole v. Walsh*, 5 B. P. C. 267; *Teulon v. Curtis*, Y. 610.

(283) "A mortgage is the conveyance of an estate, by way of pledge for the security of debt, and to become void on payment of it. The legal ownership is vested in the creditor; but, in equity, the mortgagor remains the actual owner, until he is debarred by his own default, or by judicial decree." 4 Kent's Com. 185.

"A mortgage at common law may be defined to be an estate created by a conveyance, absolute in its form, but intended to secure the performance of some act, such as the payment of money and the like, by the grantor or some other person, and to become void if the act is performed agreeably to the terms prescribed at the time of making such conveyance." 2 Washb. Real Prop. 36, 8d ed.; see, also, 1 Hill. Mort. 1, §§ 1, 2.

We must also distinguish from both living and dead pledges a third species of transaction, viz.: an absolute sale accompanied by a contract for re-purchase on certain conditions. (284) A transaction of this kind is, however, not very common, and when it occurs it usually leads to much difficulty in determining whether, in point of fact, the intention of the parties was not a mortgage, or at least whether it is not a

Sale with contract for redemption.

(284) The cases upon the subject in the American courts are very numerous; and, as might be expected, where there are so many different State courts, the decisions are not entirely harmonious. In examining the subject, several points present themselves for consideration. In the cases before our courts the question sometimes has been the general one, can a conveyance which is absolute on its face be shown by parol evidence to be a mere mortgage? As a general rule it has been held by most of the cases that this can be done in a court of equity. Some of the cases also hold that it may be done in a court of law, while others deny that it can be shown in a court of law. In another class of cases the conveyance was, upon its face, an absolute one, with a right to repurchase upon specified terms and conditions; and the question before the court then is, was the conveyance really absolute, with a right of repurchase, or was it, in legal effect, a mortgage? As there is an important difference in the two supposed cases, there have been many cases before the courts for adjudication.

For the purpose of presenting the cases in separate classes, they will be noticed in the following order:

Some of the courts hold that parol evidence is not admissible, either at law or in equity, for the purpose of showing that a conveyance, absolute on its face, was intended as a mere mortgage. See *Webb v. Rice*, 6 Hill, 219; 1 id. 606; *Hove v. Russell*, 36 Me. 562; *Ellis v. Higgins*, 82 id. 84; *Streator v. Jones*, 1 Murphy (N. C.), 449.

Some of the cases hold that such evidence is admissible either at law or in equity. *Prewett v. Dobbs*, 18 Sm. & Marsh. 481; *Stamper v. Johnson*, 8 Texas, 1; *Carter v. Carter*, 5 id. 98.

Other cases hold that such evidence is admissible in equity, but not at law. *Conwell v. Evill*, 4 Blackf. 67; *Reading v. Weston*, 8 Conn. 117; *Flagg v. Mann*, 2 Sumn. 527; *Bickford v. Daniels*, 2 N. H. 78.

That such evidence is admissible in some form, or in some court, either of equity or at law, is established by the strong current of authority in this country. *Kenton v. Vandergift*, 42 Penn. St. 839; *Crane v. Buchanan*, 29 Ind. 570; *Wells v. Marrow*, 88 Ala. 125; *Blakemore v. Byrnside*, 7 Ark. (3 Eng.) 505; *Hogel v. Lindell*, 10 Mo. 483; *Hodges v. Tennessee Marine & Fire Ins. Co.*, 8 N. Y. (4 Seld.) 416; *Anthony v. Anthony*, 23 Ark. 478; *Clark v. Condit*, 8 C. E. Green (N. J.), 358; *Bank, etc., of Winchester v. Whyte*, 8 Md. Ch. 508; *Horn v. Keteltas*, 46 N. Y. (1 Sick.) 605; *Stoddard v. Whiting*, id. 627, 632; *Carr v. Carr*, 52 N. Y. (7 Sick.) 251.

The right to redeem the mortgaged property is one of the essential features of a mortgage. But there is a conveyance which, in form, is somewhat similar to a mortgage; and this is a sale with an agreement to repurchase, or, as it is generally termed, a conditional sale. In a sale of this character there is no right of redemption as in the case of a mortgage. A mortgage is a mere security for a debt. A conditional sale is a purchase for a price, and to become absolute upon the happening of a particular event; or a purchase accompanied by an agreement to resell upon specified terms. To determine whether a given transaction is a mortgage or a conditional sale, is sometimes a matter of some difficulty. The principal incidents to show that a transaction is a mortgage are such as the following:

The lending and borrowing of a sum of money, or the relation of debtor and creditor, and the continuance of a debt between the parties. *Glover v. Payn*, 19 Wend. 518; *Horn v. Keteltas*, 46 N. Y. (1 Sick.) 605; *Carr v. Carr*, 52 N. Y. (7 Sick.) 251; *Fiedler v. Darrin*, 50 N. Y. (5 Sick.) 487; *Pearson v. Seay*, 88 Ala. 648; *Bacon v. Brown*, 19 Conn. 29; *Wright v. Bates*, 18 Vt. 841, 850; *Dougherty v. McColgan*, 6 Gill & Johns. 275; *Edrington v. Harper*, 8 J. J. Marsh. 854.

The retaining of the possession of the property by the grantor. *Crowe v. Threadgill*, 85 Ala. 834; *Wright v. Bates*, 18 Vt. 841, 850.

Welsh mortgage. Perhaps the distinction between a conditional purchase of this kind and a Welsh mortgage, is somewhat fine (*j*), but the contention usually is, to show that the transaction was in fact a common mortgage (*k*). (285)

(*j*) See *Alderson v. White*, 2 De G. & J. 97; *Love v. Ball*, 2 Vern. 84; *Williams v. Owen*, 10 Gossip v. Wright, 32 L. J. Ch. 648. Sim. 886; 5 M. & Cr. 308.

(*k*) *Bonham v. Newcomb*, 1 Vern. 214; *Man-*

The great excess in value of the property over the amount paid, which is an important circumstance in a doubtful case. *Crews v. Threadgill*, 35 Ala. 334, 344; *Streator v. Jones*, 8 Hawks. 423; *Oldham v. Halley*, 2 J. J. Marsh. 118, 115.

Or, the necessities or embarrassing circumstances or condition of the grantor. *Horn v. Keteltas*, 46 N. Y. (1 Sick.) 605; *Streator v. Jones*, 8 Hawks. 423, 433.

On the other hand, to show that the transaction is a conditional sale, and not a mortgage, several circumstances will be considered, such as the connection of a third person with the transaction. *Carr v. Carr*, 52 N. Y. (7 Sick.) 251, 258.

The reservation of a power, on the part of the grantor, to annul the bargain, or to the grantee of a right to buy the land absolutely. *Chambers v. Hise*, 2 Dev. & Bat. Eq. 305; *Saxton v. Hitchcock*, 47 Barb. 220; *Poindexter v. McCannon*, 1 Dev. Eq. 373; *Slowey v. McMurray*, 27 Mo. 113.

The lapse of a long period of time before any claim of a right of redemption is made. *Poindexter v. McCannon*, 1 Dev. Eq. 373.

The continuous possession of the property by the grantee. Id.

The approximation of the consideration to the cash value of the property. *Robinson v. Cropsey*, 6 Paige, 480; 2 Edw. Ch. 138; *Poindexter v. McCannon*, 1 Dev. Eq. 373.

The surrender of personal securities, or the extinguishment of a debt. *Gomez v. Kamping*, 4 Daly, 77, 81; *Baker v. Thrasher*, 4 Denio, 493; *Mullish v. Robertson*, 25 Vt. 603; *Coles v. Perry*, 7 Texas, 109; *Hooper v. Bailey*, 28 Miss. 328.

Or, the absence of any personal agreement to repay the purchase-money, making the grantor's right to repurchase, and the grantor's right to recover the price mutual and reciprocal. *Horn v. Keteltas*, 46 N. Y. (1 Sick.) 605; *Conway's Exrs. v. Alexander*, 7 Cranch, 218.

An omission to give or take a note, bond or other evidence of indebtedness is strong evidence to show that the transaction is a conditional sale instead of a mortgage; but it is not conclusive. *Robinson v. Farrelly*, 16 Ala. 473; *Horn v. Keteltas*, 46 N. Y. (1 Sick.) 606; *Davis v. Stonestreet*, 4 Ind. 101.

When the transaction is a conditional sale the conditions must be strictly performed or the right to repurchase will be lost. *Saxton v. Hitchcock*, 47 Barb. 220; *Robinson v. Cropsey*, 2 Edw. Ch. 147; *Rankin v. Mortimers*, 7 Watts, 372; *Hoopes v. Bailey*, 28 Miss. 328.

The courts will favor a construction which renders the instrument a mortgage, instead of being a conditional sale, as a mortgage is more beneficial to the person receiving the money. *Rich v. Doane*, 35 Vt. 125; *Trucks v. Lindsey*, 18 Iowa, 504; *McNeill v. Norworth*, 39 Ala. 156; *Dougherty v. McCaigan*, 6 Gill & Johns. 275; *Crews v. Threadgill*, 35 Ala. 334; *Turnipseed v. Cunningham*, 16 id. 501; *Scott v. Henry*, 13 Ark. 112.

Though parol evidence may be introduced to show that an absolute conveyance was really a mortgage, it is not competent to show by such evidence that a mortgage was intended to be a conditional sale. *Kerr v. Gilmore*, 6 Watts, 405; *Kunkle v. Wolfersberger*, id. 126; *Brown v. Mickle*, 6 Penn. St. 390; *Woods v. Wallace*, 22 id. 171; *Wing v. Cooper*, 37 Vt. 182.

(285) While treating of the subject of liens upon real estate, it may be well to notice a vendor's lien upon real estate for the purchase-money. Where the purchase price of lands is not paid, it is the usual practice for the purchaser to execute a mortgage upon the lands for the security of the vendor. But, if no mortgage is given the vendor has, under some circumstances, a lien upon the lands sold, for the purchase-money. The general rule is, that the equitable lien of the vendor for the unpaid purchase-money is recognized as an incident of the debt. *Chase v. Pick*, 21 N. Y. (7 Smith) 581, 584; *Manley v. Slason*, 21 Vt. 271, 278; *Chilton v. Braiden*, 2 Black, 458; *Coul v. Varnum*, 37 Ill. 181; *Merritt v. Wells*, 18 Ind. 171; *Russell v. Watt*, 41 Miss. 603; *Pell v. McElroy*, 36 Cal. 268; *Kyles v. Tait*, 6 Gratt. 44; *Carson v. Green*, 3 Bibb, 183; *Watson v. Wells*, 5 Conn. 468; *Jackman v. Hallock*, 1 Ohio.

We now come to *mortuum vadium*, or mortgage, which being now the common form in which permanent loans are effected, is of the highest importance in a commercial country such as this, where the employment of floating capital rests very commonly with those who are not its owners, and who, therefore, are driven to borrow. The law relating to mortgages has passed through many stages ere it reached its present position. These we will shortly trace.

This kind of pledge is where a man borrows of another a specific sum (*a. g.* 200*l.*) and grants him an estate either in fee or for a less period, on condition

Mortgage. that, if he, the borrower, or mortgagor, as he is called, or his

heirs, shall repay the mortgagee the sum so borrowed together with interest at the agreed rate (*l.*), (286), on a certain day mentioned

[* 301] * in the deed, that then the mortgagor may re-enter on the estate so granted in pledge (*m*): the estate so granted is, therefore, an estate on

(*l*) Interest is invariably mentioned in the mortgage deed. Where, however, no interest was provided for by the deed, it was held that the mortgage carried no interest. *Thompson v. Drew*, 20 Beav. 52.

(*m*) If no day was fixed the mortgagor had his whole life: Co. Litt. 208 b. The definition or description given in the text must not be taken as a complete definition of the word

mortgage as now used, for a mortgage may be made, not only of land, but of any species of property. No difficulty arises, however, on the subject, for the application of the same idea to chattels or other property is not difficult, being only subject to such further rules of law as are specially applicable to the particular cases.

818; *Sherais v. Nicodemus*, 7 Yerg. 9; *Wynns v. Alston*, 1 Dev. Eq. (N. C.) 163; *Van Doren v. Todd*, 2 Green (N. J.), 397.

While this lien is generally recognized in this country, it is not allowed in some of the States. See *Kauffelt v. Bower*, 7 Serg. & R. 64; *Gilman v. Brown*, 1 Mason, 191; *Womble v. Battle*, 3 Ired. Eq. 182; *Simpson v. Maunder*, 3 Kans. 172.

And where the lien is recognized and enforced, it is also held that the lien may be waived; as by taking a distinct collateral security for the purchase price. *Johnston v. Union Bank*, 37 Miss. 526; *McCandlish v. Keen*, 18 Gratt. 615, 624; *Hummer v. Schott*, 21 Md. 307; *Burger v. Potter*, 32 Ill. 66; *Mattix v. Weand*, 19 Ind. 151.

Merely taking the bond or note of the purchaser does not waive the lien. *Neil v. Kinney*, 11 Ohio St. 58; *Shall v. Biscoe*, 18 Ark. 142; *Eskridge v. McClure*, 2 Yerg. 84; *Van Doren v. Todd*, 2 Green (N. J.), 397; *Lagow v. Badollet*, 1 Blackf. (Ind.) 416.

Where a note or bond of the purchaser is taken, and still retains a lien of the vendor, the lien is not one which will be transferred upon a sale or assignment of such note or bond. *Brush v. Kingsley*, 14 Ohio, 20; *Neil v. Kinney*, 11 Ohio St. 58; *Shall v. Biscoe*, 18 Ark. 142; *Iglehart v. Armiger*, 1 Bland. Ch. 519, 524; *White v. Williams*, 1 Paige, 506; *Briggs v. Hill*, 6 How. (Miss.) 362.

Other cases, however, hold that the lien may be assigned. *Fisher v. Johnson*, 5 Ind. 492; *Honore v. Bakewell*, 6 B. Monr. 67; *Davidson v. Allen*, 36 Miss. 419; *Cleveland v. Martin*, 2 Head, 128; *Magruder v. Campbell*, 40 Ala. 647.

(280) The rate of interest reserved must be legal; for, if it be greater than is allowed by law, the mortgage will be void for usury in some of the States, and it will be subject to the general laws relating to usury in the State under whose laws the instrument is to be applied and enforced. *Vickery v. Dickson*, 62 Barb. 272; 35 id. 96; *Baxter v. McIntire*, 13 Gray, 168; *Lockwood v. Mitchell*, 7 Ohio St. 387; *Mitchell v. Preston*, 5 Day, 100; *Morgan v. Tipton*, 3 McLean, 339; *Robertson v. Campbell*, 2 Call. 354.

Where the consideration of a mortgage is illegal it will render the mortgage void, whether the illegality consists of a violation of the common law, or of the provisions of a statute. *Baker v. Collins*, 9 Allen, 253. See the cases collected in the notes to *Collins v. Blantern*, 1 Smith's Lead. Cas. 489 (687).

A mortgage executed under duress will be void where any other contract would be void on that ground. *Baker v. Morton*, 12 Wall. 180; *Boyle v. Hammons*, 2 Heisk. (Tenn.) 180; *Bane v. Detrich*, 52 Ill. 19; *Worcester v. Eaton*, 13 Mass. 371; *Deputy v. Stapleford*, 19 Cal. 302; *Nisk v. Stubbs*, 30 Ala. 335.

condition liable to determine absolutely if the mortgagor, in accordance with the condition, repay the money at the appointed time; but, should he fail strictly to comply with this condition, the estate of the mortgagee becomes absolute at law, and is, therefore, dead to the mortgagor. (287) During the period between the grant and the day fixed for payment the mortgagee is called tenant in mortgage (*n*).

Such is the simple idea of a mortgage as originally conceived; some modifications of the form which it assumed were, however, early introduced. For a person having once mortgaged his land was bound afterwards, if he would establish a complete title, to prove that he had complied with the exigency of the condition, a thing often not easy to demonstrate, even if the fact were so. It became common, therefore, to substitute for the conditions defeating the estate granted, a proviso or contract that, if the money were repaid on the

(*n*) Lit. s. 232.

(287) Mortgages usually contain two parts, the conveyance and the defeasance. It is not essential, however, that the defeasance should be inserted in the mortgage, for a separate instrument for that purpose is equally valid and effectual. *Venderhaise v. Huguss*, 2 Beasley, 410; *Snyder v. Grinwold*, 37 Ill. 216; *Guthrie v. Kohle*, 46 Penn. St. 331; *Second Ward Bank v. Upmann*, 12 Wis. 499; *Crassen v. Suvoeland*, 22 Ind. 427; *Hill v. Edwards*, 11 Minn. 22; *Daubenspick v. Platt*, 22 Cal. 380.

The courts do not look with favor upon the practice of executing the defeasance as a separate instrument, because it is liable to accidents and abuses; or it may be a mode of committing frauds, and, besides this, the defeasance may be lost, thus leaving an apparently absolute title in the grantee. *Cottrell v. Purchase*, Cas. Temp. Talb. 61; *Jaques v. Weeks*, 7 Watts, 261, 269; *Baker v. Wind*, 1 Ves. Sen. 160; 4 Kent's Com. 142; *Bickford v. Daniels*, 2 N. H. 71.

The general rule is, that the defeasance and the deed must be parts of the same transaction to constitute a mortgage. No conveyance will be considered a mortgage unless it became such at the time of its inception; and it can never become one by a subsequent act. *Lund v. Lund*, 1 N. H. 39; *Bickford v. Daniels*, 2 id. 71; *Bryan v. Cowart*, 21 Ala. 92; *Reitenbaugh v. Ludwick*, 31 Penn. St. 131; *Holmes v. Grant*, 8 Paige, 248, 255; *Sweetland v. Sweetland*, 3 Mich. 482; *Freeman v. Baldwin*, 13 Ala. 246.

It is not essential that the date of the deed and of the defeasance should be the same, as they will constitute a mortgage if delivered together. *McIntier v. Shaw*, 88 Mass. (6 Allen) 83; *Blaney v. Bearce*, 2 Greenl. 232; *Kelly v. Thompson*, 7 Watts, 401; *Bryan v. Cowart*, 21 Ala. 92; *Sweetland v. Sweetland*, 3 Mich. 482.

Nor that there should be a written defeasance executed at the same time with the absolute deed; for if there is a verbal agreement that a defeasance shall be executed on request, and such defeasance is subsequently executed and delivered to the grantor, it will relate back to the deed and make it a mortgage. *Lovering v. Fogg*, 18 Pick. 540, 548; *Wilson v. Shoenberger's Exrs.*, 31 Penn. St. 295; *Reitenbaugh v. Ludwick*, id. 131; *Montgomery v. Chadwick*, 7 Iowa, 114, 132.

The law does not require that a defeasance shall be expressed in any particular form of language. It will be sufficient if it clearly appears that, upon payment of the debt by the grantor, the conveyance shall become void, or that the grantee will reconvey the land to the grantor. *Weed v. Stevenson*, Clarke's Ch. 166; *Steel v. Steel*, 86 Mass. (4 Allen) 417; *Bayley v. Bulley*, 71 Mass. (5 Gray) 505; *Webb v. Patterson*, 7 Humph. 431; *McGin v. Marshall*, id. 121; *Colwell v. Woods*, 3 Watts, 188; *Brown v. Mickle*, 6 Penn. St. (6 Barr.) 390; *Perkins v. Dibble*, 10 Ohio, 433; *Baldwin v. Jenkins*, 23 Miss. 206; *Gillis v. Martin*, 2 Dev. Eq. 470.

When parol evidence is admissible to show that a deed was intended to be a mortgage, has already been noticed. *Ante*, 603, note 234. See the same note as to the distinction between a conditional sale and a mortgage.

particular day the mortgagee should then, or at any time after, at request of the mortgagor, re-convey the property mortgaged; and this is the form now invariably adopted. A re-conveyance then became sufficient for the support of the title whatever were the facts as to the payment. At the same time courts of law still held the mortgagor as strictly as before to the performance of his condition to the letter. *This strict compliance with the exact terms of the contract was, however, not in reality the intention of the parties, and therefore courts of equity taking a less restricted view of their relations, and looking to the spirit and intention of the transaction, established the doctrine that the mortgagor should have a right at any reasonable time to require a re-conveyance upon payment of the principal money, interest, and all expenses which the mortgagee might properly have incurred, thus, in fact, rendering the condition little more than a peculiar form of stating the nature of the transaction. (288) This they have declared to be a loan of money, with, as a collateral security, a pledge of the land (*o*): the loan or debt being the primary fact, the conveyance of the land being only a means of securing the debt from becoming a loss (*p*). Upon this principle, equity declares that a transaction which is once a mortgage shall be always a mortgage; which means, that no contract, however explicit in its terms, shall exclude him, who initially is a borrower and not a vendor, from redeeming the property (*q*): and, so long as this relation of debtor and creditor exists, the right to redeem,

(*o*) *Seton v. Slade*, 7 Ves. 264, see p. 273. "The contract is in this court a mere loan of money secured by the pledge of the estate."
 "You shall not by special terms alter what this court says are the special terms of that contract."

(*p*) A mortgage usually implies a personal debt, and indeed has been said always to do so. *Quarrell v. Beckford*, 1 Mad. 278; *King v. King*, 3 P. W. 358; *Yates v. Aston*, 4 Q. B.

182. But a mortgage may exist without such debt, as where trustees exercise a power of mortgaging property, in which case the mortgagees would have no debt against any one. As to the effect of assigning the debt, reserving the securities, see *Morley v. Morley*, 25 Beav. 258; *Ancaster v. Mayer*, 1 Bro. C. C. 462; *Ex parte Waring*, 19 Ves. 345.

(*q*) *Seton v. Slade*, *ubi sup.*

(288) According to the strict rule of the common law, a mortgagor who failed to perform the conditions contained in the mortgage would forfeit his right to the land, or to redeem it by subsequently tendering the amount due upon the mortgage. Courts of equity, however, took a more liberal view of the relations of the parties, and, instead of treating the mortgage as an instrument which must be strictly performed as a condition of preventing a forfeiture of the land, they held that the mortgage was a mere security for the repayment of the money mentioned in it, and that an omission to pay at the day, or according to the conditions in the mortgage, did not forfeit the estate, and that the mortgagor might redeem the lands after a breach of such conditions. This right to redeem is known as an "Equity of Redemption."

This difference between the strict rules of the common law and the liberal rules of a court of equity will serve to explain many of the apparent discrepancies in the decisions of the courts as to the rights of the respective parties.

At the common law the mortgagee was regarded as holding the freehold, and he might maintain ejectment to recover possession of the land; so he might devise it, and it would descend to his heir. In the view of a court of equity the land is regarded as a pledge, which the mortgagee holds as a security for the debt due to him. This security is a mere chattel interest, and, until a foreclosure, the mortgagor continues the real owner of the fee. The equity of redemption is the real and beneficial estate, and it is as clearly descendible by inheritance, devisable by will, and alienable by deed, as it would be were it an absolute estate of inheritance at law.

or equity of redemption, as it is called, will also exist (r). (289) * Nevertheless equity will not leave the mortgagee entirely in the power of the mortgagee, as to whether there shall be a redemption or not, for equity has always allowed the mortgagee to foreclose the equity of redemption (s): (290) [* 303]

(r) *Id.* Where there has been fraud on the part of the mortgagor in concealing from the mortgagee some charge upon the property, he forfeits the right to redeem: 4 & 5 W. & M. c. 16. The mortgagee must, however, also be honest, in order to take advantage of this statute: *Stafford v. Selby*, 2 Vern. 589. See *Kennard v. Puttoye*, 2 Giff. 81.

(s) The right to foreclose only arises after default has been made, though where the proviso for redemption was in payment five years after the mortgage, but interest meanwhile to be paid half-yearly, the mortgagee was allowed to foreclose before the five years had expired, the interest not having been paid. *Edwards v. Martin*, 25 L. J. Ch. 284.

(289) It is an established rule that a mortgagee can never provide, at the time of making the loan, for any event or condition upon which the equity of redemption shall be discharged and the conveyance become absolute. *Vernon v. Bethell*, 2 Eden, 118; *Waters v. Randall*, 6 Metc. 483; *May v. Eastin*, 2 Port. 414; *Henry v. Davis*, 7 Johns. Ch. 42; S. C. affirmed, 2 Cow. 324; *Spurgeon v. Collier*, 1 Eden, 55, 59; *Jaques v. Weeks*, 7 Watts, 261; *Batty v. Snook*, 5 Mich. 281; *Walling v. Aikin*, 1 McMullan's Eq. 1; *Courtney v. Scott*, 6 Litt. 457; *Mayo v. Judah*, 5 Munf. 495.

A mortgagor may release the equity of redemption to the mortgagee at a time subsequent to the original transaction. But such releases will be closely scrutinized by the courts, and will be strictly construed, and the fairness of the transaction, and the value received by the mortgagor, must be shown by clear and satisfactory evidence. *Holdridge v. Gillespie*, 2 Johns. Ch. 34; *Hammonds v. Hopkins*, 8 Yerg. 525; *McKinstry v. Conly*, 12 Ala. 678; *Hicks v. Hicks*, 5 Gill & Johns. 85; *McGan v. Marshall*, 7 Humph. 121; *Mills v. Mills* 26 Conn. 213.

The right of redemption may be barred by the statute of limitations in the same manner as other rights and demands; and the length of time required for this purpose will usually be governed by the local laws of the State or country in which the land is situated. An adverse possession by the mortgagee for such a length of time as would bar the mortgagor's right, will raise a presumption that the equity of redemption has been extinguished.

But, so long as the mortgage is regarded and treated as a subsisting security, no length of time of holding possession by the mortgagee will bar the right of redemption. *Wiley v. Ewing*, 47 Ala. 418; *Tripe v. Marcy*, 89 N. H. 439; *Ayres v. Waite*, 10 Cush. 73; *Chick v. Rollins*, 44 Me. 116; *Miner v. Beekman*, 50 N. Y. (5 Sick.) 337; 14 Abb. N. S. 1; *Dexter v. Arnold*, 1 Sumn. 109; 3 id. 153; *Lamar v. Jones*, 3 Harr. & McHen. 328; *Kane v. Bloodgood*, 7 Johns. Ch. 90; *Slee v. Manhattan Co.*, 1 Paige, 45.

(290) The right of the mortgagee to foreclose his mortgage and thus bar or cut off the right of redemption is well settled in this country. And this may be done whenever the money secured by the mortgage becomes due, or whenever a default occurs by which the conditions of the mortgage are broken and the right to foreclose becomes operative. But this right of foreclosure, like the right of redemption, may be lost or barred by the lapse of time. And, if the mortgagee permits the mortgagor to remain in possession and to occupy the lands for such a length of time as will be a bar by the statute of limitations, and without any entry or claim by the mortgagee, or without any payment or accounting, or acknowledgment of the existence of the debt, the right to foreclose will be barred, upon the presumption that the mortgage debt has been paid. *Boyd v. Harris*, 2 Md. Ch. 210; *Roberts v. Welch*, 8 Ired. Eq. 287; *Evans v. Huffman*, 1 Halst. Ch. 854; *Haskell v. Bailey*, 22 Conn. 569; *Thayer v. Mann*, 19 Pick. 535; *Howard v. Shurtleff*, 2 Metc. 26; *Richmond v. Aiken*, 26 Vt. 324; *Elkins v. Edwards*, 8 Ga. 326; *Belmont v. O'Brien*, 12 N. Y. (2 Kern.) 394; *Blethen v. Duinel*, 35 Me. 556; *Tripe v. Marcy*, 89 N. H. 439.

In these cases in which the mortgage is regarded as a mere security for a debt and the mortgagor is regarded as the owner of the fee, a tender of the money due on the mortgage, at any time before a foreclosure, is valid and sufficient, and discharges the lien. *Kortright v. Cady*, 21 N. Y. (7 Smith) 843; *Hutchings v. Munger*, 41 N. Y. (3 Hand) 155; *Darling v.*

but this can only be done by a suit in equity, in which the court always gives the mortgagor a considerable period to pay the money.

Foreclosure.

But if, after the formal proceedings of a chancery suit have been completed, and the final hour fixed by the court for payment has passed without payment by the mortgagor, then the court declares that the estate shall thenceforth be the absolute property of the mortgagee, and the mortgagor shall be foreclosed and barred of his right to redeem: but at any time before this final order is made, the mortgagor may pay the principal, interest, and costs, and obtain a re-conveyance (*t*). By a recent statute the court is empowered, in a foreclosure suit, to direct a sale of the mortgaged property, instead of foreclosure at the request of either party (*u*).

The doctrines thus established in a court of equity as to the primary importance which is attached to the personal debt, to secure which a mortgage is made, do not apply in all their completeness when the property subject to the mortgage has been conveyed away by the mortgagor; because, in this case, the person so becoming entitled cannot be under any personal liability to the mortgagee: the utmost liability which he can incur is to indemnify the original mortgagor against any claim made on him personally by the mortgagee, and this would, of course, depend upon the contract between them. The property [*304] in his hands, however, ceases to be regarded as a *mere collateral security, but becomes primarily liable to pay the amount of the mortgage (*x*).

But subsequent dealings between the alienee of the equity of redemption and the mortgagee may, and often do, have the effect of casting upon the former a personal liability to pay the amount, and in this case the estate is restored to its original position as a collateral security (*y*).

We may here notice that, by a recent act (*z*), where a mortgagor dies, the heir or devisee who becomes entitled to the property subject to the mortgage takes it *cum onere*, and is not entitled to require payment of the debt out of

(*t*) 7 Geo. 2, c. 20, s. 2.

(*u*) 15 & 16 Vict. c. 86, s. 48.

(*x*) *Shafto v. Shafto*, 2 P. W. 664 n; *Scott v. Beecher*, 5 Mad. 96; *Rickham v. Crutwell*, 3 M. & Cr. 768.

(*y*) *Waring v. Ward*, 7 Ves. 332; *Earl of*

Oxford v. Lady Rodney, 14 Ves. 417; *Lushington v. Sewell*, 1 Sim. 435; *Barham v. Earl Thanet*, 3 M. & K. 607; *Earl of Clarendon v. Barham*, 1 Y. & C. 688; *Lord Ilchester v. Lord Carnarvon*, 1 Beav. 209.

(*z*) 17 & 18 Vict. c. 113.

Chapman, 14 Mass. 101; *Caruthers v. Humphrey*, 12 Mich. 278; *Van Huse v. Kanouse*, 13 id. 306; *Moynahan v. Moore*, 9 id. 9; *Willard v. Harcey*, 5 N. H. 252.

Contra, *Shields v. Lozear*, 34 N. J. Law (5 Vroom), 496.

Payment by the mortgagor, and an acceptance by the mortgagee of the amount of the mortgage debt, extinguishes the debt and the lien. *Jostin v. Wyman*, 9 Gray, 63; *Yose v. Handy*, 2 Greenl. 322; *Williams v. Thurlow*, 31 Me. 392; *Gray v. Jenks*, 3 Mason, 520; *Craft v. Webster*, 4 Rawle, 253; *Paxon v. Paul*, 3 Harr. & McH. 399; *Griffin v. Lovell*, 42 Miss. 402; *Atkinson v. Stewart*, 46 Mo. 510; *Atkinson v. Angert*, id. 515; *Sherwood v. Wilson*, 2 Sweeny, 684; *Swain v. Seamans*, 9 Wall. 254.

In relation to the satisfaction of a mortgage it has been held that, in the absence of an agreement between the parties, the mere receipt of rents and profits from the mortgaged premises by the mortgagee in possession, to an amount sufficient to satisfy the mortgage, is not a legal satisfaction of the mortgage; and that the mortgagor must resort to an accounting in equity to have such receipt so applied; and that, until so applied by a judgment of the court in satisfaction of the mortgage, the character of the mortgagee, as mortgagee in possession, is not divested, and therefore ejectment cannot be maintained against him or his grantee. *Hubbell v. Moulton*, 53 N. Y. (8 Sick.) 225.

the personal assets of the deceased, unless the deceased shall, by his will, have signified the contrary or other intention (a).

Besides allowing foreclosure, courts of equity, even before the passing of the act which limits the period in which suits shall be brought, were accustomed to refuse relief to a mortgagor who allowed a long lapse of years to take place without asserting his right. Therefore if a mortgagee were in possession of the mortgaged premises for twenty years or more, without giving any acknowledgment of the mortgagor's title, and without any claim being made by the mortgagor, the court held that he should not afterwards be disturbed (b).

As soon as the estate vests in the mortgagee under the deed, he may immediately enter upon the lands, being * liable to be dispossessed upon performance of the condition, or being redeemed. But it is not unusual [* 305] to agree that, until default shall have been made in payment, at the time specified, the mortgagor may retain possession. After this time has passed, however, the estate being absolute at law, the mortgagee may enter without fear of the mortgagor evicting him by legal procedure (c). This right of entry is not unfrequently exercised where the security is of scanty value, and particularly when the mortgagor neglects even the payment of interest. But here, as in other points, equity gives the mortgagor its careful protection, for it requires the mortgagee to account most strictly for the profits of the land, not only those which he has actually received, but also those which, but for his wilful default, he might have received (d); (291) and he is bound (until after foreclosure) to appropriate the receipts which he has thus to account for in discharge first of interest and costs, and then of the principal monies owing. A mortgagee thus taking possession is entitled to receive all rents and profits accruing afterwards, though of course he has no right to any account of rents or profits previously received by the mortgagor (e). (292) How far he is enti-

(a) As to these words, see the Amendment Act, 30 & 31 Vict. c. 69.

(b) *Anon.*, 3 Atk. 313; see 3 & 4 Will. 4, c. 27, s. 28, which enacts that no suit shall be brought for the recovery of land but within a period of twenty years from the last acknowledgment of the mortgagor's title by the mortgagee, a further period being allowed in cases of disability.

(c) But even after default, if he have not actually entered, he may not even at law bring ejectment, if the mortgagor tender principal, interest, and costs. 7 Geo. 2, c. 20.

(d) The form of decree which is made against a mortgagor in possession in a redemption suit is given in Seton on Decrees,

pp. 366, 461. See also *Nelson v. Booth*, 3 D. G. & J. 119. As to the costs in a redemption suit, the rule is that the mortgagor pays them, unless upon taking the account it shall appear that the mortgage is fully paid off. Where therefore a mortgagor files a bill for redemption against a mortgagee in possession, alleging that the debt is discharged, the costs are always reserved to abide the result of the account. Where the account shows that the mortgagee is not paid off, the costs are almost invariably thrown upon the mortgagor. See *Norton v. Cooper*, 5 De G. M. & G. 728.

(e) *Ex parte Wilson*, 2 V. & B. 252; *Codrington v. Johnstone*, 1 Beav. 520.

(291) A mortgagee who enters into possession of the mortgaged land, under the mortgage, before foreclosure, will be accountable for the net rents and profits actually received, and nothing more, unless they were lost or reduced, by his willful neglect, or gross negligence. *Moore v. Degraw*, 1 Halst. Ch. 346; *Shaeffer v. Chambers*, 2 id. 548; *Richardson v. Wallis*, 5 Allen, 78; *Miller v. Lincoln*, 6 Gray, 556; *Robertson v. Campbell*, 2 Call. 354; *Ballinger v. Worsley*, 1 Bibb, 195; *Van Buren v. Olmstead*, 5 Paige, 1.

The mortgagee, by taking possession of the land, imposes upon himself the duty of a careful and prudent owner, and he is bound to obtain and secure what such an owner would with reasonable diligence have secured. *Ib.*

(292) The same rule prevails in this country. *Syracuse City Bank v. Tallman*, 81 Barb. 201; *Hughes v. Edwards*, 9 Wheat. 489; *Clarke v. Curtis*, 1 Gratt. 289; *Whitney v. Allen*, 21 Cal. 233; *Mayo v. Fletcher*, 14 Pick. 525; *Wilder v. Houghton*, 1 id. 87.

tled to receive rents in arrear seems to depend upon several circumstances. If [*306] the tenant hold under lease or *agreement from the mortgagor, made since the mortgage, there is no privity between the mortgagee and him, and so the mortgagee cannot distrain, he simply puts an end to the tenancy so created and a new tenancy under him commences; still if any rent be in arrear an action for mesne profits seems to lie (*f*). If the lease have been created prior to the mortgage or with the concurrence of the mortgagee, he is then the true landlord of the tenant, and may, on taking possession, distrain, as well for rents in arrear as accruing rents (*g*).

Such were till recently the outlines of the relation between mortgagor and mortgagee, and the rights relative to the mortgaged estate, which they respectively had by virtue of the contract of mortgage alone without further stipulations. But it long ago became the practice, in addition to the rights which we have mentioned, to give to the mortgagee a power of selling the property so as, in the hands of the purchaser, to be free from all equity of redemption (*h*). This power, existing by contract, usually formed part of the mortgage deed, and commonly it was stipulated that it should be exerciseable only after some considerable notice to the mortgagor of the mortgagee's intention to sell. The practical utility of this power, obviating as it did the expense of a chancery suit, has led to its recognition by the legislature; and a recent enactment declares (*i*) that every mortgagee by

Power of sale
added by con-
tract.

Now by statute.

[*307] deed (*k*) shall, whether the mortgage deed provides for it or not, have a power to sell the property at any time after the expiration of one year from the time when the principal money shall have become payable according to the terms of the deed, or after any interest shall have been in arrear for six months: but no sale is to be made until after giving six months' notice in writing to the mortgagor, or affixing such a notice on some conspicuous part of the property (*l*). (293) We may notice that it

(*f*) *Pope v. Biggs*, 9 B. & C. 245; *Evans v. Elliot*, 9 A. & E. 842.

(*g*) *Moss v. Gallimore*, Doug. 279; *Rogers v. Humphreys*, 4 A. & E. 313. A mortgagee is not entitled to any profits of the property which have been actually taken by the mortgagor, though not disposed of by him. *Codrington v. Johnstone*, 1 Beav. 520; and see the discussion in *Brown v. Tanner*, L. R. 3 Ch. 597, a peculiar case as to when the profits of a ship are earned.

(*h*) *Clay v. Sharpe*, 1802, Reg. lib. B. A. fo. 66; Sug. V. & P. 396; *Corder v. Morgan*, 18 Ves. 344.

(*i*) 23 & 24 Vict. c. 145, s. 11.

(*k*) The act only relates to "hereditament of any tenure or any interest therein;" therefore is not applicable to mortgages of mere chattels. *Ib.*

(*l*) 23 & 24 Vict. c. 145, s. 13.

(293) In this country it is the usual practice to insert in the mortgage a power of sale in case of a default, which will enable the mortgagee to obtain an easy, prompt remedy, without the delay, trouble and expense of a foreclosure by a bill in equity, or other action in the courts.

Such powers of sale have long been, and they are now, in extensive use, and their validity is universally recognized by the courts. The general rule is, that a sale made in pursuance of such a power, to be valid, must strictly comply with its terms. *Wing v. Cooper*, 37 Vt. 169; *Cranston v. Crane*, 97 Mass. 459; *Bourty v. Mitchell*, 7 Gray, 243; *Smith v. Provin*, 4 Allen, 518; *Bradley v. Chester Valley R. R. Co.*, 36 Penn. St. 141; *Simson v. Bokstein*, 23 Cal. 590; *Mitchell v. Bogan*, 11 Rich. 686; *Walthall v. Rives*, 34 Ala. 91.

The sale may be made by the mortgagee; but, in such a case, if he bids off the property as purchaser, it has been held that the sale is voidable at the election of the mortgagor, unless there was an express agreement or authority for that purpose, or unless a statute permitted such sale and purchase. *Benham v. Rowe*, 2 Cal. 887; *Hall v. Towle*, 45 Ill. 493

has been decided, although perhaps sufficiently obvious, that the power of sale which existed by contract did not interfere with the mortgagee's ordinary power to foreclose (*m*). The same is of course true with respect to the statutory power of sale. (294)

The same statute gives to the mortgagee a power to insure the property against fire, if of an insurable nature, and a power to appoint a receiver of the rents (*n*).

Inasmuch as the intention of the parties to a mortgage is nearly always that the loan secured by the mortgage should continue upon the security for a considerable period, and, except so far as may be necessary for the purpose of enforcing the security, it is not desired to interfere with the possession of the mortgagor and the management by him of the property, it becomes a question of some interest to inquire into the exact legal position of the mortgagor whilst so in possession. In equity he is, in accordance with the principles which we have mentioned, considered, until foreclosure or sale, as the owner of the property, subject only to the liability of having it taken from him to satisfy the mortgage debt. At law, however, after default in payment upon the day *stipulated in the deed, he has lost his original estate (if the mortgage be of his whole interest), and his legal interest, if any, is a tenancy under the mortgagee. In the absence of any special agreement, after the execution of a legal mortgage, the mortgagor, so long as he retains possession, is tenant at sufferance of the mortgagee; but if there is a general agreement, either verbal or by writing, that he shall retain the possession, and no term is specified, he is tenant at will (*o*).

Possession usually retained by mortgagor.

(*m*) *Ex parte Hodgson*, 1 Gil. & J. 12; *ex parte Davis*, 3 Deac. & Ch. 504. 23 & 24 Vict. c. 145, ss. 11, 17, 18, 19, 20, 21, & 22.

(*n*) These powers were often inserted in mortgage before the act (the former invariably in a well-drawn mortgage). The advantage of a receiver is that he is considered as the agent of the mortgagor and not of the mortgagee, who therefore obtains the advantage without the liability to a strict account attending his being himself in possession.

(*o*) *Keech v. Hall*, Dougl. 22; *Birch v.*

Wright, 1 T. R. 378; *Partridge v. Bere*, 5 B. & Al. 604; *Doe d. Roby v. Maisey*, 8 Man. & R. 107; *Doe v. Cadwallader*, 2 B. & Ad. 478; *Doe d. Fisher v. Giles*, 5 Bing. 421. When the tenancy at will is determined by the death of the mortgagor, it has been thought that the heir entering is a disseisor, and that an adverse possession commenced. *Per* Holt, J., *Smartle v. Williams*, 8 Lev. 387; 1 Salk. 245. Locke King's act, 17 & 18 Vict. c. 113, *sup.* p. 304, may perhaps have some bearing upon this.

Griffin v. Marine Co. of Chicago, 52 id. 130; *Roberts v. Fleming*, 53 id. 196; *Edmonson v. Welsh*, 27 Ala. 578; *Richards v. Holmes*, 18 How. 143; *Parmenter v. Walker*, 9 R. I. 225.

But if the mortgage by its terms authorizes the mortgagee to make a sale of the premises, and to purchase them at such sale, this, in the absence of fraud, or some statutory regulation to the contrary, will be entirely valid. *Elliott v. Wood*, 45 N. Y. (6 Hand) 71; affirming 8 C., 53 Barb. 285.

When the power has been executed by a valid sale in pursuance of its terms, the sale passes an absolute title to the land to the purchaser, free from any right of redemption. *Capron v. Attleborough Bank*, 11 Gray, 492, 498; *Bloom v. Van Rensselaer*, 15 Ill. 503; *Hymen v. Devereux*, 68 N. C. 624; *Montague v. Dawes*, 12 Allen, 397; *Brackets v. Baum*, 50 N. Y. (5 Sick.) 8.

(294) The insertion of a power of sale is a mere cumulative remedy, and it does not in any manner interfere with or prevent the remedy by suit or action in the courts for a foreclosure of the mortgage. *Walton v. Cody*, 1 Wis. 420; *Carmerais v. Genella*, 22 Cal. 116; *Marriott v. Givens*, 8 Ala. 694; *Carradine v. O'Connor*, 21 id. 578; *Morrison v. Bean*, 15 Tex. 267; *Thompson v. House*, 48 Miss. 444.

The mortgage deed, however, sometimes contains a stipulation that the mortgagor shall retain the possession, generally until default shall be made in payment. An agreement of this kind is construed as a re-demise from the mortgagee to the mortgagor until the day fixed for payment (*p*).

In those cases where the mortgagor is in the actual personal enjoyment of the property, it is not uncommon for him to attorn tenant to the mortgagee at a rent equal to the interest upon the mortgage debt, thereby giving the tenant power to distrain for the amount of interest; in such a case he is either tenant at will or yearly tenant.

[* 309] With respect to under-tenants of the land under the * mortgagor, since he cannot, after the mortgage, grant a valid lease or demise as against the mortgagee, they have no title to hold against the mortgagee; but of course any tenant under a demise prior to the mortgage is not affected by the mortgage, and until he receive notice from the mortgagee to pay rent to him, he is justified in continuing to pay rent to the mortgagor (*q*), who, in fact, for this purpose, may be considered as the bailiff of the mortgagee, but without any liability to account (*r*).

We will here add a few short remarks upon some subsidiary points relating to mortgages, which are of constant and practical application. It is not at all uncommon for the same property to be made subject to a number of successive mortgages. For although the first mortgage alone can completely fill the character of a true mortgage, inasmuch as that alone can confer upon the mortgagee a legal estate, still the equity of redemption is regarded to such an extent as an ownership, that a conveyance of it in a form exactly similar to a first mortgage is considered to constitute a security, having many of the properties and much of the value of a first mortgagee; except of course this, that should the property prove insufficient in value to satisfy both claims, the first mortgagee is entitled to a complete discharge of all money owing upon his security before the second or subsequent mortgagees can obtain anything. (295) Where there are several mortgages upon the same

(*p*) See Shepp. Touch. 272, where a distinction is taken between those cases where the time during which the mortgagor may retain possession is certain and where not; and also between the different forms which the stipulation may assume. See as to these questions, *Wilkinson v. Hall*, 4 Scott, 301; *Doe v. Goldwin*, 2 Q. B. 143; *Doe v. Day*, 2 Q. B. 147;

Doe v. Lightfoot, 8 M. & W. 553; and as to how far the execution of the deed by the mortgagee is necessary, in order to constitute a valid legal term in the mortgage. *Morton v. Woods*, L. R. 3 Q. B. 658.

(*q*) *Ante*, p. 306, and see *Doe d. Marriott v. Edwards*, 8 N. & M. 193.

(*r*) *Moss v. Gallimore*, Doug. 285.

(295) Several different mortgages of the same land may be executed at the same time; and unless affected by a priority of recording or registry, the general rule is that the mortgagees will have equal and concurrent rights, in proportion to the amounts of their respective claims. *Aldrich v. Martin*, 4 R. I. 520; and see *Donnels v. Edwards*, 2 Pick. 617; *Russell v. Carr*, 38 Ga. 459.

Where two mortgages are executed and recorded at the same time, if it is agreed by all parties that one of the mortgages shall have a priority over the other, the law, for the purpose of carrying that intention into effect, will presume that the mortgage intended to be preferred was first delivered. *Jones v. Phelps*, 2 Barb. Ch. 440; *Pomeroy v. Latting*, 15 Gray, 435; *Douglass v. Peete*, Clarke's Ch. 563; see *Isett v. Lucas*, 17 Iowa, 503; *Stafford v. Van Rensselaer*, 9 Cow. 316.

So where a grantee of land at the instant of receiving his deed executes and delivers two mortgages of a part of it, one of which is to his grantor, to secure the payment of a part of the purchase-money, and the other is to a third person, and all the deeds are entered for

property there often arise questions as to the order of priority of the claims, which are of the highest importance to the parties. They usually arise in foreclosure or redemption suits; therefore such questions have principally been dealt with by courts of equity, and are also from their inherent nature subject to the jurisdiction of those courts. The fundamental doctrine upon which such questions usually depend is that of notice, * which [*310] involves a most righteous principle, viz., that a person who takes property with notice of a prior right, even though he be a *bona fide* purchaser for valuable consideration, yet he shall give full effect to that prior right (s).

Where there is no duty arising out of that good faith which courts of equity require from every man, then he who has the legal estate is considered to have the better equity, so that if a third mortgagee (who lent his money without notice of the existence of the second mortgage) takes a transfer of the first mortgage, thus obtaining the legal estate, he is considered as having a better equity than that of the second mortgagee (t). Where, however, there is nothing else to distinguish the equities of various incumbrancers, the maxim *qui prior est tempore potior est jure* applies, and the incumbrances rank in the order of their date (u). (296)

(s) *Le Neve v. Le Neve*, Amb. 436; s. c. 8 Atk. 646; 1 Ves. 64. Notice to an agent is notice to his principal; *ib.* The cases upon notice are very numerous, both as to what constitutes actual, as well as constructive notice. We cannot here enter into these details. The principle has been recently applied to the case where the contract was expressly extended to future advances. For it was held that if A. mortgaged to B. to secure present and future advances, the mortgage was invalid as against C., so far as regarded advances made after notice of a second mortgage to C. *Hopkinson v. Rolt*, 9 H. L. 514.

(t) *Marsh v. Lee*, 2 Vent. 337. This right has become well known under the name of the *tabula in naufragio* given to it by Lord Hale. See also *Wortley v. Birkhead*, 2 Ves. S. 571. The doctrine has been applied in cases almost innumerable, and with endless variations in the circumstances. The priorities of successive incumbrances are not, it seems, altered by one getting in the legal estate from one who is trustee for all. *Sharples v. Adams*, 32 Beav. 213.

(u) The maxim quoted is, however, the last consideration which the courts entertain, for any negligence on the part of a mortgagee

record at the same moment, the mortgage to his grantor will take precedence. *Clark v. Brown*, 3 Allen, 509.

A mortgagor may, before foreclosure, make a second mortgage, or indeed any number of subsequent mortgages, as his interest in the equity of redemption may be mortgaged. *Justice v. Uhl*, 10 Ohio St. 170, 176.

A second mortgagee stands in the place of the mortgagor, as to his right of redeeming the first mortgage; and if there are other successive mortgages of the same property, each new mortgagee succeeds to the rights of his mortgagor. *Norton v. Warner*, 3 Edw. Ch. 106; *Peabody v. Roberts*, 47 Barb. 91, 95; *Cronin v. Haseltine*, 3 Allen, 824.

(296) In this country the rights of the mortgagee depend materially if not essentially upon the recording or registry of his mortgage, and upon the priority of such recording or registry. The statutes of each State will be consulted by those who wish to learn what the law is in any particular State. As one of the objects of recording a mortgage is to give notice of its existence to subsequent *bona fide* purchasers or mortgagees, it is a settled rule that if a subsequent purchaser or mortgagee has notice, at the time of taking his deed or mortgage, of the existence of the prior unregistered or unrecorded mortgage, he will not be permitted to defeat it by a prior registry or recording of his deed or mortgage; for such notice is, as to him, the same as though the prior mortgage had been duly recorded or registered. *Hewes v. Wiswell*, 8 Greenl. 94; *Brackett v. Waif*, 6 Vt. 411; *Jackson v. Burgott*, 10 Johns. 457; *Williamson v. Brown*, 15 N. Y. (1 Smith) 854, 864; *Acer v. Westcott*, 46 N. Y. (1 Sick.) 384; *Cambridge Valley Bank v. Delano*, 48 N. Y. (3 Sick.) 336; *Reed v. Gannon*, 5 N. Y. (5 Sick.) 845; *Fort v. Burch*, 5 Denio, 187; *Jaques v. Weeks*, 7 Watts, 261; *Hudson v.*

[* 311] * We cannot leave the subject of mortgages without referring to those of the peculiar kind which courts of equity have sanctioned, and which are consequently called equitable mortgages. These, although they do not confer any estate either at law or in equity upon the mortgagee, and therefore are not properly within the scope of this chapter, yet have in effect such similarity to mortgages properly so called, and are also of such great practical utility, that a passing notice of them may well find a place here. Courts of equity have declared that if a contract can be shown to exist that land should be charged with the payment of a debt, even without the evidence of writing (notwithstanding the statute of Frauds), if the title deeds of the land be deposited with the mortgagee, or some equivalent act done, it is a good mortgage (x). (297)

(not legal) may be fatal to his priority: see *Atterbury v. Wallis*, 8 De G. M. & G. 454; but a legal mortgagee without gross negligence will not be postponed. See *Colyer v. Finch*, 5 H. L. 905; *Perry Herrick v. Attwood*, 2 De G. & J. 21. We may here remark that if the mortgages are of personal property in the hands of a third person, such, for instance, as a trust fund or a debt, the mortgagee who first gives notice to the trustee, debtor, or other person in whose hands the fund is, obtains priority whatever be the date of his security. See *Dearle v. Hall*, 3 Russ. 1; *Lovell v. Cooper*, *ib.*; *Foster v. Cockerell*, 3 Cl. & Fin. 456. This does not apply to mortgages of real estate, or chattels real, even if the property be vested in a trustee. *Rooper v. Harrison*, 2 K. & J. 86; *Jones v. Jones*, 8 Sim. 683; *Wiltshire v. Rabbits*, 14 Sim. 76; *Wilmot*

v. Pike, 5 Hare, 14; and it is to be observed that the notice to be of any effectual use must be given to the trustee, &c., after he has been fully constituted such by having the fund in his hands; it will be useless if given merely in contemplation of his becoming a trustee, &c. See *Buller v. Plunkett*, 1 J. & H. 441; *Somerset v. Coz*, 33 Beav. 634; *Webster v. Webster*, *ib.* 39; where the subjects of the mortgages were the produce of commissions in the army, and the notices were to the army agents.

(x) *Russel v. Russel*, 1 Bro. C. C. 269. See *ex parte Whitbread*, 19 Ves. 209; *Whitbread v. Jordan*, 1 Y. & C. 303. A deposit of part of the deeds even creates a mortgage. *Lacon v. Allen*, 3 Dr. 579. See *Roberts v. Croft*, 3 D. G. & J. 1; *Thorpe v. Holdsworth*, L. R. 7 Eq. 139.

Warner, 2 Harr. & Gill, 415; *Rogers v. Jones*, 8 N. H. 264; *Bush v. Golden*, 17 Conn. 594, 603; *Spooford v. Weston*, 29 Me. 140; *Chiles v. Conley*, 2 Dana, 28; *Pike v. Amistead*, 2 Dev. Eq. 24; *Newman v. Chapman*, 2 Rand, 93; *Roads v. Symmes*, 1 Ohio, 281; *Dixon v. Doe*, 1 Sm. & Marsh. 70.

A mortgage not recorded or registered is preferred to a subsequently docketed judgment, as it is a valid conveyance and binds the lands except as against *bona fide* purchasers and mortgagees, whose conveyances are first recorded. *Knell v. Green Street Building Association*, 34 Md. 67; *Rodgers v. Gibson*, 4 Yeates, 111; *Heister v. Fortner*, 2 Binn. 40; *Cover v. Black*, 1 Penn. St. 493.

But, if the purchaser at the sale on the execution, under such judgment, has his deed first recorded, he will gain a preference over the mortgage. *Jackson v. Dubois*, 4 Johns. 216; *Ash v. Ash*, 1 Bay, 304; *Hampton v. Levy*, 1 McCord's Ch. 107.

A mortgage, though not recorded or registered, is valid between the parties to it. *Sulmon v. Claggett*, 3 Bland, 126; *Andrews v. Burns*, 11 Ala. 691; *Moore v. Thomas*, 1 Oregon, 201; *Howard v. McIntyre*, 3 Allen, 571.

(297) In this country there is no uniform rule upon the question whether there can be an equitable mortgage by a mere deposit of title deeds. In some of the States such a security is recognized and held valid. *Hackett v. Reynolds*, 4 R. I. 512; *Jarvis v. Dutcher*, 16 Wis. 307; *Mounce v. Byars*, 16 Ga. 469; *Chase v. Peck*, 21 N. Y. (7 Smith) 581, 584; *Rockwell v. Hobby*, 2 Sandf. Ch. 9; *Gothard v. Flynn*, 25 Miss. 58; *Mandeville v. Welch*, 5 Wheat. 277, 284; *Robinson v. Urquhart*, 1 Beasl. (N. J.) 515, 523; *Welsh v. Usher*, 2 Hill's Ch. (S. C.) 166, 170; *Richards v. Leaming*, 27 Ill. 431; *Keith v. Horner*, 32 *id.* 526.

In some of the other States such a mortgage is not recognized by the courts. *Probasco v. Brannon*, 2 Disney (Ohio), 96; *Meador v. Meador*, 3 Heisk. 563; *Bicknell v. Bicknell*, 31 Vt. 498; *Vanmeter v. McFaddin*, 8 B. Monr. 435, 437; *Shitz v. Dieffenbach*, 3 Penn. St. 233.

The principle upon which the courts have sanctioned this proceeding is, that what has been agreed to be done shall be deemed to be done, if the consideration be sufficient and some act of performance done, in pursuance of the agreement: as there would otherwise be a breach of good faith. The practice of depositing title deeds being * found of great convenience, [* 312] as on the occasion of temporary loans made by bankers to their customers, the courts have gone a step further and presumed that where no other object or intention can be shown, the title deeds were delivered by a debtor to his creditor as a security. Some difference of opinion as to what is the true remedy of an equitable mortgagee has existed amongst the judges, some holding that it is to have a regular legal mortgage executed, with a consequent right of foreclosure: others, that it is merely a right to require a sale of the property (y). (298) Of course if any memorandum, as often happens, accompanies the deposit, the construction of that document has a material bearing upon the nature of the decree which the court will make (z).

A fourth species of estates, defeasible on condition subsequent, are certain ancient estates held by statute merchant and statute staple (a); which are very nearly related to the *vivum vadium* before mentioned, or estate held till the profits thereof shall discharge a debt liquidated or ascertained. For both the statute merchant and statute staple are securities for money; the one entered into before the chief magistrate of some trading town, pursuant to the statute of 13 Edw. 1, stat. 3, *de mercatoribus*, and thence called a statute merchant; the other pursuant to the statute 27 Edw. 3, stat. 2, c. 9, before the mayor of the staple, that is to say, the grand mart for the principal commodities or manufactures of the kingdom, formerly held by act of parliament in certain trading towns (b), from whence this security is called a statute staple. They were both securities for debts acknowledged to be due; * and originally permitted only among traders, for the benefit of commerce; whereby not only the body of the debtor might be imprisoned, and his goods seized in satisfaction of the debt, but also his lands (c) might be delivered to the creditor, till out of the rents and profits of them the debt should be satisfied; and during such time as the

(y) See *Tuckley v. Thompson*, 1 J. & H. 126; *Mathews v. Goodday*, 31 L. J. Ch. 282.

(z) *Mathews v. Goodday*, *id. sup.* See *Tenant v. Trenchard*, 38 L. J. Ch. 169.

(a) As to these securities in general, see 2 Saunders, by Wms., 70, and index, *Statute Merchant*, and *Statute Staples*; 8 Price, 316.

(b) See 27 Ed. 3, stat. 2, c. 1.

(c) That is to say, his freehold lands, and lands in ancient demesne, but not his copyholds. 2 Inst. 397; 4 *Id.* 270; 3 Rep. 80; 8 Ves. 394.

The remedy of the mortgagee, whatever that may be, is in equity. Whether the decree shall be for a foreclosure or for a sale has been a question in the English courts. See *Pain v. Smith*, 2 M. & K. 417; *Parker v. Housefield*, *id.* 419; *Brocklehurst v. Jessop*, 7 Sim. 438; *Moores v. Choat*, 8 *id.* 508, 515, 523; *Price v. Carver*, 3 M. & C. 157, 161; *Lister v. Turner*, 5 Hare, 281.

In *Tuckley v. Thompson*, 1 Johns. & H. 126, the court held that the remedy was by sale and not by foreclosure. But the late cases hold that the remedy is by foreclosure and not by sale. *James v. James*, L. R., 16 Eq. 153; *Pryce v. Bury*, *id.* in note; *Redmayne v. Forster*, L. R., 2 Eq. 467.

(298) For the late English cases upon this subject, see the latter part of the last preceding note.

creditor so held the lands, he was tenant by statute merchant or statute staple. These estates are now obsolete, but there is also a similar security, the recognizance in the nature of a statute staple, acknowledged before a judge, or (out of term) before their substitutes, the mayor of the staple at Westminster and the recorder of London; whereby the benefit of this mercantile procedure is extended to all the king's subjects in general, by virtue of the statute 23 Hen. 8, c. 6, amended by 8 Geo. 1, c. 25, which directs such recognizances to be inrolled and certified into chancery. But these, by the statute of frauds, 29 Car. 2, c. 3, are only binding upon the lands in the hands of *bona fide* purchasers, from the day of their inrolment, which is ordered to be marked on the record (*d*). Recognizances are still used as penalties to secure the observance of certain orders of courts, as when a man is bound to keep the peace towards another. Though, except they be of these special kinds, they create no estate in land.

[*314] Another similar conditional estate, created by * operation of law, for security and satisfaction of debts, is called an estate by *elegit*.

Estate elegit. Without here entering into detail as to what an *elegit* is, we may here mention, that it is the name of a writ, founded originally on the statute (*e*) of Westm. 2, by which, after a plaintiff has obtained judgment for his debt at law, the sheriff gave him possession of one half of the defendant's lands and tenements, to be occupied and enjoyed, until his debt and damages are fully paid: and during the time he so holds them, he is called tenant by *elegit*. Under the act we have mentioned, the debtor could "extend," as the phrase went, the half of any freehold lands (*f*) possessed by the debtor at the time of entering up judgment: and this right was not lost even if the debtor after the judgment conveyed away the land to a purchaser without notice of the judgment.

The remedy has by the statute of frauds, and still more by a modern act (*g*), been enlarged, so as to render liable the entirety of the lands, whether copyhold or freehold, to be extended, and not only these but also all rectories, tithes, rents, or hereditaments. Moreover, the restriction as to the legal estate being in the debtor is also removed, so that all these, if they be held in trust for the debtor, or if he has any disposing power over them exerciseable for his own benefit, are extendible under an *elegit*. But an equity of redemption not falling within either of the acts is still not extendible. Nevertheless,

Equitable elegit. courts of equity will, when the creditor has proceeded at law as far as possible without success, interfere to assist him, by giving

[*315] him the same benefit as he could, had the estate been legal, have had under an *elegit* or *fieri facias* (*h*). By a subsequent act (*i*), however, *a

(*d*) The stat. 33 Hen. 8, c. 39, s. 50, enacts, that all obligations and specialties, concerning or for the benefit of the crown, shall have the force and effect of a statute staple. And the stat. 18 Eliz. c. 4, subjects the lands of "accountants" to the crown to debts to the crown, incurred at any time during the accountantship, in the same manner as if such debts had been secured by statute staple at the commencement of the accountantship. See also 12 Eliz. c. 7; 27 Eliz. c. 8. By the stat. 25 Geo. 3, c. 85, the crown has the further privilege of selling the debtor's lands. See

41 Geo. 3, c. 90; 1 & 2 Geo. 4, c. 121; 2 & 3 Vict. c. 11, s. 10.

(*e*) 13 Edw. 1, c. 18.

(*f*) Only those corporeal hereditaments, of which the annual value was capable of estimation by a jury. *Robinson v. Tonge*, 3 P. W. 398.

(*g*) 1 & 2 Vict. c. 110, s. 11.

(*h*) *Lewkenor v. Freeman*, Pr. in Ch. 105; Mitt. Plead. 126; *Forth v. Duke of Norfolk*, 4 Mad. 503; *Smith v. Hurst*, 1 C. C. 705; *Yascombe v. Jandor*, 28 Beav. 80.

(*i*) 2 & 3 Vict. c. 11.

purchaser without notice of the judgment is protected from the operation of these enlarged powers, though it seems that the provision is strictly confined to the preceding act, and leaves the operation of the act of Westm. 2 unaffected: the reason for which omission is not clear, for it is an obvious hardship for a man to have half his lands sequestered to pay the debts of him from whom they had been purchased. Estates by *elegit* have not in modern times been common, being attended with many inconveniences; but they have acquired a new importance as preparatory to a sale of the lands under very recent legislation (*j*). Of this we shall see more hereafter.

* CHAPTER XI.

[* 316]

ESTATES IN POSSESSION, REMAINDER, AND REVERSION.

HITHERTO we have considered estates solely with regard to their duration, or the quantity of interest which the owners have therein. We are now to consider them in another view; with regard to the time of their enjoyment, when the actual permanency of the profits (that is, the taking, perception, or receipt of the rents and other advantages arising therefrom) begins. Estates, therefore, with respect to this consideration, may either be in possession or in expectancy: and of expectancies there are two sorts; one created by the act of the parties, called a remainder; the other by act of law, and called a reversion.

Of estates in possession, (which are sometimes called estates executed, whereby a present interest passes to and resides in the tenant, not depending on any subsequent circumstance or contingency, as in the case of estates executory,) there is nothing peculiar to be observed. All the estates we have hitherto spoken of are of this kind; for, in laying down general rules, we usually apply them to such estates as are then actually in the tenants' possession. But the doctrine of estates in expectancy formerly contained much, and still contains some of the nicest and most abstruse learning in the English law. These will therefore require a minute discussion, and demand some degree of attention.

An estate then in remainder may be defined to be, an estate limited to take effect and be enjoyed after another estate is determined. (299) [317]

(*j*) 27 & 28 Vict. c. 112. An act, the intention of which may be praised, but which pitifully falls short of carrying that intention into effect, so as to provide for the various cases which arise.

(299) A remainder is a remnant of an estate in land, depending upon a particular prior estate, created at the same time, and by the same instrument, and limited to arise immediately on the determination of that estate, and not in abridgment of it. 4 Kent, 197.

A remainder is an estate or interest in lands or tenements to take effect in possession or enjoyment immediately upon the determination of a prior estate, which is created at the same time and by the same act or instrument, and upon which such first-mentioned interest is made to depend. 2 Washb. Real Prop. 222 (500); *Wimple v. Fonda*, 3 Johns. 288; *Leslie v. Marshall*, 81 Barb. 560, 564; *Brown v. Lawrence*, 8 Cush. 390, 397; *Booth v. Terrell*, 16 Ga. 20.

As if a man seised in fee simple grants lands to A. for his life, and, after the determination of that estate, then to B. and his heirs for ever; here A. is tenant for life remainder to B. in fee. In the first place, an estate for life is created or carved out of the fee, and given to A.; and the residue or remainder of it is given to B. But the present life estate and the remainder afterwards, when added together, are equal only to one estate in fee (*a*). They are indeed different parts, but they constitute only one whole: they are carved out of one and the same inheritance: they are both created, and may both subsist together; the one in possession, the other in expectancy. So, if land be granted to A. for life, and after the determination of the said term to B. in tail; and after the determination of B.'s estate tail, it be limited to C. and his heirs for ever; this makes a tenant for life, with remainder to B. in tail, remainder over to C. in fee. Now here the estate of inheritance undergoes a division into three portions, the first estate, and both the remainders, together constitute one entire inheritance: and if there were a hundred remainders, it would still be the same thing. And hence also it is easy to see why no remainder can be limited after the grant of an estate in fee simple (*b*): because a fee simple is the highest and largest estate that a subject is capable of enjoying; and he that is tenant in fee hath in him the whole of the estate: a remainder, therefore, which is only a portion, or residuary part, of the estate, cannot be reserved after the whole is disposed of. A particular estate, with all the remainders expectant thereon, is only one fee simple; as 40*l*. is part of 100*l*., and 60*l*. is the remainder of it: wherefore, after a fee simple [* 318] once vested, there can no more be a remainder limited thereon, * than after the whole 100*l*. is appropriated there can be any residue subsisting.

This doctrine has been, as we have seen, adopted with such strictness, that by the common law there cannot be limited a remainder upon a base fee (*c*), and though now, when an estate tail (upon which a remainder exists) is converted into a base fee, the remainder continues to be a valid remainder (subject of course to being barred), yet this which arises by operation of law, may not be affected by act of the parties; for before the statute *De Donis* no remainder could be limited upon a conditional fee (*d*), and no change has been made in this rule.

We must bear in mind that our remarks are applicable only to estates created by conveyance at common law; but by virtue of the statutes of Uses and of Wills, estates may, within the limits prescribed by certain rules, be limited with every conceivable variety of modelling (*e*).

Having premised thus much, we are in a position to discuss and comprehend the rules which are required by the law to be observed in the creation of remainders, with the reasons upon which these rules depend.

First, there must be a particular freehold estate precedent to the remainder (*f*). Thus, an estate given to A., to take effect after the death of B., must be preceded by an estate given to B. for his life, or to some other person for the life of B. This precedent estate is called the particular estate, as being

(*a*) Co. Litt. 143.

(*b*) Plowd. 129; Vaugh. 269, *ante*, p. 209.

(*c*) Co. Litt. 18 a; see Lord Coke's note to *Seymour's Case*, 10 Rep. 97 b.

(*d*) *Simpson v. Simpson*, 5 Scott, 770.

(*e*) *Infra*, c. 20.

(*f*) Co. Litt. 49; Plowd. 25; *Boraston's Case*, 3 Rep. 20.

only a small part, or *particula*, of the inheritance; the residue being granted over to the remainderman or remaindermen. In one sense, a remainder is said sometimes to exist after an estate for years. Thus, if land is granted to A. for twenty years, and after the determination of that estate to B. for life, and so on. Since B.'s interest does not carry with *it the actual [* 319] enjoyment of the law until after the determination of A.'s term, therefore it is sometimes described as a remainder; but inasmuch as the feudal seisin must by our law be in some person, and it cannot be in a tenant of less than freehold interest, therefore, in the case put, B. would be said to be in possession for an estate for life, subject to the tenancy for years of A., and, in fact, this is the ordinary form of such a limitation (*g*). The words "and in the meantime subject thereto" usually follow the limitation of the term. For the livery of seisin to A. passes it at once to B., who is at once seised of his remainder at the same time that the termor is of his term. The enjoyment of it must indeed be deferred till hereafter; but it is to all intents and purposes an estate commencing *in præsenti*, though to be occupied and enjoyed *in futuro*.

The meaning of the rule, which requires a particular precedent estate, appears also when we consider another canon of the common law, viz., that an estate of freehold (*h*) cannot be created to commence *in futuro* (*i*). (300) A grant of an estate tail to commence from the beginning of next year is void. This arises, as already shown, from the fact that livery of seisin being a personal act of the parties must, *ex necessitate rei*, operate instantly, or be entirely inoperative. There would be a manifest contradiction if an estate, which is not to commence till hereafter, could be granted by a conveyance which imports an immediate possession.

A second rule to be observed is this, that the remainder * must be [* 320] granted at the time of the creation of the particular estate (*k*). As,

where there is an estate to A. for life, with remainder to B. in fee: here B.'s remainder in fee passes from the grantor at the same time that seisin is delivered to A. of his life estate in possession. And it is this which induces the necessity at common law of livery of seisin being made on the particular estate, whenever a freehold remainder is created. For, if it be limited even on an estate for years, it is necessary that the lessee for years should have livery of seisin, in order to convey the freehold from and out of the grantor, otherwise no estate except the term of years is created (*l*). The livery is unnecessary to strengthen the estate for years: but is requisite to convey the freehold, and yet cannot be given to

Remainder and particular estate must pass out of grantor at same time.

(*g*) "It is said, that an estate-tail limited after an estate for years is a remainder. I deny that, as a general proposition. Can any case be shown where an estate for years was given to A., with limitation over to B. for life or in fee, and B. was held not to take an immediate estate of freehold? *Per* Patteson, J., *Doe d. Cooper v. Finch*, 4 B. & Ad. 233, 306.

(*h*) This does not apply to chattel interests, as in fact is obvious when the reason given in the text is considered, because livery of seisin was not applicable to them.

(*i*) *Barwick's Case*, 5 Rep. 94; *Corbet v. Stone*, Raym. 140, 151.

(*k*) Litt. s. 671; Plowd. 25.

(*l*) Litt. s. 60.

(300) This rule of the common law has been abrogated by statute in several of the States, and in them estates may be created to commence in future. See 2 Washb. Real Prop. 264, 265.

him in remainder without infringing the possession of the lessee for years, therefore the law allows, as we have already shown, such livery, made to the tenant for years, to relate and enure to him in remainder, as both are but one estate in law (*m*).

A third rule respecting remainders is this: that the remainder must vest in the grantee during the continuance of the particular estate, or *eo instanti* that it determines, except in certain cases (*n*). (301) As, if A. be tenant for life, remainder to B. in tail: here B.'s remainder is vested in him, at the creation of the particular estate to A. for life: or if A. and B. be tenants for their joint lives, remainder to the survivor in fee; here, though during their joint lives the remainder is vested in neither, yet on the death of either of them, the remainder vests instantly in the survivor: wherefore both these are good remainders. But, if an estate be limited to A. for life, remainder to the eldest son of B. in tail, and A. dies before B. has any son: here the remainder will be void, for it did not vest in any one during the continuance, nor at the determination, of the [* 321] particular estate: and even supposing that * B. should afterwards have a son, he will not take by his remainder; for, as it did not vest at or before the end of the particular estate, it never can vest at all, but is gone for ever (*o*). And this depends upon the principle before laid down, that the precedent particular estate, and the remainder, are one estate in law; they must therefore subsist and be *in esse* at one and the same instant of time, either during the continuance of the first estate, or at the very instant when that determines, so that no other estate can possibly come between them. For there can be no intervening estate between the particular estate and the remainder supported thereby (*p*): the thing supported must fall to the ground,

Remainder must vest instantly upon determination of particular estate.

(*m*) Co. Litt. 49.
(*n*) Plowd. 25; 1 Rep. 66.

(*o*) 1 Rep. 188.
(*p*) 3 Rep. 20.

(301) In accordance with the principle that the particular estate and the remainder when united together form but one estate of the extent or duration of the two, it follows that, although any number or remainders in succession may be carved out of a fee simple if each is less than a fee, yet no remainder can be limited after a fee, because when a fee has once been created there is nothing left by way of remainder to be given away.

And it has been held that if an estate is given to one with a full and absolute power of control and disposal, there can properly be no remainder limited after his estate, although this was in terms a contingent one. *McLean v. McDonald*, 2 Barb. 564; *McDonald v. Walgrove*, 1 Sandf. Ch. 274, 276; S. C., 3 N. Y. Leg. Obs. 208; *Wright v. Miller*, 8 N. Y. (4 Seld.) 9, 25; *Idv. v. Idv.*, 5 Mass. 500; *Jackson v. Bull*, 10 Johns. 19; *Terry v. Wiggins*, 47 N. Y. (2 Sick.) 512; affirming S. C., 2 Lans. 272; *Ramsdell v. Ramsdell*, 21 Me. 288; *Burbank v. Whitney*, 24 Pick. 146.

"It is a well known rule in the law of descents, that a reversion or remainder in fee, expectant on a present freehold estate, will not, during the continuance of such freehold estate, pass by descent from a person in whom the title thereto had vested by *descent*, as a new stock of inheritance, unless some act of ownership, which the law regards as equivalent to an actual seisin of a present estate of inheritance, had been exercised by the owner, over such expectant estate. But it is otherwise where the future estate was acquired by *purchase*, for the purchaser becomes a new stock of descent, and on his death the estate passes directly to his heir at law. This distinction is entirely settled by authority, and it will be found to reconcile various cases which would otherwise seem to be in conflict with each other." BEARDSLEY, J., in *Vanderheyden v. Crandall*, 2 Denio, 9, 25; S. C. affirmed, 1 N. Y. (1 Comst.) 491.

if once its support be severed from it. There are, however, as we have stated, exceptions to this rule, which we shall consider more satisfactorily when we come to speak of the various kinds of remainders. These exceptions depend, as we shall see, entirely upon legislative authority.

We may also add as part of this rule that the mode of limitation of the remainder must be such that it does not take effect before the determination of the particular estate. For it is a principle of the common law, that whenever either the whole fee, or a particular estate, as an estate for life, or in tail, is first limited, no condition can be annexed to the prior estate, which should have the double effect of defeating the estate and passing the land to another (*g*). Suppose a feoffment habendum to A. for his life, but if C. should return from Rome, then to C. in fee, this is a void remainder, as being an attempt to defeat the prior estate. The same result might, however, be validly arrived at by importing into the first life estate a restriction; thus a feoffment habendum to A. so long as he should live, and C. should not return from Rome, and in case C. should return from Rome, then to C. or his heirs, is a good remainder, which would take effect if C. *should return from Rome during A.'s [* 322] lifetime. Such difficulties, however, as these never occur in modern conveyancing, which would never take the form above-mentioned.

A fourth rule controlling the limitation of remainders, is that a remainder may not be limited to a child of an unborn person (*r*). Such a limitation, as tending to a perpetuity, is considered as absolutely void. Thus, if lands be limited in succession to a person *in esse*, and after his decease to his unborn children, and afterwards to the children of such unborn children, this last remainder is absolutely void (*s*). And we may add that a limitation of such a void remainder makes all subsequent remainders bad, even though they be limited to living persons (*t*).

The last two cases lead us to the distinction which exists between the two main classes into which remainders are divided, called respectively Vested and Contingent.

Where there is a present capacity for taking effect in possession, if the possession were to become vacant, the remainder is vested, and it is not the less so because, notwithstanding the present capacity, there is a possibility that the remainder will never come into actual possession. Thus, if land be limited to A. for life, remainder to B. (a living person) for life, with remainder over, B.'s remainder is a vested interest, although if he were to die before A., *he obviously would never have any actual enjoyment of the [* 323] land (*u*). (302)

(*g*) Co. Litt. 203 b.

(*r*) *Fearne*, Conting. Rem. 502, *Mainwaring v. Baxter*, 5 Ves. 458; *Beard v. Westmacott*, 5 Taunt. 393. See Opinions of Mr. Booth and Mr. Yorke, 2 vol. 432; *Cole v. Sewell*, 4 Dru. & W. 1; 2 H. L. Ca. 186; *Monypenny v. Dering*, 2 De G. M. & G. 145.

(*s*) Therefore, in settlements of real estate, where it is desired to tie up the property as far as possible, the practice is to give estates for life to all persons who are living, and

estates tail to unborn children, the estates being arranged in order suited to the wishes of the parties.

(*t*) See *Monypenny v. Dering*, *ubi sup.* Some limitations taking effect after a void remainder were held good, not as remainders, but as substantive and independent or alternative gifts, contingent upon an event which must take place within the lawful period.

(*u*) *Fearne* on Conting. Rem. 216.

(302) "Remainders are of two sorts, vested and contingent. An estate is vested when there is an immediate right of present enjoyment, or a present fixed right of future enjoyment. It gives a legal or equitable seisin." 4 Kent's Com. 302. The broad distinction

Contingent remainders, on the other hand, are where the estate is limited to a person, who at the time of its creation is either unborn or unascertained, or the commencement of the estate is made to depend upon an event, the happening of which is a condition precedent to the remainder taking effect, and which may either not happen at all or not before the determination of the particular estate (x).

Contingent remainders are of ancient date, though not coeval with other similar limitations allowed by the common law, for it is certain that in the earliest periods of English law, they were either unthought of or considered as void (y). Even after their establishment, which followed the requirements of the more artificial life which succeeded the simple habits of the military ages, they still continued subject to many restrictions from which vested remainders [* 324] were free. Modern *legislation has done much to free them from the fetters which technical doctrines had thrown about them, and they in fact now are subject only to those particularities and trammels which are involved in their very essence (z).

(x) Mr. Fearne, in his well-known essay (p. 5), has enumerated four sorts of contingent remainders. 1st. Where the remainder depends entirely upon a contingent determination of the preceding estate itself. 2nd. Where the contingency on which the remainder is to take effect is independent of the determination of the preceding estate. 3rd. Where the condition upon which the remainder is limited is certain in event, but the determination of the particular estate may happen before it. 4th. Where the person to whom the remainder is limited is not yet ascertained, or not yet in being.

The following are examples given by him of these four kinds:—1. A grant to A. until C. shall return from Rome, and after such return of C. then to remain over in fee. 2. A grant to A. for life, remainder to B. for life, and if B. die before A., remainder to C. for life. 3. A grant to A. for life, and after the death of B. remainder to C. 4. Grant to A. for life, remainder to the right heirs of

B., a living person. As we cannot here enter at length into the learning concerning contingent remainders, much of which is obsolete, the description given in the text will suffice.

(y) As to their antiquity, see Hayes' Com. Law, Uses and Trusts, 945; Williams' Real Property, 226; Third Report of Real Property Commissioners, p. 23.

(z) Formerly they were thought not to be devisable by will, but later cases decided that they came within the Statute of Wills. Fearne, Conting. Rem. 367. By the recent Wills Act, 1 Vict. c. 26, s. 3, they are expressly made devisable. Again, before 7 & 8 Vict. c. 76, (repealed, but substantially re-enacted by 3 & 4 Vict. c. 106,) they could not be conveyed by direct conveyance. Fearne, C. T. 366, citing *Weale v. Lower*, Pollex. 53; *Vick v. Edwards*, 2 Bro. P. C. 15; 3 P. W. 372. The same act, 3 & 4 Vict. c. 106, has, as we shall see presently, removed much of their liability to defeat.

between vested and contingent remainders is this: In the first class of cases, there is some person *in esse* known and ascertained, who, by the will or deed creating the estate, is to take and enjoy the estate upon the expiration of the existing particular estate, and whose right to such remainder no contingency can defeat. *Crocoll v. Sherred*, 5 Wall. 269, 288; *Brown v. Lawrence*, 3 Cush. (Mass.) 390, 397; *Leslie v. Marshall*, 31 Barb. 560, 564; *Gourley v. Woodbury*, 42 Vt. 395; *Marshall v. King*, 24 Miss. 85, 90.

In the second class of cases, it depends upon the happening of a contingent event whether the estate limited as a remainder shall ever take effect at all. The event may either never happen, or it may not happen until after the particular estate upon which it depends shall have determined, so that the estate in remainder will never take effect. 2 Washb. Real Prop. 224, 502; *Moore v. Lyons*, 25 Wend. 119, 144; *Livingston v. Green*, 52 N. Y. (7 Sick.) 118, 123; *Leslie v. Marshall*, 31 Barb. 560, 564; *Brown v. Lawrence*, 3 Cush. (Mass.) 390, 397.

It is not the uncertainty of enjoyment in future, but the uncertainty of the right to that enjoyment, which marks the difference between a vested and a contingent interest. *Williamson v. Field*, 2 Sandf. Ch. 533.

The present *capacity* of taking effect in possession, if the possession were now to become vacant, and not the certainty that the possession will become vacant before the estate limited in remainder determines, universally distinguishes a vested remainder from one that is contingent. *Howell v. Mills*, 7 Lans. 193, 196.

Reverting to our description of a contingent remainder, a few remarks occur. First, where the remainder is limited to a person either unborn or unascertained, any remainder to an unborn person, as to the children of a tenant for life, who at the time of the settlement has no son, is of course contingent, because *non constat* that he will ever have a son. Formerly, in order that the estate might vest in the son, it was necessary that he should actually be born in the lifetime of his father, so that a posthumous son was excluded from taking a remainder, not being *in esse* at the determination of the particular estate (a). To remedy this hardship an act (b) was passed, declaring that posthumous children under the limitations contained in marriage or other settlements (which have been considered to include wills), shall take in the same manner as if born in the lifetime of their parent. The effect of this is that such a child takes all the profits from the death of the parent (c). (303)

* In reference to the restriction in the choice of unborn persons [* 325] which the law has laid down, and which seems obviously to be connected with, or perhaps arise out of the policy of not permitting land to be settled inalienably for remote periods, we may here notice certain theories now exploded upon which this restriction was formerly supposed to rest. It was said, and for this we have in especial Lord Coke's great authority, that the validity of a contingent remainder depended upon the character of the contingency or possibility upon which it depended. A possibility which shall make a remainder good, ought to be a common possibility, and *potentia propinqua*; as death, or death without issue, or coverture, or the like. If a lease be made

(a) In *Reeve v. Long*, Salk. 228, 4 Mod. 282, the House of Lords, by a decision grounded rather upon the hardship of the case than on sound principles, in order to avoid the admitted effect of the rule stated in the text, held that a limitation under which a posthumous son being contained in a will claimed was an executory devise, and not a remainder. In consequence of the discussion which this case gave rise to, the act 10 & 11 Will. 3, c. 16, was passed.

(b) 10 & 11 Will. 3, c. 16.

(c) *Basset v. Basset*, 3 Atk. 203. When the birth of a posthumous child, taking by

descent or under an executory limitation, not being a remainder within the act, divests an estate which had descended on an heir-at-law, the heir-at-law retains the intermediate rents. Harg. Co. Litt. 11 b, 4; *Goodtitle v. Newman*, 3 Wils. 526; *Basset v. Basset*, *ubi sup.* As to the rules in construing instruments that a person *en ventre* is to be considered born, see *Grower v. Butts*, 1 S. & S. 181; Digest, Lib. 1, tit. 5, *De Statu Hominum*, ss. 7, 26; *Blasson v. Blasson*, 3 De G. J. & S. 865, in which case it was held that the theory would only be permitted when it had the effect of benefiting the child in question.

(303) A remainder may be considered as vested, although all the persons who may take are not ascertained, or *in esse*, and cannot be until the happening of some future event. An instance of that is, where there is a devise to a class, of which each member is equally the object of the testator's bounty, as to "the children" of a person, some of whom are living at the testator's death. To illustrate: Suppose a devise to A, for life, remainder to the children of B, C, if B, C, has children at the testator's death, they would take a vested remainder, and if he were to have other children during the life of A, and *before the remainder was to take effect in possession*, it would open and let in the children born during A's life, who would take shares as vested remainders. *Doe v. Provoost*, 4 Johns. 61; *Tanner v. Livingston*, 12 Wend. 83, 93; *Ballard v. Ballard*, 18 Pick. 41; *Jenkins v. Freyer*, 4 Paige, 47; *Yeaton v. Roberts*, 8 Fost. (N. H.) 486; *Carroll v. Hancock*, 3 Jones (Law), 471; *Adams v. Ross*, 1 Vroom (N. J.), 505, 513; *Graham v. Houghtalin*, *id.* 552, 558.

A remainder will be construed to be a vested one, if the terms by which it is created will admit of such a construction. *Dingley v. Dingley*, 5 Mass. 535, 537; *Doe v. Provoost*, 4 Johns. 61; *Den v. Demarest*, 1 N. J. 525; *Fay v. Sylvester*, 2 Gray, 171; *Crozzall v. Sherred*, 5 Wall. 287; *Moore v. Lyons*, 25 Wend. 119; *Manderson v. Lakins*, 23 Penn. St. 31.

for life, with remainder to the heirs of J. S., this is good; for, by common possibility, J. S. may die during the life of the tenant for life; but if at the time of the limitation there is no such person as J. S., but during the life of the tenant for life J. S. is born, and dies, his heirs shall never take (*d*). The second case being considered as *potentia remotissima*.

The same somewhat metaphysical idea was expressed sometimes by saying that there could not be a possibility upon a possibility, or a contingency upon a contingency adopted as a means of limiting an estate: one instance of such a piling of Pelion on Ossa which was given was, that a limitation to a son John [* 326] of a person who has no son, is * bad; because although the limitation to a son *simpliciter* was good, it being a simple possibility that he should have one, yet there was a double possibility involved in his having a son of a particular name (*e*). It has been well remarked that if the son would get an estate by being christened John, there was a strong likelihood instead of a mere possibility that he would receive that name. The whole theory about possibilities has long been dissipated, and only deserves mention from the greatness of those men who have enunciated it (*f*).

It is a consequence of the nature of remainders generally that a contingent remainder, if it amounts to a freehold, cannot be limited unless the previous estate be a freehold. Thus, if land be granted to A. for ten years, with remainder in fee to the right heirs of B., this remainder is void (*g*); but if granted to A. for life, with a like remainder, it is good. For, unless the freehold passes out of the grantor at the time when the remainder is created, such freehold remainder is void: it cannot pass out of him, without vesting somewhere; and in the case of a contingent remainder it must vest in the particular tenant, else it can vest nowhere; unless, therefore, the estate of such particular tenant be of a freehold nature, the freehold cannot vest in him, and consequently the remainder is void.

Before proceeding further with the consideration of remainders, and the peculiarities which distinguish those which are contingent, we must here mention a doctrine which has had much, and still retains some, influence over their fortunes. When a less estate and a greater, limited subsequent to it, coincide and meet in one and the same person without any intermediate estate (*h*), the less is immediately annihilated, or, in the law phraseology, is [* 327] * said to be merged, that is, sunk or drowned in the greater: or, to express the same thing in other words, the greater estate is accelerated, so as to become at once an estate in possession. Thus, if A. be tenant for years with remainder to B. for life, and A. assign his term to B., or the two estates come together in any other way, the term is merged in the freehold estate; and so in other cases. If, however, the order of limitation be otherwise, that is, if A. be tenant for life, remainder to B. for years, there would be no merger on their union, indeed it would be obviously inconsistent with reason that the term which is by express limitation to exist after A.'s death should by any means be entirely lost: whereas in the case first put, on the supposition, which the law always makes, that an estate

(*d*) *Cholmley's Case*, 2 Rep. 51; Co. Litt. 378; *Lampet's Case*, x. Rep. 336.

(*e*) *Cholmley's Case*, 2 Rep. 51.

(*f*) See the Third Report of the Real Property Commissioners.

(*g*) *Chudleigh's Case*, 1 Rep. 113, 130.

(*h*) *Duncombe v. Duncombe*, 3 Lev. 437.

for life is greater than a term of years however long, there is no such inconsistency (i).

It seems that as an estate for one's own life is considered as greater than one *pur autre vie* (k), there would be a merger upon an estate *pur autre vie* coming to a tenant for life in immediate remainder, though opposite opinions on this point have been sometimes entertained. Certainly this view is less consonant to reason than in the ordinary case of merger, whatever be thought of the reasonableness of the doctrine in general (l).

Indeed it has been thought that two estates of equal character (m) will unite by merger, so that the one in *remainder alone will exist in the same [* 328] manner as if it were in possession; thus a term of years has been thought to merge in another limited in immediate remainder, even though for a less number of years (n): but this seems so contrary to reason that it can hardly be received as sound law. If a term of years be created out of a larger term, and the term so created and the reversionary term coalesce, there would doubtless be a merger, and naturally so; but that a term of twenty years should merge in a term of ten years originally limited to commence after the expiration of the first term, so that the owner of both, instead of having an estate for thirty years, should have only one for ten years, is alien to all principles of justice.

There is an exception to the general rule under the statute *de Donis*, for by this act a remainder in fee expectant upon an estate tail may exist in the tenant in tail without any merger of his estate tail taking place (o).

Tenant in tail
may have in
him, the remain-
der in fee with-
out merger.

Also it has been held that if a contingent interest be created between the particular estate and the remainder, these, though given to the same person, do not merge (p), as they would do if there were no such contingent limitation. Thus, where the limitations were to A. for life, and if he should die without leaving issue living at his death to A. and his heirs, it was held that A.'s life estate did not merge in the remainder to him in fee (q).

But if A. conveyed to another person his two estates: * there was [* 329] a merger, so as to cause the limitation in fee to take effect in possession, and this had, as its consequence, the exclusion for ever of the contingent estate (r). Of these cases of destruction of contingent remainders we shall presently see something more.

(i) Where there is a beneficial lease for years, followed by a life interest, the doctrine is one to be carefully borne in mind, as, if the life-tenant purchased the lease, the proper course, in order to preserve his chance of the term existing beyond his own life, would be to have the term assigned to a trustee.

(k) Co. Litt. 273 b.

(l) It seems to have been held, however unreasonable it appears, that if a lease be made to A. for the life of B., *sans* waste, remainder to A. for his own life, he is punishable for waste, since the former estate is merged, and the privilege annexed to it goes with it. *Windmore & Hulbort's Case*, Godb. 51, 52, where several cases of merger are put.

(m) See 3 Prest. Conv. 222, 258; 9 Rep. 138; *Wilson v. Piggott*, 2 Ves. S. 354; *Doe d. Simpson v. Simpson*, 5 Scott, 770, 790; *Digh-*

ton v. Greenoil, 2 Vent. 321 (successive estates by elegit); Collis, P. C. 64.

(n) *Hughes v. Robotham*, Cro. El. 302; *Stephens v. Bridges*, 6 Madd. 66; 4 Bac. Abr. 875; Gwill. ed. See, however, *Bowles' Case*, 11 Rep. 79, 83, 153; 1 Roll. 177; and Co. Litt. 299 b; *Hurd v. Foy*, 2 Roll. 485; 15 Vin. Abr. 315. An *interesse termini* being no estate cannot be the subject of merger, or prevent it. *Doe d. Rawlings v. Walker*, 5 B. & C. 111; *Whitchurch v. Whitchurch*, 2 P. W. 236; Dyer, 112.

(o) *Wiscot's Case*, 2 Rep. 60; *Lord Stafford's Case*, 8 Rep. 74.

(p) *Duncombe v. Duncombe*, 3 Lev. 437.

(q) *Ib.*

(r) *Fearne, Conting. Rem.* 322; *Noel v. Bewley*, 3 Sim. 103; *Egerton v. Massey*, 3 C. B. N. S. 338. It has been held that if a tenant

A further limitation to the general doctrine of merger, is, that the two estates do not unite by merger, unless they be held in the same right. Thus, if a lessee for years dies and makes the freehold reversioner his executor, so that the term vests in him, yet, it being held *en autre droit*, there is no merger. So, if tenant in fee marries the lessee for years, there is no merger, for he has the entrance in his own right, but the term in that of his wife (s); and if the wife survives her husband, and he have not alienated the land and the term, the term survives to her (t).

If one of the estates be a mere legal estate vested in the tenant as trustee, there will still be a merger at law, for courts of law take no notice of trusts, but of course equity will interfere to protect those who claim under the trusts from injury (u).

[* 330] * We must next notice a celebrated rule of construction of instruments which is intimately connected with the theory of remainders.

Rule in Shelley's case. It is usually called the Rule in Shelley's case, from the distinct enunciation which Lord Coke gives in his report of that case (x), although the rule itself is of ancient date (y). "It is a rule in law when the ancestor by any gift or conveyance takes an estate of freehold, and in the same gift or conveyance an estate is limited mediately or immediately to his heirs in fee or in tail, that always in such cases 'the heirs' are words of limitation of the estate, and not words of purchase." (304) In other words that, observing that the effect of adding to a gift to a man (which, taken alone, would give him a life estate), an immediate subsequent gift to his heirs, is to enlarge the life estate to a disposable fee simple; so the gift to his heirs in any subsequent part of the limitation of estates produces the same effect of giving him a remainder in fee simple; if the words used be 'heirs of his body,' of course the result is a fee tail (z).

Reverting now to contingent remainders, we come to a peculiarity which they possess, and which formerly was of far greater consequence than it is now. This, which we have already hinted at, is their liability to being defeated in certain cases. The cases in which this happens are now few, since the legislature has interfered to protect them from most of the dangers which

for life and remainderman in fee conditional (or for any estate less than an absolute fee-simple), convey their estates to a third person by the same assurance, there is no merger. *Bredon's Case*, 1 Rep. 76; *Lord Clarickard's Case*, Hob. 278; 3 Prest. Conv. 409.

(s) Co. Litt. 338; Plowd. 418; *Platt v. Sleep*, Cro. Jac. 275.

(t) If the husband had the term in right of his wife, and the inheritance descend upon her, it seems doubtful whether there would not be a merger. It has been held that if the husband, having the term in right of his wife, purchase the reversion, the term merges. *Anon.*, 4 Leon. 37; s. c. Godb. 1. This arises (as C. J. *Manwood* said) from the power of disposal over the term, which, in that case, the husband is deemed to have exercised for his own benefit. On the other hand, if the

husband has the term in his own right, and the inheritance descend upon his wife, there is no merger. *Platt v. Sleep*, Cro. Jac. 275.

(u) *Nurse v. Yerworth*, 3 Swanst. 608. No merger will be allowed to interfere with a restriction against alienation by a married woman. *Whittle v. Henning*, 2 Ph. 736.

(x) 1 Rep. 104 a.

(y) 18 Ed. 3, 577; see 7 M. & G. 944 n; 38 Ed. 3, 26 b; 40 Ed. 3, 9.

(z) Much intricate learning has arisen out of this rule, for which readers may consult *Fearne's Conting. Rem.* 76; *Hayes' Principles for Expounding Dispositions to Ancestors and Heirs in tail*; and 1 *Hayes' Introduction to Conveyancing*, 542; see, also, *Coupe v. Arnold*, 4 De G. M. & G. 574, for one of the most recent discussions on the application of the rule.

(304) This rule of the common law, which has been so generally recognized by the courts of this country, is now materially changed when not abrogated by statute. For a reference to many of these statutes, see 2 Washb. Real Prop. 275 (561), 4 Kent's Com. 214.

used to beset them. If the particular estate upon which a remainder depended determined before the contingency happened whereby it became vested, since at the only moment when it could become an estate in possession it was not ready to do so, some other vested estate fell into possession and could *not afterwards be defeated: or, if not some other estate limited [* 331] as a remainder, then the grantor's original estate reverted to him and could not again be taken out of him. Thus, where there was an estate for life limited to A. with remainder to the eldest son of B. for life (B. having no son at the date of the settlement), remainder to C. in fee, unless B.'s son was born when A.'s life estate determined, C. would take possession, and B.'s son never could come in. Not only, however, did such a disappointment occur, if B.'s son were not born at the date of the death of the tenant for life, or the determination of his estate by forfeiture, but if A. conveyed his estate for life to C., so that C. became seised of an estate in possession together with the first subsequent vested estate in remainder, there was in this case also a defeat of the contingent remainder. Because the effect of such a union of two estates in the same person is to merge the lesser estate in the greater, or C.'s estate *pur autre vie* became lost in the greater estate in fee, which being therefore vested in possession could not afterwards be affected by any contingency. It will be seen that these doctrines gave considerable power to the tenant for life, and those in remainder, by collusion to defeat the intention of the settlor.

To prevent these consequences, conveyancers (a) invented a means of securing contingent remainders from destruction, by limiting after the particular estate for life an estate to trustees for the natural life of the tenant for life upon trusts to preserve the contingent remainders. This being a vested remainder, always ready to come into possession when the particular estate should determine by forfeiture or otherwise than by death, prevented the possibility of the ultimate estates becoming united in *possession as long [* 332] as there was a possibility that the contingent estate might arise.

The usual form of family settlements became then much of this sort: to A. (the head of the family) for life, remainder to B. the eldest son of A. (usually a bachelor at the date of the settlement) for life, with remainder, after the determination of these estates by forfeiture or otherwise, to trustees during the life of B., upon trust to preserve contingent remainders with remainder to the eldest and other sons of B. successively in tail, with remainder to C., another son of A., for his life, and so on.

It will be seen that the principal danger in settlements of this class, from which conveyancers had to protect the contingent remainders, limited to the unborn sons, were those arising from the sudden determination by forfeiture, surrender, or merger, of the preceding freehold estates.

These then are the dangers from which the legislature has protected those who have not had the assistance of skilled conveyancers; they are obviously dangers which one venturing to make his own will, though unlearned in legal subtleties, would assuredly pass over *sicco pede*. By the act amending the law of real property (b), it is provided that contingent remainders shall be, and if created before the passing of the act, shall be deemed to be, capable of taking

(a) Sir Orlando Bridgman, Sir Geoffrey temp. Eliz.; 2 Roll. Abr. 797, pl. 12; 2 Chan. Palmer, and other counsel who lived during Rep. 170; *Heyns v. Villars*, 2 Sid. 159. the civil wars, have the credit of this invention. But see *Holcroft's Case*, Moor. 486, (b) 7 & 8 Vict. c. 106, s. 8.

effect, notwithstanding the determination by forfeiture, surrender, or merger of any preceding estate of freehold, in all respects as if such determination had not happened.

It is to be observed that this act, though in ordinary family settlements it has rendered the limitation to trustees to preserve contingent remainders unnecessary, yet has not obviated their necessity in all cases. To take the example above stated of a limitation to A. for life, with remainder to the eldest son of B. (a bachelor), or to A. for life, and remainder to such of his children as [* 333] should *attain the age of twenty-one (c). In these cases the contingent remainder might not take effect, even though the particular estate should determine in the natural mode by the death of A.

In such cases a limitation to trustees to preserve the contingent remainders is still necessary. But it is obvious that the liability to defeat in these cases depends upon the character of the limitations, and the simple rule of law that the freehold must vest in some one, and if it vests under a limitation subsequent to the contingent remainder, the estate so vested can never be divested in favour of a prior limitation: therefore, after the determination of the life estate, if there were no trustees, and no child had then attained twenty-one, (or in the first case if B. had no son,) there being no one to take the freehold except the subsequent remaindermen, their estate would vest indefeasibly.

We have said that under the Statutes of Uses (d) and Wills (e) limitations not falling within the definition of remainders, and which would be void if attempted to be created by simple grant, are within certain restrictions permitted. Those which depend upon the operation of the former statute will more properly be considered when we come to speak of the mode of alienation of real property by deed, inasmuch as the present system of conveyancing depends for much of its efficacy upon that statute. But the limitations which have been sanctioned in wills (which being often drawn up when the party is *inops consilii*, are always more favoured in construction than formal deeds, [* 334] which are presumed to be made with great *caution, forethought, and advice), are in some measure contrary to the rules which have been laid down. They have been called executory devises, or devises hereafter to be executed. In many cases there may be some little difficulty in determining whether a limitation is an executory devise or a contingent remainder: the distinction was nevertheless of the greatest importance formerly when contingent remainders were liable to destruction from so many more events than is now the case. It was then adopted as an inflexible rule that a limitation which could take effect as a contingent remainder should never be construed as an executory devise (f). This rule, were such questions now to arise, would still govern the decision of the courts.

An executory devise may then be defined as a limitation contained in a will,

(c) In *Hesting v. Allen*, 12 M. & W. 279; s. c. 5 Hare. 573; and in *Holmes v. Prescott*, 33 L. J. Ch. 264, a limitation such as that stated in the text was held contingent, V.-C. Wood, in the latter case, dissenting from *Browne v. Browne*, 3 Sm. & G. 568; and the limitation to trustees to preserve contingent remainders being only during the life of the tenant for

life, the contingent remainders were considered to fail, as to real estate.

(d) 27 Hen. 8, c. 10.

(e) 32 Hen. 8, c. 1.

(f) *Fearne*, Conting. Rem. 386, where a number of cases were cited. In *Reeve v. Long*, Salk. 228, 4 Mod. 282, as we before remarked, the rule was, on the hardship of the case, broken into. *Ante*, p. 324.

of a future estate or interest in lands which the law permits, although if it were contained in a conveyance at common law it would be void (g). (305) Thus, if a devise to A. and his heirs for ever, and if he die without issue in the lifetime of B., then to B. and his heirs (h); or a devise to A., a spinster, and her heirs, upon the day of her marriage, these devises will take effect according to their tenor. Yet it will be observed that in the former case there is a previous gift of a fee simple, and in the latter, no previous gift at all; in either case, therefore, such a limitation would be void in a common law conveyance.

The importance of this distinction between an *executory devise [* 335] and a contingent remainder arose from the fact that the former were indestructible, and when the event took place upon which they were to become vested estates, that result followed, whatever might have happened to the other estates which existed; with, however, this exception, that an executory devise, or conditional limitation made upon an estate tail, could always be barred by the recovery of the tenant in tail, and may now be barred by a disentailing deed duly executed and enrolled before the happening of the event on which the ulterior limitation was to arise, for in such a case the executory devise might be considered as a remainder upon the estate tail, only subject to the limitation imposed by the condition. Thus, if a devise be made to A., a spinster, and the heirs of her body by B. begotten, provided and upon condition that if she married any one but B. the land should go to C. and his heirs, A., by a disentailing deed executed before her marriage, could bar the executory devise, and her subsequent marriage with another would have no effect to defeat her estate in fee simple thus acquired (i).

The only restriction which is put upon the arbitrary caprice of testators in the choice of events upon which these executory devises are to take effect is that contained in the well-known rule against perpetuities (as it is usually called), a rule unknown to the common law, to which indeed executory devises were themselves unknown, and yet not imposed by statute, but established by the judges in accordance with the established policy of not permitting estates to be made incapable of answering the ends of social commerce, and providing for the purposes of private life as the interest of society requires. The limit, as finally determined by the highest authority, within which the contingency must happen upon which an executory devise is to take effect, is the period of a life or any number of lives in being and twenty-one years * afterwards, with a further period of gestation [* 336] in those cases where gestation exists (k). Or this last part of the rule might be perhaps better stated as follows: that for the purpose of giving a benefit, an infant shall be deemed to be in existence whilst in its mother's womb. Any number of lives in being, it may be observed, may be chosen, for

(g) An executory devise is thus defined by a distinguished writer:—"Every devise of a future interest which is not preceded by an estate of freehold created by the same will (whether consisting of one or more testamentary papers), or which, being so preceded, is limited to take effect before or after and not at the expiration of such prior estate of freehold, is an executory devise." 1 Jarm. Wills, 820, 3rd ed.
(h) *Pells v. Brown*, Cro. Jac. 590.
(i) *Page v. Hayward*, 2 Salk. 570.
(k) *Cadell v. Palmer*, 1 Cl. & Fin. 372. For a history of the rule, see Mr. Hargrave's argument in *Thellusson v. Woodford*, 4 Ves. 247, and *Lewis on Perpetuities*.

(305) See 4 Kent's Com. 264; and, for a collection of American cases, see the notes on pages 277, 278, 279 of the same work, 12th ed. See, also, 2 Washb. Real Prop. 337 (631).

"all the candles being lighted up at once are all burning at the same time" (*l*). The time at which the lives are to be in existence is the death of the testator (*m*).

In applying the rule to determine the question of the validity of any limitation, the courts do not inquire whether in the events that have happened, the executory limitation takes effect within the time allowed; but unless the limitation be such that it must take effect within that period, it is absolutely void *ab initio* (*n*). (306)

The rule regulating the validity of devises of freehold interests in land is equally applicable to bequests of chattel interests. Limitations of chattel interests stand upon a different footing to those of freeholds, for they do not involve the peculiarity which distinguishes those of freeholds; as there is no feudal rule rendering them liable, even if of the nature of contingent remainders, to destruction, therefore their validity never depends upon the character of the limitation, whether it be a contingent remainder, or substantive and independent executory gift (*o*); *but every reason which can be urged [* 337] for restraining a devise from operating over too prolonged a period, is equally applicable to the limitations of a term. A chattel interest may therefore be given over by way of executory bequest at any time before the expiration of twenty-one years following any number of lives in being (*p*).

Amid the various capricious devices which testators invent as to the destination of their property, it often happens that they neglect to dispose of the annual income of their property, during some interval preceding the time when a contingent executory gift takes effect; in such a case the rent and annual income become part of the residuary estate, or if that be undisposed of, go to those who would have been entitled if there had been no will; they do not, as, perhaps not unnaturally, it has been contended, go to the person entitled under the contingent gift (*q*).

In this place, as closely connected with the rule prohibiting what the law calls perpetuities, we may mention another restriction upon the disposition of property which the legislature has imposed. (307) The rule against perpetuities put, as we see, a limit upon the postponement of the vesting of property, but it did no more; it put no

Restriction upon accumulation of income.

(*l*) *Per* Lord Talbot, 3 P. W. 264.

(*m*) Or, where the question concerns "limitations" in a deed operating under the Statute of Uses, as to which the same rule applies, the period is the date of the deed. *Monypenny v. Dering*, 2 De G. M. & G. 145; *Dungannon v. Smith*, 12 Cl. & Fin. 546; and numerous other cases. A child will not be considered to be in existence whilst in its mother's womb, for the purpose of constituting one of the lives in being, or for any purpose except to give it a benefit. *Blasson v. Blasson*, 2 De G. J. & S. 663; see as to infants *en ventre*, *Nurse v. Yerworth*, 3 Swanst. 608.

(*n*) *Leake v. Robinson*, 2 Mer. 368. See *Re Sayer's Trusts*, L. R. 6 Eq. 319.

(*o*) See *Holmes v. Prescott*, 33 L. J. Ch. 264, where a gift of leaseholds was supported, though given by reference to a preceding gift of freeholds, which failed for want of a particular estate to support the contingent remainder.

(*p*) 1 Vern. 234; 2 *ib.* 151; 2 P. W. 421; 3 Atk. 282; 19 Ves. 547.

(*q*) *Hopkins v. Hopkins*, Ca. T. Talb. 44; s. c. 1 Atk. 581; *Duffield v. Duffield*, 1 Dow. & Cl. 268; *Wills v. Wills*, 1 Dru. & War. 439; *Hodgson v. Earl Bective*, 1 Hem. & M. 376 (which case was affirmed in D. P.); see also *Holmes v. Prescott*, 33 L. J. Ch. 264.

(306) For cases illustrative of the text, see *Hawley v. James*, 16 Wend. 61, 121; *Scott v. Monell*, 1 Bradf. Surr. Rep. 431; *Hannan v. Osborn*, 4 Paige, 336; *Sears v. Putnam*, 102 Mass. 5, 7.

(307) For a collection of references to constitutional and statutory provisions relating to this subject, see 2 Washb. Real Prop. 383-385 (680-684).

further restraint upon the suspension of the enjoyment of the property than upon the vesting, therefore it was competent to a testator to create a trust for the accumulation of the income of the property for the full period of any number of lives in being and twenty-one years afterwards. Such a trust might be scarcely anticipated ever to be created, inasmuch as it would in all probability involve a great hardship to *those individuals who naturally expect [* 338] to share a testator's or settlor's bounty. Political reasons have, moreover, been suggested against permitting such accumulations, for a great concentration of wealth in particular persons might prove an inconvenience to the state. Upon these grounds, when an attempt of this kind had been made, and a certain testator (*r*) made a will directing the accumulation of the income of his property during the lives of all his descendants who should be living at his death (who proved to be numerous), for the purpose of enriching some remote descendant, who was to become entitled at the extreme period allowed by the then law, the attention of the legislature being called to the fact, an act was passed (*s*) prohibiting for the future (*t*) any direction, either by a deed or will, for accumulation of annual income of either real or personal property for a longer period than the life of the settlor, or the term of twenty-one years from the death of the settlor. Exceptions are, however, made in favour of a direction for accumulation when they have for their object the payment of debts of the settlor, or the provision of portions for his children, and also in favour of directions touching the produce of timber or wood upon any lands or tenements.

Having set forth the nature of remainders at almost greater length than the comparative simplicity which the law has gradually assumed seems to render requisite, it remains for us to notice another species of estate, which is created by the act and operation of the law itself, and this is called a reversion.

An estate in reversion is the residue of an estate left in the grantor, to commence in possession after the *determination of some particular [* 339] estate granted by him (*u*). Sir Edward Coke (*v*) describes a reversion to be the returning of land to the grantor or his heirs after the grant is over. As, if there be a gift in tail, the reversion of the fee is, without any special reservation, vested in the donor by act of law: and so also the reversion, after an estate for life, years, or at will, continues in the lessor. For the fee-simple of all lands must abide somewhere; and if he, who was before possessed of the whole, carves out of it any smaller estate, and grants it away, whatever is not so granted remains in him. A reversion is never therefore created by deed or writing, but arises from construction of law; a remainder can never be limited, unless by either deed or devise. But they are equally transferable, when actually vested, being both estates *in præsenti*, though taking effect *in futuro*.

The doctrine of reversions is plainly derived from the feudal constitution.

(*r*) Mr. Peter Thellusson, who died in the year 1797; see *Thellusson v. Woodford*, 4 Ves. 227; and Hargrave's treatise on the Thellusson act.

(*s*) 39 & 40 Geo. 3, c. 98, usually called the Thellusson act, an act as remarkable for the

inaccuracy and obscurity of its language as for the circumstances which gave rise to it.

(*t*) *I. e.* after the 28th July, 1800.

(*u*) Co. Litt. 22.

(*v*) 1 Inst. 142.

He that holds lands or tenements in severalty, or is sole tenant thereof, is he that holds them in his own right only, without any other person being joined or connected with him in point of interest, during his estate therein. This is the most common and usual way of holding an estate; and therefore we may make the same observations here, that we did upon estates in possession, as distinguished from those in expectancy, in the preceding chapter: that there is little or nothing peculiar to be remarked concerning it, since all estates are supposed to be of this sort, unless where they are expressly declared to be otherwise; and that in laying down general rules and doctrines, we usually apply them to such estates as are held in severalty. We shall therefore proceed to consider the other three species of estates, in which there are always a plurality of tenants.

[* 344] An estate in joint-tenancy is where lands or * tenements are granted to two or more persons, to hold fee simple, fee tail, for life, for years, or at will. In consequence of such grants an estate is called an estate in joint-tenancy (a), and sometimes an estate in jointure, which word, as well as the other, signifies an union or conjunction of interest; though in common speech the term jointure is now usually confined to that joint estate, which, by virtue of the statute 27 Hen. 8, c. 10, is frequently vested in the husband and wife before marriage, as a full satisfaction and bar of the woman's dower (b).

In unfolding this title, and the two remaining ones in the present chapter, we will first inquire how these estates may be created; next as to their properties and respective incidents; and lastly, how they may be severed or destroyed.

The creation of an estate in joint-tenancy, depends on the wording of the deed or devise, by which the tenants claim title: for this estate can only arise by purchase or grant, that is, by the act of the parties, and never by the mere act of law. Now, if property, the nature of which is not incompatible with joint ownership (c), be given to a plurality of persons, without adding any restrictive, exclusive, or explanatory words, as if an estate be granted to A. and B. and their heirs, this makes them immediately joint-tenants in fee of the lands. For the law interprets the grant so as to make all parts of it take * effect, which can only be done by creating an equal estate in them both. As therefore the grantor has thus united their names, the law gives them a thorough union in all other respects.

The properties of a joint estate are derived from its unity, which is fourfold; the unity of interest, the unity of title, the unity of time, and the unity of possession; or, in other words, joint-tenants have one and the same interest, accruing by one and the same conveyance, commencing at one and the same time, and held by one and the same undivided possession.

(a) Litt. s. 277.

(b) *Ante*, p. 263.

(c) If the nature of the thing granted, or the character of the grantees, is repugnant to a joint-tenancy, the grantees will take in common. "If a corody be granted to two men and their heirs, in this case, because the corody is uncertain, and cannot be severed, it shall amount to a several grant to each of them of one corody; for the persons be several, and the corody is personal." Co. Litt.

190 a. So, if lands be given to two bishops and their successors, they take in common, "because they are seised in several rights, for the one bishop is seised in the right of his bishopric of the one moiety, and the other in right of his bishopric of the other moiety, and so by several titles, and in several capacities; whereas joint-tenants ought to have it in one and the same right and capacity, and by one and the same joint title." *Id.*

First, they must have one and the same interest. One joint-tenant cannot be entitled to one period of duration or quantity of interest in lands, and the other to a different; one cannot be tenant for life, and the other for years; one cannot be tenant in fee, and the other in tail (*d*). But if land be limited to A. and B. for their lives, this makes them joint-tenants of the freehold; if to A. and B. and their heirs, it makes them joint-tenants of the inheritance (*e*). If land be granted to A. and B. for their lives, and to the heirs of A.; here A. and B. are joint-tenants of the freehold during their respective lives, and A. has the remainder of the fee in severalty (*f*): or if land be given to A. and B. and the heirs of the body of A.; here * they have a joint estate, A. having in addition a several remainder [* 346] in tail (*g*). If the gift be to A. and B. and the heirs of their bodies, then since (if A. and B. be men) they cannot have both the same heirs of their bodies, the inheritances in tail are severed, but they have a joint estate for their lives (*h*). If A. and B. were one a man and the other a woman, then the gift would be in special tail, since they may marry and have heirs according to the gift; they take each a moiety of the land during their joint lifetime, and the survivor the whole in special tail. Secondly, joint-tenants must also have an unity of title: their estate must be created by one and the same act, whether legal or illegal; as by one and the same grant, or by one and the same disseisin (*i*). Joint-tenancy cannot arise by descent or act of law; but merely by purchase, or acquisition by the act of the party: and, unless that act be one and the same, the two tenants would have different titles; and if they had different titles, one might prove good and the other bad, which would absolutely destroy the jointure. Thirdly, there must also be an unity of time; their estates must be vested at one and the same period, as well as by one and the same title. As in case of a present estate made to A. and B.; or a remainder in fee to A. and B. after a particular estate; in either case, A. and B. are joint-tenants of this present estate, or this vested remainder. But if, after a lease for life, the remainder be limited to the heirs of A. and B.; and during the continuance of the particular estate A. dies, which vests the remainder of one moiety in his heir: and then B. dies, whereby the other moiety becomes vested in the heir of B.: now A.'s heir and B.'s heir are not joint-tenants of this remainder, but * tenants in common; for one moiety vested at one time, and the other moiety vested at another (*k*). Under the Statute of Uses, however, a joint-tenancy may be created though the estates vest at different times. [* 347]

(*d*) Co. Litt. 188.

(*e*) Litt. s. 277. Lord Coke says, that if a rent-charge of 10*l*. be granted to A. and B. to have and to hold to them two, viz. to A. till he be married, and to B. till he be advanced to a benefice, they are joint-tenants in the meantime, notwithstanding the limitations; and if A. die before marriage, the rent shall survive to B., but if A. had married, the rent should have ceased for a moiety, *et sic e converso*, on the other side. Co. Litt. 180 b; 2 Cruise, Digest, 498.

(*f*) The passage in Littleton is, "If lands be given to two, and to the heirs of one of them, this is a good jointure, and the one hath a freehold and the other a fee-simple."

And in his commentary Coke says, that he who has the fee cannot grant it away as a remainder, distinct from his life estate; therefore the effect seems to be as stated in the text, except that A.'s interest is looked upon as all one estate. See *Wiscot's Case*, 2 Rep. 60.

(*g*) Litt. s. 285.

(*h*) In *Wilkinson v. Spearman*, 2 P. W. 530, in which the testator devised land to his two daughters, and the heirs of their two bodies, it was thought to be a hardship that the survivor should turn out the issue of her sister during the period of her survivorship, nevertheless it was held to be law.

(*i*) *Ib.* s. 278.

(*k*) Co. Litt. 188.

Thus, where a feoffment is made to the use of a man, and such wife as he shall afterwards marry, for term of their lives, and he afterwards marries; in this case the husband and wife has a joint-estate, though vested at different times (l): because the use of the wife's estate is in abeyance and dormant till the intermarriage; and, being then awakened, has relation back, and takes effect from the original time of creation. Similar results were arrived at under the Statute of Wills, and occur now daily (m).

Lastly, in joint-tenancy there must be an unity of possession. Joint-tenants are said to be seised *per my et per tout*, which expression indicates, in accordance with the fact, that for some purposes the possession is only of a part (*my*, *moitié*, or moiety, denoting a part, usually a half (n)), and for other purposes the possession is of the whole (o). The seisin of each of them is of the whole, one is not seised of one part and the other of the other part, neither can one be exclusively seised of one acre, and his companion of another; but each has an undivided moiety of the whole, and not the whole of an undivided moiety (p).

[* 348] *And therefore, if an estate in fee be given to a man and his wife by such an assurance as would create a joint-estate in two persons not man and wife, they are neither properly joint-tenants, nor tenants in common: for husband and wife being considered as one person in law, they cannot take the estate by moieties, but both are seised of the entirety, *per tout et non per my*: the consequence of which is, that neither the husband nor the wife can dispose of any part without the assent of the other, but the whole must remain to the survivor (q). (308) "Also if a joint estate be made of land to a husband and wife, and to a third person, in this case the husband and wife have in law, in their right, but the moiety, and the third person shall have as much as the husband and wife, viz. the other moiety" (r). The application of this rule laid down by Littleton, is sometimes not unattended with difficulty, arising from the varied forms in which a gift to several persons may be made (s).

Upon these principles, of a thorough and intimate union of interest and

(l) *Ib.*; *Blamford v. Blamford*, 3 Bulstr. 101; *Sussex v. Temple*, 1 Lord Raym. 310; *Mutton's Case*, Dyer, 274; 1 Rep. 101.

(m) Where lands were devised to a woman and her children, begotten or to be begotten by W. A., and their heirs forever, it was held that she and all her children took as joint-tenants, and it was no objection that by this means the several estates might commence at different times. *Oates v. Jackson*, 2 Stra. 1172; 2 Cruise, 508. See also *Stratton v. Best*, 2 B. C. C. 233; Sugd. Gilb. Uses, 134; Fearn, C. R. 312, 9th ed.

(n) The word moiety has been used to denote one of any number of equal parts.

See Shakespeare, *Henry IV.*, part i, act 3, sc. 1, "Methinks my moiety, north from Burton here, in quantity equals not one of yours."

(o) Co. Litt. 186 a; *Henstead's Case*, 5 Rep. 10.

(p) *Quilibet totum tenet et nihil tenet; scilicet, totum in communi, et nihil separatim per se*. Bract. l. 5, tr. 5, c. 26.

(q) Litt. s. 665; Co. Litt. 187; Bro. Abr. t. *Cus in vita*, 8; *Back v. Andrews*, 2 Vern. 120; 2 Lev. 39.

(r) Litt. s. 291; *Doe v. Wilson*, 4 B. & A. 303.

(s) *Warrington v. Warrington*, 2 Haro, 54. See *Doe v. Parratt*, 5 T. R. 652.

(308) This rule has been recognized by the courts of several of the States. *Harding v. Springer*, 14 Me. 407; *Brownson v. Hull*, 16 Vt. 309; *Shaw v. Hearsey*, 5 Mass. 520; *Wright v. Saddler*, 20 N. Y. (6 Smith) 320, 334; *Torrey v. Torrey*, 14 N. Y. (4 Kern.) 430; *Den d. Hardenburgh v. Hardenburgh*, 5 Halst. (N. J.) 42; *Fuirchild v. Chastelleux*, 1 Penn. St. 176; *Den v. Branson*, 5 Ired. 426; *Den v. Whittemore*, 3 Dev. & Bat. 537; *Rogers v. Grider*, 1 Dana, 242; *Babbet v. Scroggin*, 1 Duvall, 272; *Taul v. Campbell*, 7 Yerg. 819, 838; *Ames v. Norman*, 4 Sneed, 683; *Ketchum v. Walsworth*, 5 Wis. 95; *Gibson v. Zimmerman*, 12 Mo. 385.

A different rule prevails in Connecticut. *Whittlesey v. Fuller*, 11 Conn. 337, 341

possession, depend many other consequences and incidents to the joint-tenant's estate. If two joint-tenants make a verbal lease of their land, reserving rent to be paid to one of them, it shall enure to both, in respect of the joint reversion (*t*). If their lessee surrenders his lease to one of them, it shall also enure to both, because of the privity, or relation of their estate (*u*). For the same reason, formerly, livery of seisin, made to one joint-tenant, enured to both of them (*x*): and the entry, or re-entry, of one joint-tenant was as effectual in law as if it were the act of both (*y*). (309) But this has been modified by statute, for now "when one or more of several persons * entitled to any land or rent as coparceners, joint-tenants, or tenants [* 349] in common, shall have been in possession or receipt of the entirety, or more than his or their undivided share or shares of such land, or of the profits thereof, or of such rent for his or their own benefit," such possession or receipt shall not be deemed to be the possession of the true owner of the other share of the same land or rent (*z*). In all actions also relating to their joint estate, one joint-tenant cannot sue or be sued without joining the other (*a*). But if two or more joint-tenants be seised of an advowson, and they present different clerks, the bishop may refuse to admit either: because neither joint-tenant hath a several right of patronage, but each is seised of the whole; and if they do not both agree within six months, the right of presentation shall lapse. But the ordinary may, if he pleases, admit a clerk presented by either, for the good of the church, that divine service may be regularly performed; which is no more than he otherwise would be entitled to do, in case their disagreement continued so as to incur a lapse: and, if the clerk of one joint-tenant be so admitted, this shall keep up the title in both of them: in respect of the privity and union of their estate (*b*). Upon the same ground it is held, that one joint-tenant cannot have an action against another for trespass, in respect of his land (*c*); for each has an equal right to enter on any part of it. But one joint-tenant is not capable by himself to do any act, which may tend to defeat or injure the estate of the other, unless it be such an act as severs the joint-tenancy: thus he may not grant copyholds (*d*): and if any waste be done, which tends to the destruction of the inheritance, one joint-tenant might have an action of waste against the other, by construction of the statute Westm. 2, * c. 22 (*e*). (310) A joint-tenant may make a [* 350] valid lease of his share, a dealing of this kind being a severance *pro*

(*t*) Co. Litt. 214.

(*u*) *Ib.* 193.

(*x*) *Ib.* 49.

(*y*) *Ib.* 319, 364.

(*z*) 3 & 4 Will. 4, c. 27, s. 13.

(*a*) Co. Litt. 195. But if four joint-tenants jointly demise from year to year, such of

them as give notice to quit may recover their several shares in ejectment. *Doe d. Whayman v. Chaplin*, 3 Taunt. 120.

(*b*) *Ib.* 186.

(*c*) 3 Leon. 262.

(*d*) 1 Leon. 234.

(*e*) 2 Inst. 403.

(309) So if an adverse title to the joint estate, or if an older legal title to it, is purchased by one of the joint-tenants, the benefit of such purchase will enure to his co-tenants, provided they contribute ratably toward paying the expenses of the purchase. *Brown v. Hogle*, 30 Ill. 119; *Brittin v. Handy*, 20 Ark. 381; *Gossam v. Donaldson* 18 B. Monr. 230; *Picob v. Paige*, 26 Mo. 398; *Page v. Webster*, 8 Mich. 263; *Lloyd v. Lynch*, 28 Penn. St. 419; *Van Horns v. Fonda*, 5 Johns. Ch. 407; *Vanable v. Beauchamp*, 3 Dana, 321; *Rothwell v. Davies*, 2 Black. 613.

(310) It may be stated as a general rule, that those of the States of the Union which recognize estates in joint-tenancy will also recognize and enforce an appropriate action in

tanto (*f*). Though, it seems, that if a rent be reserved on the lease, it ceases with the life of the grantor (*g*). So too, though at common law no action of account lay for one joint-tenant against another, unless he had constituted him his bailiff or receiver (*h*), yet now by the statute 4 Ann. c. 16, joint-tenants may have actions of account against each other, for receiving more than their due share of the profits of the tenements held in joint-tenancy. (311) Though this action is rarely resorted to now, the usual remedy being by suit in equity for an account and partition (*i*).

From the same principle also arises the remaining incident of joint estates. the most important of all, viz., the doctrine of survivorship: by which, when two or more persons are seised of a joint estate of inheritance,

Survivorship. for their own lives, or *pur autre vie*, or are jointly possessed of any chattel-interest, the entire tenancy upon the decease of any of them remains to the survivors, and at length to the last survivor; and he shall be entitled to the whole estate, whatever it be, whether an inheritance, or a common freehold only, or even a less estate (*k*). This is the natural and regular consequence of the union and entirety of their interest. The interest of two joint-tenants is not only equal or similar, but also is one and the same. One has not originally a distinct moiety from the other; but, if by any subsequent act (as by alienation or forfeiture of either) the interest becomes separate and distinct, the joint-tenancy instantly ceases. But while it continues, each of two

(*f*) Co. Litt. 185 a; 2 Roll. Ab. 89; Cro. Jac. 53.

(*h*) Co. Litt. 200.

(*g*) Co. Litt. 185 a; Dyer, 187. A lease by a joint-tenant for years is a complete severance of the joint-tenancy. Co. Litt. 192 a.

(*i*) Com. Dig. *Chanc.* 3 V. 6, & 4 E.; Mitford's Pleading, 109. See *Macmahon v. Burdell*, 2 Ph. 127, as to the present law.

(*k*) Litt. s. 290, 282.

case one joint-tenant wrongfully injures the common property. See 4 Kent's Com. 359. note c; 1 Washb. Real Prop. 411 (557); id. 433 (591), note.

Such co-tenant is not liable as a wrong-doer for merely exercising the usual acts of ownership over the property.

But, if he wrongfully injures, destroys or converts the property to his own use, he will be liable to an action at the suit of his co-tenant. *Chesley v. Thompson*, 8 N. H. 9; *Odiorno v. Lyford*, id. 502; *Pillsbury v. Moore*, 44 Me. 154; *Hutchinson v. Chase*, 39 id. 508.

So, if he wrongfully excludes his co-tenant from any use of the common property, or sells it as his exclusive property. *Newton v. Newton*, 17 Pick. 201; *Tinney v. Stebbins*, 28 Barb. 290; *Dyckman v. Valiente*, 42 N. Y. (3 Hand) 549, 561.

(311) In several of the States joint-tenants and tenants in common may maintain an action against their co-tenants if they have received more than a due share of the rents and profits of the common estate. *Shepard v. Richards*, 2 Gray, 424, 426; *Gowen v. Shaw*, 40 Me. 56; *Moses v. Ross*, 41 id. 360; *Blanton v. Vansant*, 2 Swan. (Tenn.) 276; *Shiels v. Stark*, 14 Ga. 429; *Huff v. McDonald*, 22 id. 131; *Isard v. Bodine*, 11 N. J. Ch. (3 Stockt.) 408.

But to charge a co-tenant for such rents, he must either have been made the bailiff of the other tenant, which would render him liable at common law, or he must have received more than his share of the rents and profits of the common property, in which case he would be liable under the statute cited in the text, 4 Anne, ch. 16. Id.

The tenant who merely occupies the common property does nothing more than he has a right to do on his own account; and to render him liable to a co-tenant for rent, or for use and occupation, there must be something more than an occupancy by him and a forbearance to occupy by his co-tenant. *Woolever v. Knapp*, 18 Barb. 265; *Dresser v. Dresser*, 40 id. 300; *Wilcox v. Wilcox*, 48 id. 327; *Crane v. Waggoner*, 27 Ind. 52; *Sargent v. Parsons*, 12 Mass. 149; *Keisel v. Earnest*, 21 Penn. St. 90; *Shiels v. Stark*, 14 Ga. 429; *Lyles v. Lyles*, 1 Hill's Ch. (S. C.) 85.

joint-tenants has a concurrent interest in the *whole; and therefore, on [* 351] the death of his companion, the sole interest in the whole remains to the survivor. For the interest which the survivor originally had is clearly not divested by the death of his companion; and no other person can now claim to have a joint estate with him, for no one can now have an interest in the whole, accruing by the same title, and taking effect at the same time with his own; neither can any one claim a separate interest in any part of the tenements; for that would be to deprive the survivor of the right which he has in all, and every part. As therefore the survivor's original interest in the whole still remains; and as no one can now be admitted, either jointly or severally, to any share with him therein; it follows, that his own interest must now be entire and several, and that he shall alone be entitled to the whole estate (whatever it be) that was created by the original grant, and that free from any claim of dower or of curtesy on account of the interest that was in the deceased joint-tenant (l).

The right of survivorship is called by our ancient authors (m) the *jus accrescendi*, because the right upon the death of one joint-tenant accumulates and increases to the survivors: or, as they themselves express it, "*pars illa communis accrescit superstitibus, de persona in personam, usque ad ultimam superstitem.*" The right of survivorship, since it operates sometimes with considerable hardship upon the representatives of him who dies first, is not looked upon with great favour, although it is too well established to be disregarded in any but exceptional cases. But where it has been found practicable this has been done. (312) Thus courts of equity have held that if two persons lend money jointly upon a mortgage, although the land be conveyed to them as joint-tenants and the contract be with them jointly, yet the representatives of him who dies first are entitled to the money *equally with the [* 352] survivor. Again, if land be purchased by several persons who pay for it in unequal shares, in equity they will be held not to be joint-tenants, whatever the form of the conveyance. This is not the case, however, when the price is paid in equal shares, it being then considered that they all take an equal chance, which could not be in the former case.

We are, lastly, to inquire how an estate in joint-tenancy may be severed and destroyed. And this may be done by destroying its constituent unities. That of time, indeed, which respects only the original commencement of the joint estate, cannot (being now past) be affected by any subsequent transactions. But the joint-tenants' estate may be destroyed, without any alienation, by merely disuniting their possession. For joint-tenants being seised *per my et per tout*, everything that tends to narrow that interest, so that they shall not be seised throughout the whole and throughout every part, is a severance or destruction of the jointure.

Joint-tenancy,
how severed or
destroyed.

Partition.

(l) Co. Litt. 80 a; 188 a.

(m) Bracton, l. 4, tr. 8, c. 9, s. 3; Fleta, l. 8, c. 4.

(312) The nature of American institutions and the general policy of our law is opposed to the principles of survivorship; and in many of the States statutes have been enacted which either abolished the rule, or changed joint-tenancies into tenancies in common, except in the case of conveyances in trust, or by way of mortgage, or to husband and wife. A reference to many of the statutes of the several States will be found in 1 Washb. Real Prop. 408 to 410, note. See, also, 4 Kent's Com. 862.

companion, now he has an estate in a moiety only for his own life; and, on the death of either, the reversioner shall enter on his moiety (*h*). And therefore, if there were two joint-tenants for life, and one granted away his part for the life of his companion, it used to be a forfeiture (*i*): for, in the first place, by the severance of the jointure he had given himself in his own moiety only an estate for his own life; and then the grant was of the same land for the life of another, which grant by a tenant for his own life merely, * was a forfeiture of his estate (*k*). The tortious effects of such grants by a tenant for life being now abolished, the result would be a life estate in the grantee, determinable on the death of the grantor.

An estate held in *coparcenary* is where lands of inheritance descend from the ancestor to two or more persons. It arises either by common law or particular custom. By common law: as where a person seised in fee-simple or in fee-tail dies, and his next heirs are two or more females, his daughters, sisters, aunts, cousins, or their representatives; in this case they shall all inherit, as will be more fully shown, when we treat of descents hereafter; and these co-heirs are then called coparceners; or, for brevity, parceners only (*l*). Parceners by particular custom are where lands descend, as in gavelkind, to all the males in equal degree, as sons, brothers, uncles, &c. (*m*). And, in either of these cases all the parceners put together make but one heir; and have but one estate among them (*n*).

The properties of parceners are in some respects like those of joint-tenants; they having the same unities of interest, title, and possession. They may sue and be sued jointly for matters relating to their own lands (*o*); and the entry of one of them in some cases enured as the entry of them all (*p*), though, as we have seen, the possession of one is not now that of all (*q*). They cannot have an action of trespass against each other: but herein they differ from joint-tenants, that they are also excluded from maintaining an action of waste (*r*): for coparceners could at all times put a stop to any waste by writ of partition, but till the statute of Henry VIII. joint-tenants had no such power. Parceners also differ materially from joint-tenants in four other points: 1. They always claim by descent, whereas joint-tenants always claim by purchase. Therefore, if two sisters purchase lands, to hold to them and their heirs, they are not parceners but joint-tenants (*s*): and hence it likewise follows, that no lands can be held in coparcenary, but estates of inheritance, which are of a descendible nature; whereas not only estates in fee and in tail, but for life or years, may be held in joint-

(*h*) 1 Jones, 55.

(*i*) 4 Leon. 286.

(*k*) Co. Litt. 252.

(*l*) Litt. s. 241, 242.

(*m*) *Ib.* s. 265.

(*n*) Therefore coparceners are entitled to be admitted to copyhold tenements as one heir, and upon payment of one set of fees. *R. v. Bonsall*, 8 B. & C. 173; Co. Litt. 163. A very subtle distinction is taken between coparcenary at common law, and a customary partible descent. "Well, said Littleton, 'by the custom,' for sons are parceners in respect of the custom of the fee of inheritance, and not in respect of their persons, as daughters

and sisters, &c., be. '*Et sunt participes quas partem capientes, &c., ratione ipsius rei quas partibilis est, et non ratione personarum quas non sunt quasi unus hæres et unum corpus, sed diversi hæredes, ubi tenementum partibile est inter plures cohæredes petentes qui descendunt de eodem stipite et semper solent dividi ab antiquo.*' Brac. lib. 5, fol. 428." Co. Litt. 176 a.

(*o*) Co. Litt. 164. *Decharmes v. Horwood*, 10 Bing. 526.

(*p*) Co. Litt. 188, 243.

(*q*) 8 & 4 Will. 4, c. 27, s. 12, *ante*, p. 348.

(*r*) 2 Inst. 403.

(*s*) Litt. s. 254.

tenancy. 2. There is no unity of time necessary to an estate in coparcenary.

For if a man has two daughters, to whom his estate descends in coparcenary, and one dies before the other; the surviving daughter and the heir of the other, or, when both are dead, their two heirs, are still parceners (*t*); the estates vesting in each of them at different times, though it be the same quantity of interest, and held by the same title. 3. Parceners, though they have an unity, have not an entirety of interest (*u*). They are properly entitled each to the whole of a distinct moiety (*v*); and of course there is no *jus accrescendi*, or survivorship between them: for each part descends severally to their respective heirs, though the unity of possession continues. And as long as the lands continue in a course of descent, and united in possession, so long are the tenants therein, whether male or female, called parceners. But if the possession * be once severed by partition, they [* 358] are no longer parceners, but tenants in severalty; or if one parcener alienes her share, though no partition be made, then are the lands no longer held in coparcenary, but in common (*x*).

Parceners may convey to each other either by feoffment or grant or release, because their seisin is to some extent joint and to some several (*y*). On the other hand, the only mode of conveyance from one joint tenant to another is by release, each being seized of the whole (*z*). Again, a tenant in common may enfeoff his co-tenant, or make a grant to him, but a release is ineffectual to pass the freehold, which in this case is several (*a*). Partitions are now always made by mutual conveyances, even when made under a decree of the court. Formerly parceners of a copyhold could not make partition without the consent of the lord, but this is not now requisite (*b*).

Parceners derive their name (according to Littleton (*c*)) from the fact they could always be constrained to make partition. And he mentions many methods of making it (*d*): four of which are by consent, and one by compulsion. The first is, where they agree to divide the lands into equal parts in severalty, and that each shall have such a determinate part (*e*). The second is, when they agree to choose some friend to make partition for them, and then the sisters shall choose each of them her part according to seniority of age; or otherwise, as shall be agreed. The privilege of seniority is in this case personal; for if the eldest sister be dead, her issue shall not choose * first, but the next sister. But, if an advowson descend in copar- [* 359] cenary, and the sisters cannot agree in the presentation, the eldest and her issue, nay her husband, or her assigns, shall present alone, before the younger (*f*). And the reason given is, that the former privilege of priority in choice upon a division, arises from an act of her own, the agreement to

(*t*) Co. Litt. 164, 174.

(*u*) *Doe d. Read v. Taylor*, 5 B. & Ad. 575.

(*v*) Co. Litt. 163, 164.

(*z*) Litt. s. 309.

(*y*) Co. Litt. 163 b; 200 b.

(*s*) *Ib.*

(*a*) *Ib.*

(*b*) P. 41 Eliz. B. R. Fuller Hal. MSS.; *Horn-castle v. Charlesworth*, 11 Sim. 315; 4 & 5 Vict. c. 85, s. 85.

(*c*) Sect. 241.

(*d*) Sects. 243-264.

(*e*) Before the Statute of Frauds, coparceners might have partitioned their inheritance

by parol, even where it was held in reversion. Litt. s. 250; Co. Litt. 169 a. And a rent-charge might have been granted to one parcener out of the allotment of the other, by parol. Litt. s. 252. But that act made a writing necessary, and now a deed is so. *Post*, c. 21.

(*f*) Co. Litt. 166; 8 Rep. 23. It has been doubted whether the grantee of the eldest sister shall have the first and sole presentation after death. *Harg. Co. Litt.* 266. But it was expressly determined in favour of such a grantee in 1 Ves. sen. 340. See Burn's Ecclesiastical Law, vol. i. 15; *Richards v. Earl Macclesfield*, 7 Sim. 257.

make partition; and therefore is merely personal: the latter, of presenting to the living, arises from the act of the law, and is annexed not only to her person, but to her estate also. A third method of partition is, where the eldest divides, and then she shall choose last; for the rule of law is, *cujus est divisio, alterius est electio*. The fourth method is where the sisters agree to cast lots for their shares. The method by compulsion was, where one or more sued out a writ of partition against the others; whereupon the sheriff went to the lands, and made partition thereof by the verdict of a jury there impaneled, and assigned to each of the parceners her part in severalty. The writ is now abolished, and the only method applicable for compulsory partition of lands held in parcenary is the same as in that above described for the case of joint-tenancy.

But there are some things which are in their nature not easily susceptible of partition; the court would now in these cases, probably, order a sale. Formerly, it either proceeded (as we have shown) in a somewhat whimsical manner to compel the parties to agree to a sale, or it gave the eldest sister, if she pleased, the right of user, she making to the others a reasonable satisfaction in other parts of the inheritance; or if that could not be, then the sisters were allowed to have the profits of the thing by turns, in the same manner as they [*360] took an *advowson (*g*). These methods were frequently adopted where the subject-matter was a mansion-house or common of estovers or of piscary uncertain, or any other common, without stint. After a partition the former parcener holds his shares in severalty, but continues to be entitled by descent (*h*). The importance of this will be seen when the law of descent comes to be considered. If, however, the partition be effected by a conveyance to the use of a third person, and then a reconveyance by him to the parceners of their several shares, the effect will be different, and this is the usual and proper mode of effecting a partition by coparceners.

There is yet another consideration attending the estate in coparcenary: that if one of the daughters has had an estate given with her in frankmarriage by her ancestor, (which we may remember was a species of estates-tail, freely given by a relation for advancement of his kinswoman by marriage (*i*)), in this case, if lands descend from the same ancestor to her and her sisters in fee-simple, she or her heirs shall have no share of them, unless they will agree to divide the lands so given in frankmarriage in equal proportion with the rest of the lands descending (*k*). This mode of division was known in the law of the Lombards (*l*); which directs the woman so preferred in marriage, and claiming her share of the inheritance, *mittere in confusum cum sororibus, quantum pater aut frater ei dederit, quando ambulaverit ad maritum*. With us it is denominated bringing those lands into hotch-pot (*m*): which term I shall explain in the very words of Littleton (*n*): "it seemeth that this word *hotch-pot*, is in English a pudding; for in a pudding is [*361] not *commonly put one thing alone, but one thing with other things together." By this housewifely metaphor our ancestors meant to inform us (*o*), that the lands, both those given in frankmarriage and those descending in fee-simple, should be mixed and blended together, and then

(*g*) Co. Litt. 164, 165.

(*h*) *Doe d. Crosthwaite v. Dixon*, 5 A. & E. 894; *Martin v. Strachan*, 5 T. R. 107 n.; Com. Dig. Parceners, c. 15.

(*i*) See p. 220.

(*k*) Bracton, l. 2, c. 34; Litt. s. 266—273.

(*l*) L. 2, t. 14, c. 25.

(*m*) Britton, c. 72.

(*n*) Sect. 267.

(*o*) Litt. s. 268.

divided in equal portions among all the daughters. But this was left to the choice of the donee in frankmarriage: and if she did not choose to put her lands into hotch-pot, she was presumed to be sufficiently provided for, and the rest of the inheritance was divided among her other sisters. The law of hotch-pot took place then only, when the other lands descending from the ancestor were fee-simple; for if they descended in tail, the donee in frankmarriage was entitled to her share, without bringing her lands so given into hotch-pot (*p*). And the reason is, because lands descending in fee-simple are distributed by the policy of law, for the maintenance of all the daughters; and if one has a sufficient provision out of the same inheritance, equal to the rest, it is not reasonable that she should have more: but lands descending in tail are not distributed by the operation of the law, but by the designation of the giver, *per formam doni*: it matters not therefore how unequal this distribution may be. Also no lands, but such as are given in frankmarriage, shall be brought into hotch-pot; for no others are looked upon in law as given for the advancement of the woman, or by way of marriage portion (*q*). And therefore, as gifts in frankmarriage are fallen into disuse, we should hardly have mentioned the law of hotch-pot, had not this method of division been revived and copied by the statute for distribution of personal estates, which we shall hereafter consider at large.

The estate in coparcenary may be dissolved, either by partition, which disunites the possession; by alienation of one parcener, which disunites the title, and may disunite * the interest; or by the whole at last [** 362*]
How dissolved. descending to and vesting in one single person, which brings it to an estate in severalty.

Tenants in common are such as hold by several and distinct titles, but by unity of possession; because none knoweth his own severalty, and therefore they all occupy promiscuously (*r*). This tenancy therefore happens where there is a unity of possession merely, but perhaps an entire disunion of interest, of title, and of time. For if there be two tenants in common of lands, one may hold his part in fee-simple, the other in tail, or for life; so that there is no necessary unity of interest: one may hold by descent, the other by purchase; or the one by purchase from A., the other by purchase from B., so that there is no unity of title: the estate of one may have been vested fifty years, that of the others but yesterday; so there is no unity of time. The only unity there is, is that of possession; and for this Littleton gives the true reason, because no man can certainly tell which part is his own: otherwise even this would be soon destroyed.

Tenancy in common may be created, either by the destruction of the two other estates, in joint-tenancy and coparcenary, or by special limitation in a deed, or by a conveyance of an undivided share by the owner of the whole. By the destruction of the two other estates, is meant such a destruction as does not sever the unity of possession, but only the unity of title or interest: Thus, if one of two joint-tenants in fee alienes his estate for the life of the alienee, the alienee and the other joint-tenant are tenants in common; for they now have several titles, the other joint-tenant by the original grant, the alienee by the new alienation (*s*); and they also have several

(*p*) *Ib.* s. 274.
 (*q*) *Ib.* s. 275.

(*r*) *Litt.* s. 293.
 (*s*) *Ib.* s. 292.

interests, the former joint-tenant in fee-simple, the alienee for his own life [* 363] only. So, if one joint-tenant gives his * part to A. in tail, and the other gives his to B. in tail, the donees are tenants in common, as holding by different titles and conveyances (t). If one of two parceners alienes, the alienee and the remaining parcener are tenants in common (u); because they hold by different titles, the parcener by descent, the alienee by purchase. So likewise, if there be a grant to two men, or two women, and the heirs of their bodies, here the grantees shall be joint-tenants of the life estate, but they shall have several inheritances; because they cannot possibly have one heir of their two bodies, as might have been the case had the limitation been to a man and woman, and the heirs of their bodies begotten (x): and in this, and the like cases, their issues shall be tenants in common; because they must claim by different titles, one as heir of A., and the other as heir of B.; and those two not titles by purchase, but descent. In short, whenever an estate in joint-tenancy or coparcenary is dissolved, so that there be no partition made, but the unity of possession continues, it is turned into a tenancy in common.

A tenancy in common may also be created by express limitation in a deed; but here care must be taken not to insert words which imply a joint estate; and then if lands be given to two or more, and it be not joint-tenancy, it must be a tenancy in common. The law was formerly apt in its con-

The law favoured
a joint-tenancy
formerly.

structions to favour joint-tenancy rather than tenancy in common (y); because the divisible services issuing from land (as rent, &c.) are not divided, nor the entire services (as fealty) multiplied by joint-tenancy, as they must necessarily be upon a tenancy in common. These reasons have, however, long ceased to be of any validity, and now the tendency is quite the other way (z). Land given to two, to be

But not now.

holden the one moiety to one, and the other moiety to the other, [* 364] is an estate in * common (a); and, if one grants to another half his land, the grantor and grantee are also tenants in common (b); because, as has been before (c) observed, joint-tenants do not take by distinct halves or moieties; and by such grants the division and severalty of the estate is so plainly expressed that it is impossible they should take a joint interest in the whole of the tenements.

Again, where lands are given to two persons in different capacities, without words of division, they will take as tenants in common, for they cannot take as joint-tenants. Thus, if the donees be one a corporation and the other a natural person, or one by the king in his royal capacity, and a subject, the tenancy is not joint, but in common (d).

In a will, the construction of which is less strict than that of a deed, any gift, imputing a division or distribution (e), or containing words denoting equality of interest, will confer a tenancy in common (f). The meaning will

(t) Litt. s. 295.

(u) *Ib.* 300.

(x) *Ib.* 283; *ante*, p. 343.

(y) Salk. 392.

(z) *Jolliffe v. East*, 3 Bro. C. C. 25.

(a) Litt. s. 298.

(b) *Ib.* 299.

(c) See p. 347.

(d) Co. Litt. 190 a.

(e) *Phillips v. Phillips*, 2 Vern. 490; s. c. 1 P. W. 34; 1 Eq. Ca. Abr. 292, pl. 6; *Barker v. Giles*, 2 P. W. 280; *Ettricks v. Ettricks*, Amb. 656; *Chapman v. Peat*, 1 Ves. 542; *Ackerman v. Burrows*, 3 V. & B. 54.

(f) *Leven v. Dodd*, Cro. El. 443; s. c. sub. var. nom. Moo. 558; 2 and 17; Toth. 148; *Harrison v. Foreman*, 5 Ves. 206. The cases where this question has occurred are very numerous.

be gathered from the whole will, and the words immediately constituting the gift may be controlled by the context (*g*).

In deeds operating under the Statute of Uses, a similar liberality of interpretation has been allowed as in wills (*h*); and, as most deeds conveying estates to various persons are of this character, it may be said to be the general rule, and probably a common law conveyance would now be construed in a like manner (*i*), but it is the most *usual as well as the safest way, [* 365] when a tenancy in common is meant to be created, to add express words of exclusion as well as description, and limit the estate to A. and B., to hold as tenants in common, and not as joint-tenants.

As to the incidents attending a tenancy in common: tenants in common (like joint-tenants) are compellable in equity to make partition of their lands (*k*). (314) They properly take by distinct moieties, and have no entirety of interest: and therefore there is no survivorship between tenants in common. For, though a tenancy in common for life may be created and the benefit of survivorship may, by a devise over, be added, yet this will not create a joint-tenancy, but the devise over gives a contingent interest to the survivor. "Survivorship is not the only characteristic of a joint-tenancy" (*l*).

The other incidents are such as merely arise from the unity of possession, and are therefore the same as appertain to joint-tenants merely upon that account: such as being liable to reciprocal actions of waste, and of account, by the statutes of Westm. 2, c. 22, and 4 Ann, c. 16. (315) For by the common law no tenant in common was liable to account with his companion for imbezzling the profits of the estate, or for trespass if he carried off the profits (*m*); though, if one actually turns the other out of possession, an action of ejectment (*n*) or trespass (*o*) will lie against him. (316)

(*g*) *Armstrong v. Eldridge*, 8 B. C. C. 215; *Doe d. Calkin v. Tomlinson*, 2 M. & Sel. 165; *Tuckerman v. Jeffries*, 3 Bac. Abr. Joint-Ten. (F.) 681; *Begley v. Cook*, 3 Drew. 662.

(*h*) *Rigden v. Vallier*, 2 Ves. 8. 252.

(*i*) See Harg. Co. Litt. 190 b: *Goodtitle v. Stokes*, 1 Wils. 341. Words importing equality of distribution contained in a surrender of copyholds, always have been held to create a tenancy in common. *Fisher v. Wigg*, 1 P. W. 14; *Goodtitle v. Stokes*, *ubi. sup.*; *Rigden v. Vallier*, 2 Ves. 257.

(*k*) The law of partition as applicable to tenants in common, is the same as that already

discussed as to joint tenancy, and the previous history of it is also identical.

(*l*) *Per Bayley, J.*, in *Doe d. Borwell v. Abey*, 1 M. & Sel. 428. See *Halton v. Finch*, 4 Beav. 186. In *Re Drakeley's Estate*, 19 Beav. 395; *Turner v. Whittaker*, 23 Beav. 196; *Sarel v. Sarel*, *ib.* 87. The distinction is important as regards the power of compelling a partition of the lands in fee simple.

(*m*) Co. Litt. 199; see *Jacobs v. Steward*, L. R. 4 C. P. 328.

(*n*) Co. Litt. 200.

(*o*) *Murray v. Hall*, 7 C. B. 441.

(314) See *Ante*, 646, note 813, as to partition.

(315) One of the incidents of such a tenancy is, that each is bound to contribute his proportion of the necessary expenses of keeping the buildings in proper repair. And where one tenant is willing to do this, and the other is not, the latter may be compelled to discharge this duty, and to pay his share of such reasonable expenses of repair. But before one tenant can maintain an action against his co-tenant, there must have been a request to join in the reparation, and a refusal, and the expenditures must have been made before suit brought. *Doane v. Badger*, 12 Mass. 65; *Mumford v. Brown*, 6 Cow. 475. It has also been held that one tenant in common cannot make improvements, erect buildings, and the like, on the common property, and make his co-tenant liable therefor. *Taylor v. Baldwin*, 10 Barb. 582; *Stevens v. Thompson*, 17 N. H. 109; *Crest v. Jack*, 3 Watts, 289.

(316) The same rule prevails in this country. *Erwin v. Olmstead*, 7 Cow. 229; *Booth v. Adams*, 11 Vt. 156; *McGill v. Ask*, 7 Penn. St. 897; *Bennett v. Clemence*, 6 Allen, 18; *Wood*

[* 366] * Yet mere occupation by one tenant in common, if unaccompanied by exclusion of his co-tenants, does not render him liable for rent to them (*p*); but if there be exclusion this is otherwise (*q*). (317)

Those incidents of joint-tenants which arise from the privity of title and entirety of interests, are not for the most part applicable to tenants in common: thus tenants in common need not generally sue jointly, since they have several titles (*r*); though for injuries to their common property as trespass *quare clausum fregit*, or a nuisance, or similar wrongs done to the property of all, they should all be parties to the action (*s*): and so if the object be the recovery of a common right, as for rent reserved by them, or waste upon a lease for years. But if waste be committed where there is no lease by them all, the action by one alone is good (*t*).

Tenancy in common can only be put an end to in two ways:—1. By uniting all the titles and interests in one tenant, by purchase or otherwise; which brings the whole to one severalty. 2. By making partition between the several tenants in common, which gives them all respective severalties. For tenancies in common differ in nothing from sole estates, except in having the peculiarity of unity of possession.

(*p*) *M' Mahon v. Burchell*, 2 Ph. 127; *Sandford v. Ballard*, 30 Beav. 109; *Griffes v. Griffes*, 8 L. T. 758; *Teasdale v. Sanderson*, 33 Beav. 534; where the court held where one had been in personal occupation, that he should not be allowed for lasting improvements unless he were charged with an occupation rent.

(*q*) *Sandford v. Ballard*, 33 Beav. 401. As to what is exclusion, see, in addition to this case, *Tyson v. Fairclough*, 2 Sim. & S. 143. If a lessee after notice to pay the rent to two

tenants in common in equal moieties pays the whole to one of them, the other (if the notice proceeded from him) may distrain for his moiety. *Harrison v. Baraby*, 5 T. R. 246; 5 B. & Ald. 851. See also *Denys v. Shackburgh*, 4 Y. & C. C. C. 42. *In Re Peat's Trusts*, L. R. 7 Eq. 802.

(*r*) Litt. s. 811.

(*s*) Co. Litt. 197; Com. Dig. Abatement, E. 10.

(*t*) *Curtis v. Bourn*, 2 Mod. 62.

v. Phillips, 43 N. Y. (4 Hand) 152, 156; *Wait v. Richardson*, 33 Vt. 190; *Small v. Clifford*, 38 Me. 213; *Young v. Adams*, 14 R. Monr. 127; *Challefoux v. Ducharme*, 4 Wis. 554; *Goosey v. Urig*, 18 Ill. 238; *Manchester v. Doddridge*, 3 Ind. 360; *Corbin v. Cannon*, 31 Miss. 570; *Hannon v. Hannah*, 9 Gratt. 146.

It is, however, a very general rule that one tenant in common cannot maintain trespass *quare clausum* against the other, unless the party charged has done something which is inconsistent with the rights of his co-tenant. *Lawton v. Adams*, 29 Ga. 273; *McPherson v. Seguire*, 3 Dev. 153; *Jones v. Chiles*, 8 Dana, 163; *Filbert v. Hoff*, 42 Penn. St. 97; see *Hastings v. Hastings*, 110 Mass. 280.

(317) It is not easy to determine precisely what acts of a tenant in common shall, as a settled rule, constitute a disseisin of his co-tenant. If such co-tenant is actually ousted and held out of possession under a claim of exclusive right of possession by the tenant so turning him out, and there is also a denial of the co-tenant's right, and this is known by the latter, expressly or by implication, this will amount to a disseisin. *Brackett v. Norcross*, 1 Greenl. 89; *Dexter v. Arnold*, 3 Sumn. 152; *Harpending v. Dutch Church*, 16 Pet. 455; *Gray v. Givens*, Riley's Ch. (S. C.) 41; *Jackson v. Tibbits*, 9 Cow. 241; *Wright v. Saddler*, 20 N. Y. (6 Smith) 320, 330; *Wood v. Phillips*, 43 N. Y. (4 Hand) 152.

It is a general rule that the possession of one tenant in common is the possession of all, unless there has been an actual ouster, or an exclusive taking of the profits by one of such tenants, against the will of the other co-tenants. *Small v. Clifford*, 38 Me. 213; *Roberts v. Morgan*, 30 Vt. 319; *Munroe v. Luke*, 1 Met. 570; *Forward v. Deets*, 32 Penn. St. 69; *Hoffstetter v. Blattner*, 8 Mo. 276; *Meredith v. Andres*, 7 Ired. Law, 5; *Abercrombie v. Baldwin*, 15 Ala. 763; *Owen v. Morton*, 27 Cal. 524, 560.

* CHAPTER XIII.

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THE TITLE TO THINGS REAL, IN GENERAL.

THE foregoing chapters having been principally employed in defining the nature of things real, in describing the tenures by which they may be holden, and in distinguishing the several kinds of estate or interest that may be had therein; we come next to consider, lastly, the title to things real, with the manner of acquiring and losing it.

Title to things
real.

A title is thus defined by sir Edward Coke (a), *titulus est justa causa possidendi id quod nostrum est*; or, it is the means whereby the owner of lands has the just possession of his property. A complete title involves the two elements, the fact of possession, and the right to the possession.

Title defined.

When the subject matter is such that there is no possession applicable, as when the title to an estate in lands, in reversion or remainder, is spoken of, an undisputed and indisputable right to it constitutes all that is involved in the name title; but in such a case we do not say that the title to the lands is complete until the estate falls into possession and the owner of the estate obtains legal possession, either by personal occupation, or that of his bailiff, or of his tenant at sufferance, will, or for years. We may consider thus shortly the parts of our definition, and then proceed to discuss the several manners in which title may be acquired and lost.

The lowest and most imperfect degree of title consists * in the mere naked possession, or actual occupation of the estate; without [* 368]

Mere possession. any right to hold and continue such possession beyond that which the fact of such possession affords. This may happen when one man invades the possession of another, and by force or surprise turns him out of the occupation of his lands; which is termed a disseisin,

Disseisin.

being a deprivation of that actual seisin, or corporal freehold of the lands, which the tenant before enjoyed. Or it may happen, that after the death of the ancestor and before the entry of the heir, or after the death of a particular tenant and before the entry of him in remainder or reversion, a stranger may contrive to get possession of the vacant land, and hold out him that had a right to enter. In all which cases, and many others that might be here suggested, the wrongdoer has only a mere naked possession, which the rightful owner may put an end to by those remedies which the law provides, as will more fully appear in the third book of these commentaries. But, in the meantime, till some act be done by the rightful owner to divest this possession and assert his title, such actual possession is, *prima facie*, evidence of a legal title in the possessor, so that, speaking generally, the burden of proof of title is thrown upon any one who claims to oust him: this possessory title, moreover, may, by length of time and negligence of him who had the right, by degrees ripen into a perfect and indefeasible title. And at all events, without such actual possession, no title can be completely good.

(a) Co. Litt. 845.

The other part of a good and perfect title is the right of possession, which may reside in one man, while the actual possession is not in himself but in another. For if a man be disseised, or otherwise kept out of possession, by any of the means before mentioned, though the actual possession be lost, yet he has still remaining in him the right of possession; and may exert it whenever he thinks proper, by entering upon the disseisor, [* 369] and turning him * out of that occupancy which he has so illegally gained, or by bringing a suitable action (b).

If he neglects to bring an action or make an entry, within the period which the law has laid down (which, where no infancy or other disability exists, is limited to twenty years after the right to bring such action has accrued (c)) his right of doing so is extinguished (d); no mere claims, even though continually made, will preserve the right (e). When, therefore, the period in question has elapsed, the title of him in possession becomes indefeasible. Suits in equity must be brought within the same period as actions at law (f), except where the land is vested in a trustee upon an express trust for the claimant, or in a person claiming through such a trustee, and not a purchaser for valuable consideration, for time is no bar to a *cestui que trust* recovering the land (g). Where the trustee has sold the land for a valuable consideration the right first accrues at the time of the sale, and may be barred by lapse of time subsequently.

To complete the account of a perfect title, it is necessary that certain negative conditions should be complied with, as that no duty of the nature of a trust accompanies the right of possession so as to render it a [* 370] * mere barren right, unproductive of beneficial enjoyment. In other words the right of possession must be equally indisputable in a court of equity as a court of law. This beneficial ownership or freedom from any binding trust, may be described as the right of property, although it is not the sense in which that phrase was formerly used (h). Next, the land must be free from any incumbrance or other claim; the nature of which, when, like mortgages, they depend upon contract, has been sufficiently discussed; and their character, when arising *in invitum* by process of law on the part of a creditor, will be presently treated. As to claims, generally, we need here only add that a purchaser, buying with an apparently good title, is not bound by those of which he

(b) There is sometimes a difficulty in determining whether a rightful claimant is justified in re-entering without bringing an action of ejectment. Formerly, if the person in possession were so as heir of the original disseisor or other wrong doer, the right of entry was taken away or tolled, and an action was absolutely necessary, but this effect of a descent from a disseisor, called a descent cast, was taken away by the stat. 8 & 4 Will. 4, c. 27, s. 39. (Vide *infra*, vol. iii. p. 5.)

(c) As to the time when the right is to be deemed to have accrued, and the periods within which action to recover land or other real property may be brought, see 8 & 4 Will. 4, c. 27, ss. 2—9. As to the further periods allowed for disabilities, s. 16. Forty years is the maximum time even where disabilities

exist, s. 17, except in the case of an advowson, for which one hundred years is the maximum time, s. 37. *Post*, p. 427, *et seq.*

(d) *Ib.* s. 34.

(e) Sect. 11.

(f) Sect. 24.

(g) Sect. 25.

(h) Co. Litt. 266; Bract. l. 5, tr. 3, c. 5, s. 2. Formerly the right of possession and the right of property were held distinct in courts of law by reason of the different kinds of real action which existed, in some of which the right of possession was determined without fully determining the right of property. All these real actions, with a very few exceptions, of which ejectment is the chief, have been, as already remarked, abolished.

has no notice, and in respect of which no action or suit has been actually commenced (i). Moreover, a suit already commenced will not bind him, unless it has been registered within five years from the date of the purchase in suitable books kept in the Common Pleas for that purpose (k). Lastly, the land must be free from those special liabilities which arise from debts of record, specialty debts, or "accountants'" debts, when due to the crown (l). But a purchaser is protected even from these if they are not registered within five years in a manner similar to that requisite for *lites pendentes* (m).

Lites pendentes must be registered to bind purchasers.

Crown debts.

*CHAPTER XIV.

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TITLE BY DESCENT.

THE several gradations and stages, requisite to form a complete title to lands, tenements, and hereditaments, having been briefly stated in the preceding chapter, we have to consider the several manners in which this complete title may be reciprocally lost and acquired: whereby the dominion of things real is either continued, or transferred from one man to another. And here we must first of all observe, that (as gain and loss are terms of relation, and of a reciprocal nature) by whatever method one man gains an estate, by that same method or its correlative some other man has lost it. As where the heir or devisee acquires by descent or devise, the ancestor or testator has first lost or abandoned his estate by his death: where the lord gains land by escheat, the estate of the tenant is first of all lost by the natural or legal extinction of all his hereditary blood: where a man gains an interest by occupancy, the former owner has previously relinquished his right of possession: where one man claims by prescription or immemorial usage, another man has either parted with his right by an ancient and now forgotten grant, or has forfeited it by the supineness or neglect of himself and his ancestors; and so, in case of forfeiture, the tenant by his own misbehaviour, or neglect has renounced his interest in the estate; whereupon it devolves to that person who by law may take advantage of such default; and, in alienation by common assurances *inter vivos* the two considerations of loss and acquisition are so *interwoven, and so constantly contemplated together, that we never hear of a conveyance, without at once receiving the ideas as well of grantor as grantee.

The various methods of acquiring on the one hand, and of losing on the other, a title to estates in things real, are reduced by our law to the following:

descent, where the title is vested in a man by the single operation of law, upon the decease of a former owner and by reason of consanguinity to him; purchase, where the title is vested in him

The modes of losing, continuing, and acquiring a title to real property.

Descent.

Escheat.

Occupancy.

Prescription.

Forfeiture.

Alienation.

These are reducible to descent, purchase, and escheat.

(i) Sug. V. & P. 258, 14th ed.

(k) 2 & 3 Vict. c. 11, s. 7.

(l) *Ante*, p. 813, note (d).

(m) 2 & 3 Vict. c. 11, s. 8. The same act provides means of releasing lands from crown debts, ss. 9, 10. As to other crown debtors, see Sug. V. & P. 545.

by his own act or agreement (*a*); and, thirdly, by escheat, of which we shall see more presently (*b*). There are also some modes of vesting which for some purposes are considered as falling under the general term purchase, but for other purposes must be distinguished from it. They are where the title vests through partition or inclosure, which, by the recent act to amend the law of inheritance, are distinguished from purchase.

Descent, or hereditary succession, is the title whereby a man on the death of another acquires his estate by right of representation, as his heir-at-law.

Definition and nature of descents. An heir is he upon whom the law casts the estate immediately on the death of the ancestor: and an estate, so descending to the heir, is in law called the inheritance.

The doctrine of descents, or law of inheritance in fee-simple, is a point of the highest importance; and is indeed one principal object of the laws of real property in England. All the rules relating to purchases,

Importance of doctrine of descents.

whereby the legal course of descents is broken and altered, perpetually refer to this settled law of inheritance, as a *datum* or [* 373] first principle universally known, and upon which their subsequent limitations are to work. Thus, a gift in tail, or to a man and the heirs of his body, is a limitation that cannot be perfectly understood without a previous knowledge of the law of descents in fee-simple. One may well perceive that this is an estate confined in its descent to such heirs only of the donee as have sprung or shall spring from his body; but who those heirs are, whether all his children both male and female, or the male only, and (among the males) whether the eldest, youngest, or other son alone, or all the sons together, shall be his heir; this is a point that we must refer back to the standing law of descents in fee-simple to be informed of.

Since, in the year 1833, an act (*c*) was passed materially altering the rules of descent as regards the inheritance accruing upon the death of any person who may have died since the 31st of December, 1833, we will, in this chapter, exhibit the present law of inheritance, briefly noting by the way the rules which formerly prevailed but do so no longer, the importance of which, in connection with existing titles to land, is now nearly extinct (*d*). (318)

The alterations in the law made by the act alluded to apply to every kind of hereditament, whether it be subject to the common law of England or to any peculiar custom, such as that of gavelkind, Borough English.

I. The first rule or canon of descent is, that inheritance shall be traced from the last purchaser of the property, and for this purpose the person last entitled to the property shall be deemed to be the purchaser, unless it be proved that he inherited it (*e*). But where there is a total failure of heirs of the purchaser, or where the land shall be descendible

(1.) Descent shall be traced from the last purchaser.

(*a*) Co. Litt. 18.

(*b*) As to the distinction between escheat and purchase in their practical effects, see *Anon.* 12 Mod. 188; Vin. Abr. Manor. R. 2, pl. 7; *Holmes v. Hanby*, 1 Sid. 284; s. c. 2 Keb. 28; *Fleta*, vi. 1. s. 18; and Mr. Hargrave's note to Co. Litt. 18 b, where, however, the learned writer to some extent loses sight of the fact that escheat takes place because of

and as incident to the lord's seignory, and is therefore merely a fruit or practical result of it, see *post*, p. 394.

(*c*) 3 & 4 Will. 4, c. 106.

(*d*) Some further illustrations of the cases in which descent may or may not be claimed will appear in the next chapter.

(*e*) Sect. 2.

(318) The law relating to descents is regulated by statute in most of the States of the Union. Extracts from many of these statutes may be found in 3 Washb. Real Prop. 21 to 44, in note, 3d ed.

as if an ancestor had been the purchaser, and there should be a total failure of the heirs of such ancestor, then the descent shall henceforth be

* traced from the person last entitled to the property as [* 374]
Exception. if he had been the purchaser (f).

In order to understand this rule, we must bear in mind that the word purchaser means the person who last acquired the property otherwise than by descent, or than by escheat, partition, or inclosure, by the effect of which the property "shall have become part of, or descendible in the same manner as other land acquired by descent" (g).

Moreover, it is enacted (h), that when any land shall have been limited by an assurance executed after the 31st of December, 1833, to the person, or the heirs of the person, who shall thereby have conveyed the land, such person shall be considered to have acquired the land as a purchaser by virtue of such assurance, and shall not be entitled thereto as his former estate (i).

This first rule or canon is an alternation of the former law under which the person who last died actually seised of the property constituted the stirps or stock from whom descent was to be traced: the maxim being *seisina facit stipitem*: and a person was only considered actually seised when he had himself, or by his own or his ancestor's lessee entered, or had received rent from the lessee (k).

The rule which is now in force is not free from objection, and it may be remarked is not in accordance with the recommendation of the real property commissioners, * upon whose first report the Inheritance Act was to a great extent founded. They recommended that descent should be always traced from the person last entitled, a simpler and more convenient arrangement, as the title, when it depends upon the inability to show whether or not a proposed stirps inherited, must always be in some degree uncertain. It has been held, however, that another objection which seems not unnaturally to arise out of this rule is invalid. Suppose a purchaser to die intestate, leaving two daughters, Elizabeth and Mary. Then suppose Elizabeth to die, without having in any manner dealt with her share, and leaving a son, it might seem that the descent of the moiety which Elizabeth took, ought, if in accordance with the rule to be traced from the purchaser, go as to half only to her son and the remainder to Mary. It has been held in accordance with a natural sense of what under such circumstances would appear fair, that the moiety in question descends entirely to the son (l).

Although the rule declares that the descent is to be traced, not from the person who was last entitled or possessed, but from the person who last took by purchase, yet a person who has taken by descent may in several ways so change his estate or acquire a new estate, as to constitute himself for the pur-

(f) 22 & 28 Vict. c. 35, s. 19.

(g) 3 & 4 Will. 4, c. 106, s. 1.

(h) Sect. 3.

(i) The doctrine before the act was that when there was a devise to the testator's heir, the devisee was considered to take the land by his prior title as heir, and not under the will, unless the testator altered the estate, and limited it in a manner different from that in which it would have descended to the heir. See Lord Raym. 728, 829; 2 W. Bl.

687; and the case was the same even if there was an executory devise over. *Doe d. Pratt v. Timmins*, 1 B. & Al. 580; *Manbridge v. Plummer*, 2 M. & K. 93; Watk. Desc. 229, 231. Upon this section, see *Honeywood v. Honeywood*, 34 Beav. 817.

(k) Co. Litt. 15 a n.; 82 a; 8 Rep. 42 a; *Doe v. Keen*, 7 T. R. 890; *Doe v. Whichelo*, 8 T. R. 213.

(l) *Paterson v. Mills*, 19 L. J. Ch. 810; *Cooper v. France*, id. 818

poses of further devolution of title a purchaser, or "break the descent" as it is termed. But as to what dealings with the estate will have this effect, questions of some nicety sometimes arise.

Before the recent act the law distinguishing between the cases where a man who died intestate seised of lands had inherited them from his father and where from his mother; and if the intestate had inherited from his mother then the heir was to be sought *ex parte maternâ* as it was called (*m*). Thus, if Mary Farrifield was seised of law, and having married John Sandie, died a widow, leaving a son William Sandie; William Sandie, being his mother's [*376] *heir-at-law, succeeded to the land. If then William Sandie died seised intestate and without having in any manner dealt with the land, the descent was to be traced not according to the then usual rule from William Sandie *simpliciter* as the person last seised, but from William Sandie *ex parte maternâ* through the mother's blood. It will be seen that in some respects this was like the present rule of seeking the heir by descent from the last purchaser and not the last person who died seised. Now it was held as a settled doctrine that William Sandie, in the case we have put, could in many ways break the descent, so as to constitute himself a stock of descent according to the common rule. Thus, if he made a feoffment in fee, so as to part with the estate absolutely and then took a reconveyance, the descent was broken (*n*), but if he made a conveyance for the purpose of creating particular estates, and limited the ultimate fee to himself, this was held to be the same estate that he had before and it descended to the heir *ex parte maternâ*. The estate which is taken back must be in reality a new estate, and not merely a part of the old estate, unless it comes within the enactment already quoted (*o*): The same principles now apply to determine by what means a person who has inherited may constitute himself a purchaser (*p*).

[*377] The last part of the rule provides for a case in which *much hardship might ensue without the provision which it makes. Thus, if lands descend from a foundling to his issue, then on failure of such issue there would be no heir, yet the person who last enjoyed the land might through his maternal ancestors have an heir, to whom naturally it would seem the lands ought to descend rather than that there should be an escheat. Accordingly this provision was introduced by a recent act to meet such a case (*q*).

(*m*) Litt. s. 4.

(*n*) Co. Litt. 12 a. 126, & Harg. n.; *Price v. Langford*, Salk. 837; 1 Show. 92. This case seems hard to reconcile with the subsequent case, *Abbot v. Burton*, Salk. 590. Where a person made a mortgage in fee by surrender of copyhold lands which he had inherited from his mother, and afterwards the mortgagee on being paid off surrendered to the use of the mortgagor, it was held that the descent was broken, *Doe v. Morgan*, 7 T. R. 103. For other cases on the point, whether a descent is broken, see *Hutcheson v. Hammond*, 8 Bro. C. C. 128; *Wood v. Skelton*, 6 Sim. 176; *Buchanan v. Harrison*, 1 J. & H. 662.

(*o*) *Ante*, p. 874; *Abbot v. Burton*, Salk. 590.

(*p*) See *Nanson v. Burnes*, L. R. 7 Eq. 250; where an absolute surrender and conveyance to A. B., and a declaration of trust by A. B. in favour of the surrenderor and his appointees, was held not to break the line of descent. See also *Davis v. Kirk*, 2 K. & J. 391.

(*q*) In *Doe v. Blackburn*, 1 Moo. & Rob. 547, the case mentioned in the text occurred, and the heir of the last owner was defeated in an ejectment. That case was prior to 22 & 23 Vict. c. 35; under the present law, the claim would have been supported. The difficulty was foreseen by the real property commissioners (1st Rep. p. 15), but not provided for by the Inheritance Act. For some further remarks upon this part of the law of descent, see *post*, p. 397.

II. The second rule is that an inheritance shall descend to the issue of the last purchaser, and that on failure of issue of the last purchaser, the inheritance shall go to his lineal ancestors, or their issue; each of the ancestors taking in preference to his issue, but so that a nearer lineal ancestor and his issue are to be preferred to a more remote lineal ancestor and his issue other than such nearer ancestor or his issue (*r*). This rule, as regards the latter part of it, was a great change from the former rule of descent in which no parent or other lineal ancestor could be heir—a rule probably founded on feudal reasons. For it was an express rule of the feudal law (*s*), that *successionis feudi talis est natura, quod ascendentes non succedunt*; and therefore the same maxim obtained *also in the French law till recently (*t*). Our Henry I., indeed, [*378] among other restorations of the old Saxon laws, restored the right of succession in the ascending line (*u*): but this soon fell again into disuse; for so early as Glanvil's time, who wrote under Henry II., we find it laid down as established law (*x*), that *hereditas nunquam ascendit*; which remained an invariable maxim, until altered by the Inheritance Act, so as to accord more with our sense of a natural course of succession.

This rule has put an end to the possibility which formerly not uncommonly existed, of estates which have once vested afterwards being divested by the subsequent birth of a nearer heir, with the single exception of the case of a posthumous child. Formerly, when an estate might descend to a sister, or an uncle or aunt, during the lifetime of the father or grandfather of the intestate, by the birth, after any interval, however long, of a brother, or, as the case might be, a sister or an uncle, the estate would devest and go to such nearer heir (*y*). This can now never happen, except in the case above noticed, because all such cases supposed the existence of a lineal ancestor, who now would take in priority to all such brothers, sisters, uncles, or aunts. In the case of a posthumous child alone, then, can this divesting now take place. During the interval, before the birth of such child, the rents and profits will now belong to the person who, but for him, would be heir, as was considered to be the case formerly in the instances above noticed (*z*).

* III. The third rule, or canon of descent, is this: [*379] (III.) Lineal descendants represent their ancestor in infinitum. that the lineal descendants, *in infinitum*, of any person deceased shall represent their ancestor: that is, shall stand in the same place as the person himself would have done, had he been living.

Thus, the child, grandchild, or great-grandchild, either male or female, of

(*r*) The words of the act (3 & 4 Will. 4, c. 106, s. 6) are "That every lineal ancestor shall be capable of being heir to any of his issue; and in every case where there shall be no issue of the purchaser, his nearest lineal ancestor shall be his heir, in preference to any person who would have been entitled to inherit, either by tracing his descent through such lineal ancestor, or in consequence of there being no descendant of such lineal ancestor; so that the father shall be preferred to a brother or sister, and a more remote lineal ancestor to any of his issue, other than a nearer lineal ancestor, or his issue." Sec. 6.

(*s*) 2 Feud. 50.

(*t*) Domat. p. 2, l. 2, t. 2; Montesq. Esp. des L. lib. xxxi. c. 53. By the Code Civil, however, upon failure of lineal descendants of the deceased owner, and of his brothers and sisters and their descendants, the inheritance is equally divided between the two ascending lines, the nearest in degree in each line taking a moiety, and, if more than one, *per capita*. L. 8, tit. 1, 746.

(*u*) LL. Hen. I., c. 70.

(*x*) L. 7, c. 1.

(*y*) Co. Litt. 11; Doct. & Stud. 1 Dial. c. 7.

(*z*) *Basset v. Basset*, 8 Atk. 203; and see *Goodtitle v. Newman*, 8 Wills. 516; *ante*. p. 324 n.

the eldest son, succeeds before the younger son, and so *in infinitum* (a). And these representatives shall take neither more nor less, but just so much as their principals would have done. As, if there be two sisters, Margaret and Charlotte; and Margaret dies, leaving six daughters; and then John Stiles, the father of the two sisters, dies without other issue: these six daughters shall take among them exactly the same as their mother Margaret would have done, had she been living; that is, a moiety of the lands of John Stiles in coparcenary: so that, upon partition made, if the land be divided into twelve parts Charlotte the surviving sister shall have six thereof, and her six nieces, the daughters of Margaret, one a piece.

This taking by representation is called succession *in stirpes*, according to the roots; since all the branches inherit the same share that their root, whom they represent, would have done. (319) And in this manner also was the Jewish succession directed (b); but the Roman somewhat differed from it. In the descending line, the right of representation continued *in infinitum*, and the inheritance still descended *in stirpes*: as, if one of three daughters died, leaving ten children, and then the father died; the two surviving daughters had each one-third of his effects, and the ten grandchildren had the remaining third divided between them. And so among collaterals, if any person of equal degree with the persons represented were still subsisting (as, if the deceased left one brother, and two [* 380] nephews, the sons of another brother), the succession was * still guided by the roots: but, if both the brethren were dead leaving issue, then their representatives in equal degree became themselves principals, and shared the inheritance *per capita*, that is, share and share alike; they being themselves now the next in degree to the ancestor, in their own right, and not by right of representation (c). So, if the next heirs of Titius be six nieces, three by one sister, two by another, and one by a third; his inheritance by the Roman law was divided into six parts, and one given to each of the nieces: whereas the law of England in this case would still divide it only into three parts, and distribute it *per stirpes*, thus: one third to the three children who represent one sister, another third to the two who represent the second, and the remaining third to the one child who is the sole representative of her mother. Thus also, as we have seen, if one of several parceners dies leaving issue, the share of the parcener goes to the issue, by virtue of the continued right of representation (d).

The rule of representation is applied even in those cases where by custom some of the other rules, which we shall presently notice, are disregarded; as, for instance, where the custom of Borough English exists by which the

(a) Hale, H. C. L. 236, 237.

(c) Nov. 110, c. 8; Inst. 3. 1. 6.

(b) Selden, De. Succ. Ebr. c. 1.

(d) *Ante*, p. 375.

(319) "The second rule of the descent is, that if a person dying seised, or as owner of land, leaves lawful issue of different degrees of consanguinity, the inheritance shall descend to the children and grandchildren of the ancestor, if any be living, and to the issue of such children or grandchildren as shall be dead, and so on to the remotest degree, as tenants in common. But such grandchildren and their descendants shall inherit only such share as their parents respectively would have inherited if living. The rule is thus declared in the New York Revised Statutes, and it probably is to be found in the laws of every State in the Union." 4 Kent's Com. 391. See 3 Washb. Real Prop. 21 to 44, 8d ed., in note where the statutes are quite fully given.

youngest son inherits in preference to the eldest (*e*), or in gavelkind lands, where all sons inherit equally (*f*). So that if a purchaser of gavelkind land dies intestate, leaving no issue and no brother, but a nephew Thomas, and two grand-nephews, the sons of William, a deceased brother of Thomas, then Thomas takes half, and each of the grand-nephews a quarter of the land (*g*).

* The application of the rule is governed by those other rules of [* 381] descent which determine the question which of the issue takes; and by those special rules which custom has established for the particular *locus in quo*, different from the common law.

This right of perpetual representation is an ancient rule which seems to have grown general during the twelfth century, and seems to have been more slowly introduced into the collateral, than the descending line. In the time of Henry II., when Glanvil wrote, it does not appear to have been universally admitted, though that author appears to declare in its favour by holding that the son of an eldest son should inherit in priority to his uncle, a younger son of the same stock. Frequent contests took place between relations, such of these as to inheritance, and especially as to the title to the crown. Many arguments were urged, founded on the superior personal ability of the uncle to perform the duties or services attaching to the inheritance. We are not surprised to find that king John, who kept his nephew Arthur from the throne, attempted (*h*) to establish the principle that the uncle being nearer to the common stock had the superior right; but in the time of his son Henry III., we see the rule treated as indisputably settled (*i*) in the manner in which it now exists, and but few attempts were afterwards made to shake it (*k*).

(IV.) Males preferred to females. * IV. A fourth general rule or canon is, that the male issue shall be admitted before the female. (320) [* 382]

Thus sons shall be admitted before daughters; or, as our male lawgivers have somewhat uncomplaisantly expressed it, the worthiest of blood shall be preferred (*l*). As if John Stiles has two sons, Matthew and Gilbert, and two daughters, Margaret and Charlotte, and dies; first Matthew, and (in case of his death without issue) then Gilbert, shall be admitted to the succession, in preference to both the daughters.

This preference of males to females is entirely agreeable to the law of succession among the Jews (*m*), and also among the states of Greece, or at least among the Athenians (*n*); but was not adopted by the laws of Rome (*o*), (such of them at least as are at present extant,) wherein brothers and sisters were allowed to succeed to equal

(*e*) *Blackborough v. Davis*, 1 P. W. 41; *Clements v. Scudamore*, *ib.* 63; *Bowen v. Littlewood*, *ib.* 594; 2 Lord Raym. 1024, 1 Mod. 102. The courts do not extend peculiar customs further than the evidence of them is clear. See *Muggleton v. Barnet*, 1 H. & N. 282; 2 H. & N. 653.

(*f*) *Hook v. Hook*, 1 H. & M. 43.

(*g*) *Ib.*

(*h*) Hale, H. C. L. 217, 220.

(*i*) Bracton, lib. 2, c. 30, s. 2.

(*k*) Dalrymple on Feuds, c. 5, s. 2, cites as instances the contest decided by Edward I., between Bruce and Baliol; the rival claims of the Duke of Lancaster and Earl of March on the abdication of Richard II.; and those

of Cardinal Bourbon and Henry of Navarre to the crown of France on the death of Henry III. Edward III.'s claim to the French throne was grounded upon an alleged right of representation, that he might take through his mother, though she was by the Salic law excluded. This claim, however, even if the difficulty of so claiming had been less manifest, was clearly bad upon the same principle of representation, since a descendant, also through a female from Edward's eldest uncle, was alive.

(*l*) Hal. H. C. L. 235.

(*m*) Numb. c. 27.

(*n*) Petit. LL. Attic. l. 6, t. 6.

(*o*) Inst. 3. 1. 6.

(320) This rule of descent has not been adopted in this country.

portions of the inheritance (*p*). Without entering into the comparative merit of the Roman and the other constitutions in this particular, or examining into the alleged greater dignity of blood in the male or female sex; it is sufficient

here to observe, that our preference of males to females seems to arise from feudal principles. have arisen entirely from the feudal law. For though our British ancestors, the Welsh, appear to have given a preference to males (*q*), yet our Danish predecessors (who succeeded them) seem to have made no distinction of sexes, but to have admitted all the children at once to the inheritance (*r*).

[* 383] But the feudal *law of the Saxons on the continent (which was probably brought over hither, and first altered by the law of king Canute) gives an evident preference of the male to the female sex. *Pater aut mater, defuncti, filio non filia hæreditatem relinquunt. . . . Qui defunctus non filios sed filias reliquerit, ad eas omnis hæreditas pertineat* (*s*)."

It is possible, therefore, that this preference might be a branch of that imperfect system of feuds, which obtained here before the conquest: especially as it subsists among the customs of gavelkind, and as, in the charter or laws of king Henry I., it is not (like many Norman innovations) given up, but rather enforced (*t*). The true reason of preferring the males must be deduced from feudal principles: for, by the genuine and original policy of that constitution, no female could ever succeed to a proper feud (*u*), inasmuch as they were incapable of performing those military services, for the sake of which that system was established. But our law does not extend to a total exclusion of females, as the Salic law, and others, where feuds were most strictly retained: it only postpones them to males; for, though daughters are excluded by sons, yet they succeed before any collateral relations; our law, like that of the Saxon feudists before mentioned, thus steering a middle course between the absolute rejection of females, and the putting them on a footing with males.

V. A fifth rule or canon of descent is this: that where there are two or more males, in equal degree, the eldest only shall inherit; but females all together. (321) As if a man has two sons, Matthew and Gilbert,

(v.) Primogeniture or descent to the eldest male;—Coparcenary or descent to all the females together.

[* 384] sons die without issue before * the father, the daughters Margaret and Charlotte shall both inherit the estate as

coparceners (*x*).

(*p*) But we find that by the Lex Vaconia, *De Hereditatibus mulierum*, it was decreed that no one should make a woman his heir (*ne quis hæredem virginem neque mulierem faceret*); (Cic. Verr. 1, 42); nor leave to any one by way of legacy more than to his heir or heirs. This law is however supposed to have referred principally to those who were rich, in order to prevent the extinction of opulent families. (Adam's Roman Antiq.

214.) And Dr. Adam says, that females were entirely excluded by the Roman law from inheriting. *Ib*.

(*q*) Stat. Wall. 12 Edw. 1.

(*r*) LL. Canut. c. 68.

(*s*) Tit. 7, ss. 1 & 4.

(*t*) C. 70.

(*u*) 1 Feud. 8.

(*x*) Litt. s. 5; Hale, H. C. L. 238.

(321) The right of primogeniture is not recognized in the law of descents in this country.

This right of primogeniture in males seems anciently to have only obtained among the Jews, in whose constitution the eldest son had a double portion of the inheritance (y); in the same manner as with us, by the laws of king Henry I. (z), the eldest son had the capital fee or principal feud of his father's possessions, and no other pre-eminence; and as the eldest daughter had afterwards the principal mansion, when the estate descended in coparcenary (a). The Greeks, the Romans, the Britons, the Goths, Vandals, and Franks, the Saxons, and even originally the feudists, divided the lands equally; some among all the children at large, some among the males only. This is certainly the most obvious and natural way; and has the appearance, at least in the opinion of younger brothers, of the greatest impartiality and justice. But when the emperors began to create honorary feuda, or titles of nobility, it was found necessary (in order to preserve their dignity) to make them impartible (b), or (as they styled them) *feuda individua*, and in consequence descendible to the eldest son alone. This example was farther enforced by the inconveniences that attended the splitting of estates; namely, the division of the military services, the multitude of infant tenants incapable of performing any duty, the consequential weakening of the strength of the kingdom, and the inducing younger sons to take up with the business and idleness of a country life, instead of being serviceable to themselves and the public, by engaging in mercantile, in military, in civil, or in ecclesiastical employments (c). These reasons occasioned an almost total change in the method of feudal inheritances abroad; so * that the eldest male began [* 385] universally to succeed to the whole of the lands in all military tenures: and in this condition the feudal constitution was established in England by William the Conqueror.

Yet we find, that socage estates frequently descended to all the sons equally, so lately as when Glanvil (d) wrote in the reign of Henry II.; and it is mentioned in the Mirror (e), as a part of our ancient constitution, that knights' fees should descend to the eldest son, and socage fees should be partible among the male children. However, in Henry III.'s time, we find by Bracton (f), that socage lands, in imitation of lands in chivalry, had almost entirely fallen into the right of succession by primogeniture, as the law now stands: except in Kent, where they gloried in the preservation of their ancient gavelkind tenure, of which a principal branch was the joint inheritance of all the sons (g); and except in some particular manors and townships, where their local customs continued the descent sometimes to all, sometimes to the youngest son only, or in other more singular methods of succession.

As to the females, they are still left as they were by the ancient law: for they were all equally incapable of performing any personal service; and therefore one main reason of preferring the eldest ceasing, such preference would have been injurious to the rest: and the other principal purpose, the prevention of the too minute subdivision of estates, was left to be

Among what nations right of primogeniture prevailed.

Descent of socage estates to all the sons

before the reign of Henry III.

and subsequently in Kent.

(y) Selden, De Succ. Ebr. c. 5
(z) C. 70.
(a) Glanvil, l. 7, c. 8.
(b) 2 Feud. 55.
(c) Hale, H. C. L. 221.

(d) L. 7, c. 8.
(e) C. 1, s. 3.
(f) L. 2, c. 30, 31 34.
(g) Somner, Gavelk. 7.

considered and provided for by the lords, who had the disposal of these female heiresses in marriage. However, the succession by primogeniture, even among females, took place as to the inheritance of the crown (*h*); wherein the necessity of a sole and determinate succession is as great in the one sex as the other. And the right of sole succession, though *not of primogeniture, was also established with respect to female dignities and titles of honour. For, if a man holds an earldom to him and the heirs of his body, and dies, leaving only daughters; the eldest shall not of course be countess, but the dignity is in suspense or abeyance till the king shall declare his pleasure; for he, being the fountain of honour, may confer it on which of them he pleases (*i*), and the one so selected and her issue will continue to bear it. If, however, such issue become extinct, the title will again become in abeyance, unless there be a failure of issue of all the coparceners except one, in which last case the descendant of that one will be entitled to claim the title (*k*). There is a distinction in the case of an office of honour, which may be exercised by deputy, for the coparceners may agree in appointing a deputy of suitable dignity (*l*).

In these rules we may observe a clear trace of the ancient law of feuds, before their descent by primogeniture among males was established, namely, that the lord might bestow them upon such son as he thought proper, "*progressum est ut ad filios devenire in quem scilicet dominus hoc vellet beneficium confirmare*" (*m*). As to the mutual rights of parceners sufficient has already been said (*n*).

VI. A sixth rule is that a relation of the whole blood, and his or her issue, shall be preferred to a relation of the * same degree of the half blood, and his or her issue, but the relations of the half blood are not excluded (*p*). (322)

(*h*) Co. Litt. 165.

(*i*) Co. Litt. 165, Harg. n. *In re Braye Peerage*, 8 Scott, 108. For other instances of abeyance, see 10 Cl. & Fin. 957.

(*k*) *Ib.*

(*l*) When the office of great chamberlain had descended to two sisters, coheiresses of the Duke of Ancaster, one of whom was married to Peter Burrell, Esq., the judges gave it as their opinion in the House of Lords, "that the office belongs to both sisters; that the husband of the eldest is not of right entitled to execute it; and that both sisters may execute it by deputy, to be approved of by them; such deputy not being of a degree inferior to a knight, and to be approved of by the king." *Ib.*; *et Journ. Dom. Proc.* May 25, 1781. See also Parl. Reg. for 1780.

(*m*) 1 Feud. 1.

(*n*) *Ante*, p. 356.

(*p*) The words of the act are (s. 9) "That any person related to the person from whom the descent is to be traced, by the half blood, shall be capable of being his heir, and the place in which any such relation by the half blood shall stand in the order of inheritance, so as to be entitled to inherit, shall be next after

any relation in the same degree of the whole blood and his issue, where the common ancestor shall be a male; and next after the common ancestor, where such common ancestor shall be a female; so that the brother of the half blood on the part of the father, shall inherit next after the sisters of the whole blood on the part of the father and their issue, and the brother of the half blood, on the part of the mother, shall inherit next after the mother." The latter part of the section can only be understood by reference to the succeeding rule that male ancestors and their issue are preferred to female ancestors, which renders its meaning sufficiently plain. For a half brother the son of a common father will take by virtue of being issue of the father before the succession reaches the mother, but after the brothers and sisters of the whole blood who themselves come after the father, but a half brother, the son of a common mother, does not take till all male paternal ancestors and their issue are exhausted, and then the succession goes to the mother before him, and he takes next after her.

This rule was introduced by the act and altered to a considerable extent the former rules, for previously a relation of the half blood could never be an heir, and the estate even escheated to the lord rather than he should inherit (*q*).

VII. The seventh rule is as follows:—Each male ancestor and his ancestors, whether male or female, and his and their issue, shall be preferred to all other female ancestors and their ancestors, whether male or female, and their issue (*r*).

* This rule was settled by the legislature in accordance with a previous decision of the courts (*s*) which followed much prior discussion [* 388] as to the true theory of descent in so remote a case as the exhaustion of all male paternal ancestors, and their lineal descendants.

The effect of it is that the mother of the remotest male paternal ancestor shall inherit before the mother of the purchaser, and before the mother of any nearer paternal ancestor. It will be observed from this, that, unless on tracing the ascending line of male paternal ancestors, an ancestor is reached who was *filius nullius* or a bastard, it can never be absolutely shown that a mother or any other female ancestor is, as such, the heir. For unless it be assumed that there is no descendant living from any one of the persons who occupied the ascending line from father to father up to the commencement of the world, no female ancestor can as such inherit. Yet, since every paternal ancestor must have had a father, who must also have had a father, and so on, it is incredible but that from some one of these successive persons there should be living descendants could they be discovered.

* Although, therefore, the father, and after him the brothers and sisters and half brothers and sisters, children of the father, are [* 389] very near in the line of succession, yet it is next to impossible that the mother or half brothers or sisters children of the mother should ever inherit.

Whether, therefore, the rules of inheritance as now fixed by law are in all respects satisfactory, may be doubted.

Having regard to these rules of succession, and to the fact, which the experience of most persons will illustrate, of the extreme difficulty of tracing the complete history of a family through more than two generations, we may

(*q*) It was, however, always presumed that a person was of the whole blood until the contrary was shown. Kitch. 225 a; Plowd. 77 a; Trin. 19, H. 8, pl. ii. 6; Watk. Desc. 75, n. a.

(*r*) The words of the sections upon which this is founded are as follows, "That none of the maternal ancestors of the person from whom the descent is to be traced, nor any of their descendants, shall be capable of inheriting, until all his paternal ancestors and their descendants shall have failed; and also that no female paternal ancestor of such person, nor any of her descendants, shall be capable of inheriting until all his male paternal ancestors and their descendants shall have failed; and that no female maternal ancestor of such person, nor any of her descendants, shall be capable of inheriting until all his male maternal ancestors and their descendants shall have failed." Sect. 7.

"That where there shall be a failure of male paternal ancestors of the person from

whom the descent is to be traced, and their descendants, the mother of his more remote male paternal ancestor, or her descendants, shall be the heir or heirs of such person, in preference to the mother of a less remote male paternal ancestor or her descendants; and where there shall be a failure of male maternal ancestors of such person and their descendants, the mother of his more remote male maternal ancestor and her descendants, shall be the heir or heirs of such person in preference to the mother of a less remote male maternal ancestor, and her descendants." Sect. 8.

(*s*) *Davies v. Loundes*, 7 Scott, 22, 56. See the discussions which took place on the point whether the descendant of the parents of the mother of the more remote or less remote paternal ancestor were first entitled, in Watk. Desc. b. 3, s. 3; Orgoode's Remarks on the Law of Descents, 8 Cruise, Dig. 411; 2 Hale, Hist. Com. L. 128, 240, 244.

perceive how hard it is to ascertain with certainty who is the heir of a given person, except he had at the time of his decease relations nearly allied to him by blood.

The accompanying diagram will illustrate the application of the rules which have been enunciated.

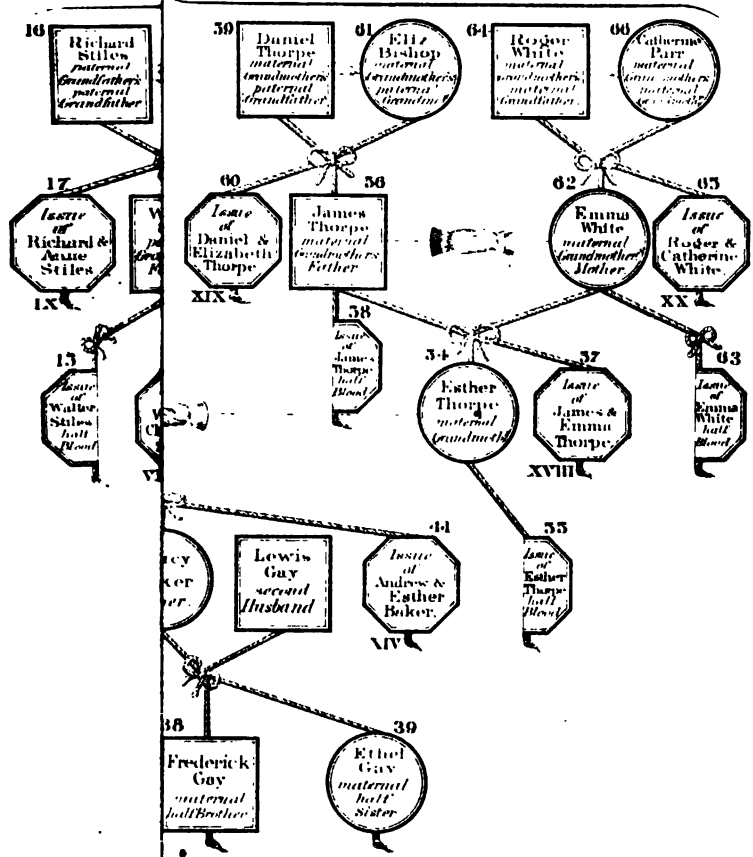
Such a diagram can of course only exhibit the succession in accordance with a particular pedigree; it will however suffice to exemplify the rules which we have laid down, by which in any case when the members of a family are completely known, the true course of descent may be determined.

We will suppose that the purchaser has married twice, and has had a son and a daughter by each marriage; and we will also suppose, in order to introduce all the branches of the pedigree, that the ascending lines of ancestors terminate at the fourth generation. First, then, in the order of succession, stands the eldest son (No. 1), or his issue, if he be dead. If his line be extinct, then his half-brother, the second son of the purchaser, succeeds. We may here notice that had the eldest son been the purchaser, then this step in the descent would have been different: for by the sixth rule the eldest daughter being of the whole blood with the eldest son would have succeeded on her brother's death in priority to the half-brother. If both sons [* 390] and their *issue be exhausted, since the inheritance descends to the heirs of the purchaser, the two daughters, though related to each other by the half-blood, together succeed as coparceners (No. 3). In default of these or their issue, the descent must be traced from the purchaser, all of whose lineal issue are now supposed to be exhausted.

The next heir therefore is, by the third rule, the father (No. 4), who is succeeded in turn by (No. 5) and (No. 6), the elder and younger brothers of the whole blood who, by virtue of the sixth rule, stand next in succession, and after them (No. 7), the sisters, who take like the daughters as coparceners. If now all the brothers and sisters of the whole blood and their issue are exhausted, the inheritance next passes to (No. 9) the children of the father related by the half blood to the purchaser. These, by virtue of the second and sixth rules, take in the order prescribed by the fourth and fifth rules. We may here again notice the effect of the sixth rule, which, as will be seen, modifies or overrides in some respects other rules. Though the descent is now being traced among the lineal descendants of the father, by virtue of the second rule, which declares their right of representation to him, yet inasmuch as the father is not the stock of descent, the descent takes a different course to that which it would have done had the father been the purchaser. For the sisters of the whole blood (No. 7) take in priority to the half-brother (No. 8), whereas had the father been the purchaser, No. 8 would of course by the fourth rule have had priority over No. 7. Upon the failure of all descendants of the father, the inheritance next passes to (No. 10) the grandfather, and through him to (No. 11) the uncles and aunts of the whole blood, and after them to (No. 12) the uncles and aunts of the half blood, the due order of persons, members of these respective classes, being observed.

When all these and their respective descendants are exhausted, the next person in order of succession is (No. 13) the great grandfather, after whom come (No. 14) * and (No. 15) the other issue of the great grandfather [* 391] related to the purchaser by the whole and half-blood respectively; and

Line 1



after them (No. 16) the paternal grandfather's grandfather and (No. 17) his other issue. All the male paternal ancestors and their issue are now supposed to be exhausted. In seeking the next heir we are by the seventh rule directed to take the female ancestor who is the mother of the most remote paternal ancestor in preference to any other, therefore (No. 18) the paternal grandfather's paternal grandmother is the next heir.

In defect of any of her descendants being in existence the paternal grandfather's mother (No. 19) and her issue (No. 20) succeed, who are followed by her father (No. 21) and his other issue (No. 22) in default of whom (No. 23) the mother of No. 19 takes the inheritance.

Having now exhausted all the ancestors both male and female of the paternal grandfather of the purchaser, we are next to seek the maternal ancestors of the father. The paternal grandmother (No. 24) and (No. 25) her issue, related to the purchaser by half blood, therefore next succeed. In default of whom the same succession of her ancestors is traced as in the former case of those of the paternal grandfather's mother. When all these are exhausted we shall have traced the succession through every branch of the paternal half of the pedigree; and then, but not before, does the mother succeed, followed by her children, the brothers and sisters of the half blood of the purchaser. In default of whom or any of their issue the maternal pedigree is to be traced in a like manner as was previously done with the paternal pedigree.

The diagram indicates, by Roman numerals, the order of succession by the common law, that is, according to the rules in force prior to the year 1834.

It may be borne in mind that the order of succession which we have described is the order in which successive persons take the actual possession and enjoyment of the property so long as it devolves in an unbroken line of * descent, that is, so long as there is no dealing by will or conveyance of such a character as to constitute a new purchaser. In the present [* 392] day wills are so common that it is rare to find many successive descents, except perhaps amongst small agricultural owners, with whom it is not altogether uncommon to find several successive owners dying intestate. Before the year 1834, since the descent was traced not from the last purchaser but from the person last actually seised of the estate, a new order of succession had to be observed upon the death of every person in whom the property had vested, since he by his own seisin became the ancestor or *stirpes* from whom the descent had to be traced. On comparing the two series of numbers it will be remarked that the most important variations arise from the former exclusion of lineal ancestors and of relations of the half blood.

[* 393]

* CHAPTER XV.

ESCHEAT.

In the preceding chapter we have seen that, according to the present use of the terms, title by descent is set in opposition to and distinguished from title by purchase. But the law also takes notice of other modes of acquiring dominion over land, and therefore in a sense acquiring or completing a title; these are, as we have seen, escheat, partition, and inclosure. As to partitions, since they only occur where the person who claims title thereunder has previously an estate in joint-tenancy, tenancy in common, or other similar estate, by virtue of which he receives the lands acquired in severalty, and in lieu of his former estate, there is little to add to what has already appeared in our disquisitions concerning those estates. Such further remarks as the subject may require will occur when the forms and ceremonies requisite to the validity of deeds come under our notice. And as to inclosures, the lands which are so acquired become in general subject to all the incidents relating to the title of the lands, in respect of which the allotment is made, and therefore they in a manner do not possess a title of their own further than is indicated by the facts of inclosure and allotment. But we are led here to say somewhat of the third method of acquiring or completing title, which is called escheat. This, like partition and inclosure, is not so much an acquisition by a new title of the lands, as a conversion of that which was a barren seignory—or nearly so—into a practical enjoyment of the lands.

[* 394] * Escheat, we may remember (*a*), was one of the fruits and consequences of feudal tenure. The word itself is originally French or Norman (*b*), in which language it signifies chance or accident; and with us it denotes an obstruction of the course of descent, and a consequent determination of the tenure, by some unforeseen contingency: in which case the land naturally results back, by a kind of reversion, to the original grantor or lord of the fee (*c*).

Escheat.

But it must be remembered that, in order to complete this title by escheat, it is necessary that the lord perform an act of his own, by entering on the lands and tenements so escheated, or bringing an action of ejectment, which action has been substituted for the old writ of escheat, a writ which the legislature has abolished (*d*). Except, indeed, when the seignory is in the crown, in which case there first issues a commission of escheat, and office is found thereby (*e*). If, however, any act is done which amounts to an implied waiver of the lord's right, as the acceptance of homage, or rent of a stranger who usurps the possession, the title by escheat is barred (*f*). The estate in the seignory carries with it as an accessory or part of it, the right to the lands on their escheat, so much so, indeed, that an

(*a*) *Ante*, p. 155.

(*b*) *Eschet*, or *échet*, formed from the verb *eschoir* or *échoir*, to happen.

(*c*) 1 Feud. 86; Co. Litt. 18. See *Burgess v. Wheate*, 1 Eden, 191, 193, 227; 3 Cruise, Dig. 397; *R. v. Wilson*, 5 M. & Ry. 140; *Delacherois v. Delacherois*, 11 H. L. 62.

(*d*) By 8 & 4 Will. 4, c. 27, s. 86.

(*e*) 8 Hen. 6, c. 16; 18 Hen. 6, c. 6; *Doe v. Redfern*, 12 East, 96.

(*f*) Bro Abr. tit. Acceptance, 25; Co. Litt. 268.

incumbrance upon the seignory will bind the lands which accrue to the lord by escheat (*g*), and the inheritance of the escheated lands will be identical with that of the seignory (*h*). Nevertheless, inasmuch as the lands may, without impropriety, be said to be acquired by the lord by reason of the escheat, the law *concerning escheats may with advantage be here considered [* 395] before entering upon the second branch of title, that by purchase.

The law of escheats is founded upon a simple principle, which those who have completely comprehended the system of tenure, which was introduced in the feudal ages, will readily understand. All inheritances are supposed to be the result of a grant by a lord. Originally this grant was to the tenant, and after him to his heirs, who were so far entitled to the benefit of the grant that they could not be deprived of it by any act of their ancestor. Such a grant necessarily reserved to the lord the full dominion over the land if there should be no heirs (*i*), for whenever such a failure took place, there was no person to take under the grant, which therefore ceased to have any operative effect. This theory of grants was considerably broken into by the introduction of the power of alienation, whereby the heirs of the original grantee could be deprived of their hopes of succession in favor of those of the alienee. Nevertheless, this did not affect the right of the lord to an escheat further than this, that the defect of heirs upon which the escheat took place was that of the heirs of the last tenant instead of the heirs of the original grantee.

An escheat therefore takes place when upon the death of a tenant in fee-simple there is no person who can claim title to the land either by descent or devise. This is usually described as being a defect of heirs or *defectum sanguinis*.

But besides this case of *defectum sanguinis*, since a grant is supposed to continue in force only so long as the tenant does not by his conduct prove himself incapable of rendering the services due to the lord; therefore, upon attainder of the tenant, he ceases to be capable of holding his lands. And to this personal incapacity there was *added by the feudal doctrines an [* 396] incapacity to transmit any title, or the blood was said to be corrupted (*k*). Thus the circumstances of an attainder were assimilated to those of a death without heirs on the part of the tenant, and the lands escheated to the lord. The inheritable quality was expunged in one instance, and expired in the other, or, as the doctrine of escheats is expressed in Fleta (*l*), "*dominus capitalis feodi loco hæredis habetur, quoties per defectum vel delictum extinguitur sanguis tenentis.*"

The law of escheat is not permitted to create an injustice towards those who have acquired any right in the lands. Therefore any partial estate, as for years or for life, which may have been validly created by any tenant, will hold good against the lord after the escheat. Again, a will duly executed by the last tenant in fee, as it would have defeated both his heir and the heir of the purchaser, had there been any, will also defeat the lord's title by escheat. Moreover, the lands will be assets in the hands of the lord for payment of the

(*g*) 1 Roll. 402; *Burgess v. Wheats*, 1 Eden, 191.

(*h*) Co. Litt. 18.

(*i*) *Revertitur terra*, as Bracton says in describing an escheat, lib. 2, fo. 28.

(*k*) Co. Litt. 18, 92.

(*l*) L. 6, c. 1. See Sir T. Clarke's description of Escheats in *Burgess v. Wheats*, 1 Eden, 191.

debts of the last tenant (*m*), to be administered in chancery. And an incumbrance which has been created by the tenant will have effect given to it against the lord (*n*). The legislature has also protected lands vested in a trustee from escheat through failure of heirs or attainder of the trustee (*o*).

Lands vested in a trustee do not escheat.

We must take care to distinguish escheat from forfeiture to the crown, which takes place, as we shall see presently, under some circumstances closely resembling those of escheat. In order satisfactorily to illustrate the doctrine of escheat, we will consider in order the several cases in which it now takes place.

[* 397] * The first case, which is where inheritable blood is wanting upon the death of a tenant, may be collected from the rules of descent laid down and explained in the preceding chapter, from which it is apparent that an escheat takes place where there is neither an heir to the last purchaser of the lands nor to the person last entitled. This combination of wants can rarely happen except where the purchaser is himself the person last entitled, and dies without an heir. We may notice, however, that the law has not provided for the case (a possible one, though so improbable that it hardly can be believed it will ever happen (*p*)), of both the purchaser's heirs failing, as also those of the person last entitled, and yet there being heirs of a person who had enjoyed the property by descent from the purchaser and prior to the person last entitled.

A few particular instances of defect of heirs may be here adduced, rather in exemplification of those doctrines which we have already stated than in addition thereto. A monster, not having the shape of mankind, but in any part evidently bearing the resemblance of the brute creation, has no inheritable blood, and cannot be heir to any land, even though it be brought forth in marriage: but, although it hath deformity in any part of its body, yet, if it has human shape, it may be heir (*q*). This is a very ancient rule in the law of England (*r*); and its reason is * too obvious, and too shocking, to [* 398] bear a minute discussion, which, moreover, is unnecessary, since such *lusus naturæ* can rarely occur. The Roman law agrees with our own in excluding such births from successions (*s*), yet accounts them, however, children in some respects, where the parents, or at least the father, could reap any advantage thereby (*t*); (as the *jus trium liberorum*, and the like); esteeming them the misfortune, rather than the fault, of that parent. But our law will

(*m*) Under 3 & 4 Will. 4, c. 104.

(*n*) *Hodge v. A.-G.*, 3 Y. & Coll. Exch. c. 342, where however the court refused to order a sale as against the crown. See *Casberd v. A.-G.*, 6 Price, 411.

(*o*) 18 & 14 Vict. c. 60, in effect re-enacting 4 & 5 Will. 4, c. 23, ss. 15, 46. It applies also to forfeitures.

(*p*) The case might happen where the purchaser was the only child of a bastard father and bastard mother; his father married as a second wife a legitimate person, by whom he had a son A.; and afterwards married a third wife, a bastard, by whom he had a son B. After the purchaser's death, the order of succession would be, 1st, the father; 2nd, A. (who enters and dies without issue); 3rd, B.; on B.'s death without issue there would be the failure of heirs requisite for an escheat, yet A.'s heirs through his mother might be in existence.

(*q*) Co. Litt. 7, 8.

(*r*) *Qui contra formam humani generis converso more procreantur, veluti si mulier monstruosum vel prodigiosum enixa sit, inter liberos non computentur. Partus autem qui membrorum officia ampliavit, ut si sex digitos habeat, vel si quatuor tantum, vel si tantum unum, talis inter liberos connumerabitur.* Bract. l. 1, c. 6, s. 7. *Sed non dico partum monstruosum licet natura membra minuerit vel ampliaverit; minuerit, ut in defectu digitorum, vel hujus modi; ampliaverit, ut si plures digitos vel articulos sicut sex vel plures ubi non debet habere nisi quinque; si inutilia natura reddiderit membra, ut si cæcus fuerit, vel gibbosus, vel membra tortuosa haberit.* Ib. l. v. tr. 5, c. 80, s. 10.

(*s*) Dig. 1, 5, 14.

(*t*) Dig. 50, 16, 185; Paul, 4, sent. 9, a. 68.

not admit a birth of this kind to be such an issue, as shall entitle the husband to be tenant by the curtesy (*u*); because it is not capable of inheriting. And therefore, if there appears no other heir than such a prodigious birth, the land shall escheat to the lord.

Bastards are incapable of being heirs. (323) Bastards, by our law, are such children as are not born either in lawful wedlock, or within a competent time after its determination. Such as are held to be *nullius filii*, the Bastards. sons of nobody; for the maxim of law is, *qui ex damnato coitu nascuntur, inter liberos non computantur* (*x*). Being thus the sons of nobody, they have no blood in them, at least no inheritable blood; consequently, none of the blood of the first purchaser: and therefore, if there be no other claimant than such illegitimate children, the land shall escheat to the lord (*y*). The civil law differs from ours in this point, and allows a bastard to succeed to an inheritance, if after its birth the mother was married to the father, which rule has been adopted in Scotland, France, and other * countries (*z*): and also, if the father had no lawful wife or child, then, even if the [* 399] concubine was never married to the father, yet she and her bastard son were admitted each to one-twelfth of the inheritance (*a*): and a bastard was likewise capable of succeeding to the whole of his mother's estate, although she was never married: the mother being sufficiently certain, though the father is not (*b*). But our law, in favour of marriage, is much less indulgent to bastards, and will not recognize the status of a child thus legitimated for the purpose of inheriting land in England (*c*).

There was, indeed, formerly one instance, in which our law has shown them some little regard; and that is usually termed the case of *bastard eigne* and *mulier puisné*. This happened when a man has a bastard son, Case of bastard eigne and mulier puisné. and afterwards marries the mother, and by her has a legitimate son, who, in the language of the law, is called a *mulier*, or as Glanvil (*d*) expresses it in his Latin *filius mulieratus*; the woman before marriage being *concubina*, and afterwards *mulier*. Now here the eldest son is bastard, or *bastard eigne*; and the younger son is legitimate, or *mulier puisné*. If then the father died, and the *bastard eigne* entered upon his land, and enjoyed it to his death, and died seised thereof so that the inheritance descended to his issue; in this case the *mulier puisné* and all other heirs, (though minors, feme-coverts, or under any * incapacity whatsoever), were totally barred of their right (*d*). But this indulgence was shown [* 400] to no other kind of bastard; for, if the mother was never married to the father, such bastard could have no colourable title at all (*e*). Since the changes in

(*u*) Co. Litt. 29.

(*x*) Co. Litt. 8.

(*y*) Finch, L. 117.

(*z*) Nov. 89, c. 8.

(*a*) *Ib.* c. 12.

(*b*) Cod. 6, 57, 5.

(*c*) *Doe d. Birtwhistle v. Vardell*, 2 Cl. & Fin. 571; *Boys v. Bedale*, 1 H. & M. 799; *Goodman v. Goodman*, 3 Giff. 648. Legitimacy, according to the law of the domicile, as well as according to the law of the place where the land lies, is necessary to entitle an heir. For a child born out of wedlock, of parents

domiciled in England, who afterwards married there, was not allowed to inherit lands in Scotland. 6 Bligh, 468. See 2 Ves. & B. 127. Similar rules are adopted to determine the validity of a divorce and second marriage. *Shaw v. Gould*, L. R. 4 H. L. E. & L. 55.

As to the status of bastards during the middle ages, and on the continent, see Butl. Co. Litt. 243 b.

(*d*) L. 7, c. 1.

(*d*) Litt. s. 399; Co. Litt. 244; *Pride v. Earl of Bath*, 1 Salk. 120.

(*e*) Litt. s. 400.

(323) This subject has been sufficiently noticed. *Ante*, 385, note 173.

the law of inheritance, which now gives title to each successor as heir of the purchaser upon every death of a tenant, and since the statute (*f*) which enacted that no descent cast should defeat any right of entry, this privilege of the *bastard eigne* has ceased to exist.

As bastards cannot be heirs themselves, so neither can they have any heirs but those of their own bodies. For, as all collateral kindred consists in being derived from the same common ancestor, and as a bastard has no legal ancestors, he can have no collateral kindred; and consequently, can have no legal heirs, but such as claim by a lineal descent from himself. And therefore, if a bastard purchases land, and dies seised thereof without issue, and intestate, the land shall escheat to the lord of the fee. Though, as we shall hereafter see, it is different if the lands be vested in a trustee (*g*).

Aliens, also, are incapable of taking by descent, or inheriting: for they are not allowed to have any inheritable blood in them. (324)

The law prohibiting aliens from holding land is a rule *stricti juris*, though somewhat relaxed of late, for it was formerly more stringent than it now is. If an alien purchased any estate, unless with the king's licence (*h*), the lands were at once forfeited to the crown, and upon inquisition and office found, the crown might take possession (*i*). It will be noticed that this was not an escheat * to any lord, but a paramount right of the crown, founded, as Spel- [* 401] man says, upon the inconsistency of the tenure of lands by fealty with allegiance to a foreign prince (*j*): or if not resting upon the mere technical grounds of inconsistent oaths, it depends upon analogous principles that the observance of political duties (*k*), if antagonistic in nature, cannot be required from the same persons.

Upon similar principles, then, if the only person who can be a man's heir is an alien, there is no one who can take the lands by descent on the death of such a tenant, therefore the lands escheat to the lord. They are not forfeited, because they never were acquired by the alien.

Formerly, also, the doctrine of an alien possessing no inheritable blood was carried out in its logical consequence to the extent of preventing any one claiming by descent under a pedigree containing an alien ancestor. But it has been enacted (*l*) that all persons, being natural-born subjects of the king, may inherit and make their titles by descent from any of their ancestors, lineal or collateral; although their father, or mother, or

(*f*) 8 & 4 Will. 4, c. 37, s. 39, passed in the same year as the Inheritance Act.

(*g*) *Post*, c. 21.

(*h*) As to the effect of this licence, see 14 Hen. 4, c. 20; Co. Litt. 2 b; Harg. 2.

(*i*) Co. Litt. 2 b.

(*j*) Gloss. *voc*s *Ligeantia*. See Bac. Ab. Alien (C).

(*k*) "That the privileges of aliens born, as touching lands, are *stricti juris*, I prove, — first by the politic grounds why an alien is not capable of inheritance in England. They are given in *Calvin's Case*, 7 Rep. 27. 1. The secrets of the realm might be thereby dis-

covered. 2. The revenues of the realm (the sinews of war) should be taken and enjoyed by strangers. 3. It tends to the destruction of the realm by admitting strangers to fortify in the heart of the kingdom." *Per* Sir O. Bridgman, O. Br. 431. See *post*, p. 448, and Shep. Touch. 282; 4 Leon. 84. See on this subject the very recent report of the Commission on Naturalisation and Allegiance, in which the commissioners recommended the total abolition of an alien's disability as regards holding lands.

(*l*) 11 & 12 Will. 3, c. 6.

(324) See *ante*, 286, note 115. And, in addition to the cases there cited, see, also, *Wilbur v. Tobey*, 16 Pick. 177; *Commonwealth v. Hite*, 6 Leigh, 588; *Barbour v. Nelson*, 1 Lit. 60; *Montgomery v. Donrion*, 7 N. H. 475; *Robeck v. Gardner*, 7 Watts, 455; *White v. White*, 2 Metc. (Ky.) 185; *Hinkle v. Shaddon*, 2 Swan. (Tenn.) 46; *O'Hanlin v. Den*, 20 N. J. 81; *Farrar v. Dean*, 24 Mo. 16; *People v. Folson*, 5 Cal. 373; *Puckett v. State*, 1 Sneed, 355; *Colgan v. McKeon*, 4 N. J. 566.

other ancestor, by, from, through, or under whom they derive their pedigrees, were born out of the king's allegiance. Inconveniences were afterwards apprehended, in case persons should thereby gain a future capacity to inherit, who did not exist at the death of the person last seised. As, if Francis the elder brother of John Stiles be an alien, and *Oliver the younger be a natural-born subject, upon John's death without issue his lands will [* 402] descend to Oliver the younger brother: now, if afterwards Francis has a child born in England, it was feared that, under the statute of king William, this new-born child might defeat the estate of his uncle Oliver. Wherefore it is provided by a later statute (*m*), that no right of inheritance shall accrue by virtue of the former statute to any person whatsoever, unless they are in being and capable to take as heirs at the death of the person last seised: — with an exception, however, in the case where lands shall descend to the daughter of an alien; which descent shall be divested in favour of an after-born brother, or the inheritance shall be divided with an after-born sister or sisters, according to the usual rule of descents by the common law.

Again, by another act, a man whose mother was a natural-born subject is, even though he be born out of the English dominion of an alien father, capable of taking lands (*n*); and we may add also, that an alien subject of a friendly state may, whilst residing in any part of the United Kingdom, hold lands for the purpose of residence or business for any term not exceeding the limit of twenty-one years (*o*).

We come now to the effect of the attainder (*p*) of a * tenant of lands for treason or other felony; and here we must again carefully distinguish [* 403] between forfeiture and escheat. Forfeiture of lands, and of whatever else the offender possessed, was the doctrine of the old Saxon law (*q*), as a part of punishment for the offence; and does not at all relate to the feudal system, nor is it the consequence of any seignory or lordship paramount (*r*): but, being a prerogative vested in the crown, was neither superseded nor diminished by the introduction of the Norman tenures; a fruit and consequence of which, escheat must undoubtedly be reckoned. Escheat therefore operates in subordination to this more ancient and superior law of forfeiture, which is that upon attainder for treason the freehold lands held in fee-simple or fee-tail are forfeited absolutely and for ever: in the case of any other felony, for the term of the felon's life, or a year and a day, which ever is the longer period (*s*). (325) We

(*m*) 25 Geo. 2, c. 30.

(*n*) 7 & 8 Vict. c. 66, s. 3.

(*o*) *Ib.* s. 5. Under this act, which amends the former acts, 13 & 13 Will. 3, c. 2; 1 Geo. 3, c. 2; 1 Geo. 1, sess. 2, c. 4; 14 Geo. 3, c. 84; all the rights of a natural-born subject (except those of becoming a member of Parliament or of the Privy Council) may be acquired by any alien who will take an oath of allegiance. A certificate of naturalisation granted under the act confers these rights. The whole law as to aliens will probably soon be altered.

(*p*) A person was held to be attainted on whom sentence of death was passed; but

the death of a person killed in open rebellion, found and recorded by the chief justice of the Queen's Bench, produced the effect of an attainder.

"*Dicitur etiam aliquando de criminibus non felonibus, ut, attinctus perjurii, vel mutilationis membrorum alterius; et frequenter apud vet. proconvicto.*" Spelm. Gloss. vocs. *Attinctus*. So, in the stat. Gloster, 6 Ed. 1, c. 6, "attainted of waste."

(*q*) LL. Aelfred. c. 4; LL. Canut. 54.

(*r*) 2 Inst. 64; Salk. 85.

(*s*) 2 Inst. 36. "Various cases are laid down in the Assises de Jérusalem, where the vassal forfeits his lands for a year, for his

(325) In the United States there is no forfeiture of estates except for treason. "The congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood, or forfeiture, except during the life of the person attainted." Const. U. S., art. 3, § 3. See 4 Kent's Com. 427, 428.

may remark, however, that copyhold lands were never held to be forfeited to the crown even for high treason (*t*).

The doctrine of escheat upon attainder, taken singly, was, prior to the recent alterations in the law, this: that the blood of the tenant, by the commission of any felony, (under which denomination all treasons were formerly comprised (*u*)), was held to be corrupted and stained, and the original donation of the feud thereby determined, it being always granted to the vassal on the implied *condition of *dum bene se gesserit*. Upon the thorough [* 404] demonstration of which guilt, by legal attainder (*x*), the feudal covenant and mutual bond of fealty are held to be broken, the estate instantly falls back from the offender to the lord of the fee, and the inheritable quality of his blood is extinguished and blotted out for ever. This law of feudal escheat was adopted in England after the conquest; and in general superadded to the ancient law of forfeiture. And as the consequence of this corruption and extinction of hereditary blood, the land of all felons would immediately revert in the lord, but that the superior law of forfeiture intervenes, and intercepts it in its passage for such periods as we have mentioned; subject to which it goes to the lord in a regular course of escheat (*y*), as it would have done to the heir of the felon in case the feudal tenures had never been introduced. And that this is the true operation and genuine history of escheats will most evidently appear from this incident to gavelkind lands (which seems to be the old Saxon tenure), that they are in no case subject to escheat for felony, though they are liable to forfeiture for treason (*z*).

As a consequence of this doctrine of escheat, all lands of inheritance immediately reverting in the lord, the wife of the felon was liable to lose her dower, till the statute 1 Edw. 6, c. 12, enacted, that albeit any person Dower. be attainted of misprision of treason, murder, or felony, yet his wife shall enjoy her dower. But she has not this indulgence where the ancient law of forfeiture operates; for it is expressly provided by the statute 5 & 6 Edw. 6, c. 11, that the wife of one attaint of treason shall not be endowed at all (*a*).

* In addition to this forfeiture and escheat of the lands vested in [* 405] the offender at the time of the commission of his crime, the ancient law superadded a further rule, deduced from the same doctrine of corruption of blood, which, though not affecting the rights of the crown by forfeiture, was most important in connection with escheats. For the ancient Norman lawyers held that since the blood of the offender was corrupted no person could claim any inheritance through him. Thus if a father was seised in fee, and the eldest son committed a felony and was attainted, and the father died,

life, or for ever. But under rapacious kings, such as the Norman line in England, absolute forfeitures came to prevail, and a new doctrine was introduced, the corruption of blood, by which the heir was effectually excluded from deducing his title at any distant time through an attainted ancestor." Hallam, *Mid. Ages*, vol. i. p. 127. The doctrine has been modified by recent legislation, as we shall see. *Post*, p. 406.

(*t*) 1 Sid. 435; 2 Vent. 88.

(*u*) 3 Inst. 15; stat. 25 Edw. 3, c. 2, s. 12.

(*x*) In some cases by special custom of the

manor copyhold lands escheat to the lord on conviction of felony without attainder: *R. v. Willes*, 3 B. & Al. 510.

(*y*) 2 Inst. 86.

(*z*) Somner, 53; Wright, Ten. 118.

(*a*) "Or of any other treasons whatsoever they be," s. 18; the wife therefore was barred by the attainder of her husband for petit as well as high treason, but not for any murder or other felony. See Co. Litt. 87 a; Staundf. 195 b. But the crime of petit treason has since been abolished. Stat. 9 Geo. 4, c. 81, s. 2.

living the offender, neither the latter or any other person could claim; nor if the son died in the lifetime of his father, leaving issue, could the grandson claim as heir. In such cases the lands escheated (*b*) for the son could not inherit, and during his life no other person could be heir, and in the second case the grandson could not inherit since his claim was extinguished by the corruption of blood. This extension of the doctrine was a refinement upon the ancient law of feuds, which allowed that the grandson might be heir to his grandfather, though the son in the intermediate generation was guilty of felony (*c*).

Such was the law of England, which prevailed from the period of the full establishment of feudal laws until recently, although the harshness which such rigorous rules often occasioned to innocent individuals, has been so far recognised for the last three centuries, that in most (if not all) of the new felonies created by parliament since the reign of Henry VIII., it was declared, that they should not extend to any corruption of blood: and by the statute 7 Anne, c. 21, (the operation of which was postponed by the statute 17 Geo. II., c. 39), it was enacted, that after the death of the late Pretender, and * his sons, no attainder for treason should extend to the disinheriting any heirs, nor the prejudice of any person, other than the offender [* 406] himself. These last provisions, indeed, were repealed by a later act (*d*), but a general remedy for the hardship which was felt in these cases has been provided by an act passed early in the present century (*e*), by which it is enacted that no attainder for felony, except high treason, petit treason (since abolished), or murder, shall extend "to the disinheriting of any heir, or to the prejudice of the right or title of any person or persons, other than the right or title of the offender or offenders during his, her, or their natural lives only, so that it shall be lawful to every person or persons to whom the right or interest of any lands, tenements, or hereditaments after the death of any such offender or offenders should or might have appertained, if no such attainder had been to enter into the same" (*f*). Formerly, if the legal estate, which was vested in a trustee, escheated, or was forfeited, the lord or the crown took the lands discharged of the trust (*g*), this law, which, in modern times at least, was an obvious injustice, has we have seen been remedied by statute (*h*).

We may notice that by the ancient rules of law, the descent from one brother to another was considered immediate (*i*), and not through the father; therefore the attainder of a common ancestor was no bar to heirship between brothers, and it seems to have been immaterial * whether they were born before or after the attainder (*k*) of their father. So between cousins, the [* 407] attainder of their common grandfather could not affect the claim of one to be

(*b*) Co. Litt. 18.

(*c*) Van Leeuwen in 2 Feud. 81.

(*d*) 39 Geo. 3, c. 98.

(*e*) 54 Geo. 3, c. 145. As to the effect of attainder for treason on a title or dignity, see *The Braye Peerage Case*, 8 Scott, 108.

(*f*) 54 Geo. 3, c. 145. It would seem that a will made before the commission of the offence would pass the lands, so that on the death of the offender the devisee would be entitled, where the attainder is for any other than the excepted offences.

(*g*) *Burgess v. Wheate*, 1 Ed. 208; Harg. Co. Litt. 18 a; 2 Myl. & K. 348.

(*h*) *Ante*, p. 896.

(*i*) *Hobby's Case*, or *Borester v. Adams*, Noy. 168; 4 Leon. 5; Palm. 19; *Collingwood v. Pace*, 1 Vant. 418; Sid. 193; O. Bridg. 410 (which was upon the analogous case of alienage.)

(*k*) *Foster v. Ramsey*, 2 Sid. 23, 51, 148; *Kynnuird v. Leslie*, L. R. 1 C. P. 389.

heir of the other (*l*). The reasoning which was held in these cases to be decisive in favour of the claim, viz., that the heirship was not—though the relationship was—traced through the common ancestor, would now, since the alteration in the law of inheritance (*m*), whereby descent is to be traced through the common ancestor, have the effect of creating an escheat in such cases as these, were it not that an important alteration in the law of corruption of blood was at the same time made by the legislature, for by the same act it is (*n*) declared that where a descent has to be traced from the purchaser, through a person who having been attainted has died before the descent took place, the attainder shall not prevent the person from inheriting the land, who would have inherited the same had there been no such attainder (*o*).

Descent may be traced through an attainted person.

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* CHAPTER XVI.

TITLE BY PURCHASE, AND FIRST BY OCCUPANCY.

WE come now to consider, the several modes of acquiring title included in the second division of the subject, all of which come under the general denomination of purchase.

Purchase, *perquisitio*, taken in its largest and most extensive sense, is thus defined by Littleton (*a*): the possession of lands and tenements, which a man has, by his own act or agreement, and not by descent from any of his ancestors or kindred. In this sense it is contra-distinguished from acquisition by right of blood, and includes every other method of coming to an estate, but merely that by inheritance: wherein the title is vested in a person not by his own act or agreement, but by the single operation of law (*b*).

What we call purchase, *perquisitio*, the feudists called conquest, *conquaestus*, or *conquisitio* (*c*): both denoting any means of acquiring an estate out of the common course of inheritance. And this is still the proper phrase in the law of Scotland (*d*): as it was among the Norman jurists, who styled the first purchaser (that is, he who brought the estate into the family which at present owns it) the conqueror or *conqueror* (*e*). Which seems to be all that was meant by the appellation which was given to William the Norman, when his manner of ascending the * throne of England [* 409] was, in his own, and his successors' charters, and by the historians of the times, entitled *conquaestus*, and himself *conquaestor* or *conquisitor* (*f*); signifying that he was the first of his family who acquired the crown of England, and from whom therefore all future claims by descent must be derived: though now, from our disuse of the feudal sense of the word, together with the reflection on his forcible method of acquisition, we are apt to annex the

(*l*) *Kynnaird v. Leslie*, L. R. 1 C. P. 389.

(*m*) 3 & 4 Will. 4, c. 106, s. 5.

(*n*) Sect. 10.

(*o*) As to the former rule, see Co. Litt. 13 a.

(*a*) S. 12.

(*b*) Co. Litt. 18.

(*c*) Craig. l. 1, t. 10, s. 18.

(*d*) Dalrymple, of Feuds, 210.

(*e*) Gr. Coustum. Gloss. c. 25, p. 40.

(*f*) Spelm. Gloss. 145.

idea of victory to this name of conquest or conquisition: a title which, however just with regard to the crown, the conqueror never pretended with regard to the realm of England; nor, in fact, ever had.

Purchase, indeed, in its vulgar and confined acceptation, is applied only to such acquisitions of land, as are obtained by way of bargain and sale, for money or some other valuable consideration. But this falls far short of the legal idea of purchase; for, if I give land freely to another, he is in the eye of the law a purchaser (*g*); and falls within Littleton's definition, for he comes to the estate by his own agreement, that is, he consents to the gift (*h*). A man who has his father's estates settled upon him in tail, before he was born, is also a purchaser; for he takes quite another estate than the law of descents would have given him. Again, if the ancestor devises his estates to his heir, such heir shall take by purchase to all intents and purposes (*i*).

* If in the limitations of a deed, an estate (preceded by other partial interests) be given to the heir of A., a living person, A. takes no estate, but if he dies during the continuance of the preceding estate, his heir takes as a purchaser, being, in fact, *persona designata*; but this remainder is of course contingent because, if A. be still alive when the prior estates determine, there is no *persona designata*, to take the remainder. In such a case the heir who takes the land is a purchaser in all respects, except that the subsequent devolution by descent will be regulated as if A. had been the purchaser (*k*).

We have already discussed the rule of construction (*l*) by which if an estate be limited to the heirs of A. by an assurance under which he already has taken an estate for life, the heir, if he ever takes the estate at all, takes it by descent from A., and not by purchase, for the word "heirs" so used merely has the effect of enlarging the previously created estate for life into an absolute disposable fee-simple. This rule arose from the consideration that, had it been otherwise, had the heir (who is uncertain till the death of the ancestor) been allowed to take as a purchaser originally nominated in the deed, as must have been the case if the remainder had been expressly limited to Matthew or Thomas by name; then, in the times of strict feudal tenure, the lord would have been defrauded by such a limitation of the fruits of his seignory, arising from a descent to the heir. The present effect, that of *giving A., the ancestor, complete power over the property, did not arise in those times when alienation was not practised.

(*g*) Co. Litt. 18.

(*h*) In *Plowd. 11*, Saunders, *arguendo*, says, that a man may have land not by descent, that is, by purchase, in three ways, by bargain or gift for money, by gift without any recompense, and by way of remainder. The title of a devisee of freeholds, or of an executor or administrator to leaseholds, or of an assignee in bankruptcy or insolvency, comes under the description of a title by purchase, since, in none of these cases, can the title arise without the consent, and to some extent, the act of the party.

(*i*) See *Strickland v. Strickland*, 10 Sim. 374. The rule was formerly different as to this, it being held that if a man devised land to his heir, the heir took it, not as devisee,

but under his earlier title of heir. 1 Roll. Abr. 626. This rule was abrogated by the Inheritance Act, 8 & 4 Will. 4, c. 106, s. 8. Even before that act, if the devise to the heir gave him a different estate to that which he would have taken by descent, he took under the devise. (Lord Raym. 728.) The origin of the old rule of law seems to have been similar to that stated in the text as the ground of the rule in *Shelley's Case*, viz., the advantage of the lord. An heir who is made devisee may now disclaim the devise and take as heir, though such a course is never adopted, since no advantage can arise from it.

(*k*) This was so enacted by 8 & 4 Will. 4, c. 106, s. 4.

(*l*) *Ante*, p. 330.

The importance of the distinction between the acquisition of an estate by purchase and by descent principally consists in this:—that the future devolution upon intestacy of the tenant is governed by different rules. Of this we have said enough.

There is also occasionally an importance in reference to the liability of an estate, to the engagements of those of whom the owner is heir; for in the case we have suggested, of a gift to A.'s heir, when A. takes no estate and therefore the heir takes by purchase, although the estate will afterwards descend as if A. had been the purchaser, it will not be liable in the hands of successive owners, for A.'s engagements (*m*).

This is the legal signification of the *perquisitio* or purchase, and in this sense it includes the following methods of acquiring titles to estates: 1. Occupancy; 2. Prescription (to which may be added the title acquired under the Statutes of limitations); 3. Forfeiture; 4. Alienation.

Of all these in their order.

Occupancy is the taking possession of those things, which before belonged to nobody. (326) We have already discussed its connection with the foundation of property, or of holding those things in severalty, which, by the law of nature, unqualified by that of society, were common to all mankind. But, when once it is agreed that everything capable of ownership shall have an owner, natural reason suggests that he who first declares his intention of [* 412] *appropriating anything to his own use, and, in consequence of such intention, actually takes it into possession and adopts a course of action grounded upon that fact, shall thereby gain the absolute property of it; according to that rule of the law of nations, recognised by the laws of Rome (*n*), *quod nullius est, id ratione naturali occupanti conceditur*.

This right of occupancy, so far as it concerns real property (and of this only we are now treating, the title to personal chattels being reserved for a later place), has but little application in English law. The only instance, in fact, in which it ever has been admitted was that which we noticed in discussing the nature of an estate *pur autre vie*, and, as we there saw, the general doctrine of occupancy by which persons wholly strangers to the property acquired title has ceased to exist. And the persons who still acquire title as special occupants are, in fact, those very persons who, according to rules of descent applicable to other cases, would also acquire title.

There are some cases, where the laws of other nations give a right by occupancy, as in lands newly created, by the rising of an island in the sea or in a river, or by the alluvion or dereliction of the waters; but in these instances the law of England assigns them an immediate owner. Bracton tells us (*o*), that if an island arise in the middle of a

New lands forming in the sea, rivers, &c.

(*m*) It will be remembered that the recent improvements in the law render every estate, whether descended or devised, liable in the hands of the heir or devisee to all the engagements of the person from whom it descended or by whom it was devised. 8 & 4 Will. 4, c. 104, extended this liability for the first time to meet the claims of simple contract creditors.

(*n*) Dig. 41, 1, 8.

(*o*) "*Habet etiam locum eadem species acces-*

sioni in insula nata in flumine; quæ si quidem mediam partem fluminis teneat, communis est eorum qui qua indiviso ab utraque parte fluminis prope ripam prædia possident, pro modo latitudinis cujuscunque fundi quæ latitudo prope ripam sit; quod si alteri parti proximior sit, eorum est tantum qui ab ea parte prope ripam prædia possident." Lib. 2, c. 2; see Inst. lib. 2, tit. 1, s. 22, from which Bracton seems to have adopted the above passage almost verbatim.

river, it belongs in common to those who have lands on each side thereof; but if it be nearer to one bank than the other, it belongs to him who is proprietor of the nearest shore. The first part of this *statement hardly represents the exact rule in this case, for it is now well settled (*p*) that [* 413] the soil or alveus of non-navigable rivers is not the common property of the riparian proprietors, but each is entitled in severalty *ad medium filum aquæ* (*q*), and this right of property which, whilst the land continues covered with the water is subject to the rights of water belonging to other riparian proprietors, becomes an absolute right when the stream is from any cause permanently diverted. Therefore it would seem that the island mentioned by Bracton as rising in the middle of the stream would belong not to the riparian owners in common, but a part of it to each of them in severalty, the shares being separated by the line which previously was the middle line of the water. Bracton's statement was copied from the civil law, which apparently did not adopt the principle of several private property in the soil of the river (*r*).

If the course of the river be changed by a sudden and violent flood or other similar means, so that a riparian owner loses suddenly his land, it would seem that though his land has become part of the alveus, yet he has not lost his right of recovering it by any works which he may erect to keep out the river, whatever may be the consequences of such works to the opposite owner (*s*).

*The channels of navigable rivers are, as has been already remarked (*t*), public highways, and the soil is presumably in the [* 414] crown (*u*). In such cases the same principles apply to give the crown the relict land.

So, also, when the alveus or soil of the river belongs to a subject not a riparian owner, as sometimes happens where a several fishery is claimed (*x*), any eyott or litle island which may be formed in the river becomes the property of him to whom the alveus belongs. However, in case a new island rise in the sea, though the civil law gives it to the first occupant (*y*), yet ours gives it to the king (*z*); and, we may add, that when a new country is thus acquired by occupancy, the laws of England as existing at the period of such occupancy

(*p*) *Bickett v. Morris*, L. R. 1 H. L. Sc. 47.

(*q*) *Ante*, p. 87; and see *Wishart v. Wyllie*, 1 Macq. 389.

(*r*) *Ille alveus quem sibi flumen fecit etsi privatus antea fuit incipit tamen esse publicus.*" Dig. 43, 12, 1, 7. The rule as to islands in a river referred to above (Inst. 2, 1, 22) immediately follows the rule that islands rising in the sea become the property of the first occupant, and the proprietary given seems to be that of a special occupant.

(*s*) Having regard to the new established doctrines as to the ownership of the alveus in non-navigable rivers and the rights incident to such ownership, it is conceived that this would be the law; as to these rivers, there is a case cited in Callis, 51, from the 22 Lib. Ass. pl. 93, which seems to bear out the views expressed in the text. "The case was, that a river of water did run between two lordships, and the soil of one side, together with the river of water, did wholly belong to one of the said lordships, and the river by litle and litle did gather upon the soil of the other lord, but so slowly, that if one had fixed his eye a whole day thereon together, it could

not be perceived. By this petty and imperceptible increase, the increasement was got to the owner of the river, but if the river by a sudden and unusual flood had gained hastily a great parcel of the other lord's ground, he should not thereby have lost the same; and so of petty and unperceivable increasements from the sea, the king gains no property, for '*de minimis non curat lex*.'"

(*t*) *Ante*, p. 108.

(*u*) *Williams v. Wilcoz*, 8 Ad. & E. 314; Hale, De Jure Maris, Part 1, c. 2, where the presumption is stated to extend only to the highest point reached by the flow of the tide; but the case of *Lord Advocate v. Hamilton*, 1 Macq. 46, seems to extend the presumption to all parts of a navigable river. A person claiming to be owner must therefore claim under a grant from the crown, either express or presumed.

(*x*) *Smith v. Kemp*, Salk. 637; *ante*, p. 108.

(*y*) Inst. 2, 1, 18.

(*z*) Bract. 1. 2, c. 2 (where that author, in mistaken support of the doctrine, states our law to be the same as that of the civil law); Callis, 22; Hale, De Jure Maris, 17.

accrue to the new acquisition (a). (327) And as to lands gained from the sea, either by alluvion, by the washing up of sand and earth, so as in time to make *terra firma*; or by dereliction, as when the sea shrinks back below the usual water-mark; in these cases the law is held to be, that if this gain be by little and little, by small and imperceptible *degrees, it shall go to the [* 415] owner of the land adjoining (b). For *de minimis non curat lex*: and, besides, these owners being often losers by the breaking in of the sea, or at charges to keep it out, this possible gain is therefore a reciprocal consideration for such possible charge or loss. But, if the alluvion or dereliction be sudden and considerable, in this case it belongs to the king; for, as the king is lord of the sea, and so owner of the soil while it is covered with water, it is but reasonable he should have the soil, when the water has left it dry (c). So that the quantity of ground gained, and the time during which it is gaining, seem to determine whether it is the king's or the subject's property. In the same manner, if a river, running between two lordships, by degrees gains upon the one, and thereby leaves the other dry, the owner who loses his ground thus imperceptibly has no remedy (d). (328)

(a) *Dutton v. Howell*, Show. 32.

(b) 2 Roll. Abr. 170; Dyer. 326; see Schultes, Aquatic Rights, 115; *In re Hull and Selby Railway*, 5 M. & W. 327. Such a gain and loss happens on the east coast of England not unfrequently. The coast of Norfolk loses considerable land annually, whilst the coast of Essex gains. See Lyell, Principles of Geol. bk. 2, pt. 1, c. 6.

(c) Callis, 24, 28; Com. Dig. Prerog. D. 61; Bac. Ab. Prerog.; *R. v. Lord Yarborough*, 8 B. & C. 91; 5 Bing. An owner of land bordering on the sea may erect any works so as to protect the land from the encroachment of the sea. *R. v. Pagham Commissioners*, 8 B. & Cr. 355. On a river, whether navigable (*A.-G. v. Lord Lonsdale*, L. R. 7 Eq. 377) or not (*Rickett v. Morris*, L. R. 1 H. L. Sc. 47), such buildings must not encroach on the alveus. *Farquharson's Case*, 7 Morr. Dict. 13, 787.

(d) *Supra*, note (b); and see *A.-G. v. Lord Lonsdale*, L. R. 7 Eq. 37. "*Per alluvionem autem id videtur adjici quod ita paulatim adjicitur, ut intelligere non possimus quantum quoque momento temporis adjiciatur.*" Inst. 2, 1, 20; Pand. xli. 1. A somewhat peculiar case involving the principles here

treated of is now depending in the courts, concerning the manor of Lancing, in Sussex. The river Adur formerly flowed at right angles to the sea, but some time ago the action of the tides began to throw a bank of shingle across its mouth, and along the shore to the east. The effect of this has been that the river, instead of entering the sea, has turned towards the east, and flowed parallel to the shore, having a bank of land between it and the sea, both beds of the river and the bank having formerly been below high water-mark. The question to be determined is to whom the bank belongs, whether to the lord of the manor of Lancing, which manor abuts on the river on the west side, or to the owners of the land on the east side of the river, opposite to the accretion. The first impression of the court seems to have been in favour of the former. The case we refer to is *Lloyd v. Ingram*, which may ultimately be decided by the title acquired through long user. See further, on these principles, Com. Dig. Prerog. D.; Bac. Ab. Prerog.; *R. v. Lady St. John Mildmay*, 5 B. & Ad. 254; *Blewett v. Tregonning*, 3 A. & E. 554; 5 N. & M. 234; 3 B. & A. 862.

(327) How far the laws of England were regarded as in force, or were adopted by the colonies of the States, see *ante*, 88, note 53.

(328) Where an island is newly formed in the middle of a stream running between the lands of two proprietors, it will be equally divided between the two proprietors. *Trustees, etc. v. Dickinson*, 9 Cush. 544, 548. But, if one portion of the island approaches nearer to one side of the stream than it does to the other, the greater part belongs to the owner of the nearer estate, according to its approximation thereto. *Ib.*

If the island be wholly on one side of the bed of the river, the common law gives the whole island, or the bare ground formed in the bed of the river, to the owner of the land on that side of the river. *Ib.*

Alluvion is the addition made to land by the washing of the sea or rivers; and the characteristic of alluvion is its imperceptible increase, which is so slow, gradual and insensible that it cannot be shown at what time it occurred. *Ib.*

The law of alluvions and derelictions, with regard to *rivers is [*416] nearly the same in the imperial law (e); from whence indeed some at least of our determinations seem to have been adopted: but we ourselves, as islanders, have applied them to marine increments; and we have in this as in many other instances given our sovereign the prerogative he enjoys, as well upon the ground of his supreme lordship as also upon the general principle adopted by our law, that whatever has no other owner is vested by law in the king.

(e) See the passage cited in former notes.

In those cases in which the change is so gradual that it cannot be perceived at any one moment of time, the proprietor, whose bank on the river is increased, is entitled to the addition. *Adams v. Frothingham*, 8 Mass. 353; *Halsey v. McCormick*, 18 N.Y. (4 Smith) 147; *Chapman v. Hoskins*, 2 Md. Ch. 485; *Emans v. Turnbull*, 2 Johns. 318; *New Orleans v. United States*, 10 Peters, 662; *Lamb v. Rickets*, 11 Ohio, 811.

Where an island is so formed in the bed of a river not navigable, as to divide the channel and lie partly on each side of the thread of the river, it will be divided between the riparian proprietors on the opposite sides of the river according to the original thread of the river. *Deerfield v. Arms*, 17 Pick. 41, 45. Land formed by alluvion in a river is, in general, to be divided among the several riparian proprietors entitled to it, according to the following rule: Measure the whole extent of their ancient line on the river and ascertain how many feet each proprietor owned on this line; divide the newly-formed river line into equal parts, and appropriate to each proprietor as many of these parts as he owned feet on the old line; and then draw lines from the points at which the proprietors respectively bounded on the old, to the points thus determined as the points of division on the newly-formed shore. *Ib.* This rule is to be modified under particular circumstances; for instance, if the ancient margin has deep indentations or sharp projections, the general available line on the river ought to be taken, and not the actual length of the margin as thus elongated by the indentations or projections. *Ib.* "The effect of that rule is, to give each one a length on the new water-line proportioned to his length on the old water-line, whether the one be longer or shorter than the other." *SHAW*, Ch. J., in *Trustees, etc. v. Dickinson*, 9 Cush. 544, 552, 553. See, also, *People v. Canal Appraisers*, 18 Wend. 855; *O'Donnell v. Kelsey*, 4 Sandf. 202; *Emerson v. Taylor*, 9 Greenl. 44; *Newton v. Eddy*, 23 Vt. 819; *Clark v. Campan*, 19 Mich. 325, 329.

The right to alluvion depends upon the fact of the contiguity of the estate to the river; and before there can be a right to accession or accretion there must be an estate to which the accession can attach; therefore, where accretion is made before a strip of land bordering on a river, the accretion belongs to it, and not to the larger portion behind it, and from which the strip was sold when separated. *Saulet v. Shepherd*, 4 Wall. 502, 508; *Banks v. Ogden*, 2 id. 58, 69.

[*417]

* CHAPTER XVII.

TITLE BY PRESCRIPTION, AND UNDER THE STATUTE OF LIMITATIONS.

A SECOND method of acquiring real property by purchase is that by prescription; as when a man can show no other title to what he claims, than that he, and those under whom he claims, have long used to enjoy it. Concerning customs, or immemorial usages, in general, with the several requisites and rules to be observed, in order to prove their existence and validity, we inquired at some length in the preceding part of these Commentaries (a). At present, therefore, we will merely distinguish between custom, strictly taken, and prescription; and then show what sort of things may be prescribed for, and how the claim may be established.

And, first, the distinction between custom and prescription is this: that custom is properly a local usage, and not annexed to any person, or the possession of any particular property, such as a custom in the manor of Dale that lands shall descend to the youngest son: prescription, on the other hand, is a strictly personal right; as, that A. and his ancestors, or those whose estate he hath, have used time out of mind to have such an advantage or privilege (b). As for example, if there be a usage in the parish of Dale, that all the inhabitants of that parish may run horse races on Ascension Day, or dance, on a certain close within the parish (c), at all times for their recreation, *or draw water from a well in a private person's grounds, or erect booths on fair day (which have been held to be lawful customs (d)), these are strictly customs, for they are applied to the place in general, and not to any particular persons, or annexed to the possession of any particular houses in the place. But if the tenant who is seised of the manor of Dale in fee, alleges that he and his ancestors, or all those whose estate he has in the said manor, have used time out of mind to have common of pasture in such a close, this is properly called a prescription; for this is a usage annexed to the person of the owner of this estate.

We may observe that a custom cannot confer a right to take a profit *à prendre* from a man's land. Therefore a custom for all the inhabitants of a parish to fish in a man's pool and carry away the fish is bad (e), as also is an alleged custom to carry off the sand blown from the sea shore upon a man's close (f). (329)

(a) Vol. i., p. 69, &c.

(b) Co. Litt. 113; 5 N. & M. 308; 1 N. & P. 172; 1 Saund. 340 C. n. e.

(c) If the land over which the right is claimed be in another parish the custom is bad, particularly if it be unrestricted as to the duration of the user. *Sowerby v. Coleman*, L. R. 2 Exch. 96.

(d) *Abbot v. Weekly*, 1 Lev. 176; *Mounsey v. Jemay*, 1 H. & C. 739; 3 *ib.* 486; *Race v. Ward*, 4 E. & B. 702; *Tyson v. Smith*, 9 A. & E. 406.

(e) *Bland v. Lipscombe*, 4 E. & B. 718 n.

(f) *Blewett v. Tregonning*, 3 A. & E. 534;

Padwick v. Knight, 7 Exch. 854. See also *Constable v. Nicholson*, 4 C. B. N. S. 230; *Mills v. Mayor of Colchester*, L. R. 2 C. P. 476. A curious custom has been established in Cornwall called tin-bounding, which seems rather contradictory to the doctrine stated in the text. It is this; that where there are mines under waste land which the owner does not choose to work, any person may mark off a portion of the waste, and if the owner does not work the tin within a year, the boulder has a right to work it, paying a royalty to the owner. Rogers on Mines, 847; *Isimey v. Stocker*, L. R. 1 Ch. 396.

Such claims as these cannot be made in favour of a whole parish, or all the inhabitants of a district, but if made at all must be made in favour of the owner of a particular property, or the heir and representatives of a particular person, and then they depend upon prescription or grant, and not custom. We must also distinguish here * those customs which regulate the rights [* 419] of tenants of a manor; for a claim by copyholders to dig clay or coal out of their copyhold tenements, may be established as holding good throughout the manor (g). This is evidently a custom of a kind different from that which gives a beneficial right to inhabitants generally. Such a custom is in fact merely evidence of the nature of the copyholder's interest (h), under the grant from the lord, and is in fact a species of general prescription in favour of all the tenants by virtue of their copyhold estates (i).

Every prescription, then, must be either in a man and his ancestors, or other predecessors in title (j), or, as the case may be, in a corporation and its predecessors. When the prescription is claimed in respect of the estate to which the claimant deduces title, it is said to be prescribing in a *que estate*.

In considering this mode of acquiring title, we will inquire first, what species of rights may be prescribed for, and secondly, the character and extent of user which is requisite to establish the claim. The latter of which depends to a great extent upon a recent statute.

Firstly, as to the several species of rights which may, or may not, be prescribed for: we may, in the first place, * observe, that nothing but [* 420] incorporeal hereditaments can be claimed by prescription: as a right

What may be prescribed for. No prescription for a castle. or a peerage as annexed to a castle.	of way, a common, &c.; but that no prescription can give a title to lands, and other corporeal substances, of which more certain evidence may be had (k). (330) For a man shall not be said to prescribe, that he and his ancestors have immemorially used to hold the castle of Arundel: for this is clearly another sort of title; a title by corporeal seisin and inheritance, which is more permanent, and therefore more capable of proof, than that of prescription. It has been decided that no claim to sit in parliament for a barony can now exist as annexed to the tenure of a castle and lands (l). But, as to a right of way, a common, light and air, or the like, a man may be allowed to pre-
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(g) *Marquis of Salisbury v. Gladstone*, 9 H. L. 692; *Duke of Portland v. Hill*, L. R. 2 Eq. 765; *ante*, vol. i. p. 72. As to rights claimed by custom by the lord over lands part of the manor, *Blackett v. Bradley*, 1 Best & S. 940, following *Hilton v. Earl Granville*, 5 Q. B. 701.

(h) A copyholder may claim by prescription a common or other profit in the soil of a stranger which is not parcel of the manor. He then claims it on behalf of the lord as customary tenant of the lord. 4 Rep. 81 b; 6 Rep. 60 b; *Day v. Savadge*, Hob. 85; Cro. Elis. 390; Moore, 461; 1 Saund. 349.

(i) Nevertheless it ought to be remarked that it has been held that the Prescription Act, 2 & 3 Will. 4, c. 71 (to be presently noticed), does not apply to such a case. *Hanmer v. Chance*, 84 L. J. Ch. 418.

(j) 4 Rep. 82. Usually the prescription is in respect of some other lands, the title to which carries, as appurtenant to them, the right claimed. There may, however, it seems, be a prescription in gross. *Upton v. Williams*, 6 M. & W. 543, *post*, p. 421, n.

(k) Dr. & St., Dial. 1, c. 8; Finch. 182.

(l) *The Berkeley Peerage*, 8 H. L. 21.

(330) Prescription applies only to incorporeal hereditaments, and does not extend to land or corporeal property; and, therefore, a right of fishing in any water gives no power over the land, nor will *prescription* in any case give a right to erect a building upon another person's land. *Cortelyou v. Van Brundt*, 2 Johns. 857, 862.

So the right to use a saw-mill erected upon the lands of another cannot be established by prescription. *Ferrie v. Brown*, 8 Barb. 105, 109.

scribe; for of these there is no corporeal seisin, the enjoyment will be frequently by intervals, and therefore the right to enjoy them can depend on nothing else but an express grant, or such usage as the law recognises as creating a right. We have in a former chapter (*m*) discussed at sufficient length the nature of easements and those incorporeal hereditaments which may be claimed by prescription. No prescriptive right in the nature of an easement so large as to preclude the ordinary uses of property by the owner of the lands affected will be recognised by law (*n*). A claim may be made by prescription to the exclusive use of a chancel or aisle, or a pew in an aisle, or even in the nave of a church; in such a case it must be shown that the claimant, and those whose estate he has, have always repaired it (*o*). (331)

[* 421] Among things incorporeal, which may be claimed by * prescription, a distinction must be made with regard to the manner of prescribing; that is, whether a man shall prescribe in a *que estate*, or in himself and his ancestors. For, if a man prescribes in a *que estate*, (that is, in himself and those whose estate in certain lands he has), nothing is claimable by this prescription, but such things as are incident, appendant, or appurtenant to lands; for it would be absurd to claim anything as the consequence, or appendix of an estate, with which the thing claimed has no connexion (*p*); but if he prescribes in himself and his ancestors, he may prescribe for anything whatsoever that lies in grant; not only things that are appurtenant, but also such as may be in gross. A difficulty evidently exists in prescribing for a right in gross, such as to take the herbage of a particular field, where the claimant cannot pretend that his own lineal ancestors have always enjoyed the right, and that it has descended from generation to generation. Such a right may be granted, however, and may be prescribed for, the prescription being in the name of the

(*m*) *Ante*, c. 8.

(*n*) *Dyce v. Hay*, 1 Macq. 305; *Jones v. Richards*, 6 A. & E. 530.

(*o*) *Boothby v. Baily*, Hob. 69; *Godolph. Rep.* 137, 150; *Lonsley v. Hayward*, 1 Y. & J. 583; *Buxton v. Bateman*, Sid. 88; *Corven's Case*, 12 Rep. 105; *Churton v. Frowen*, L. R. 2 Eq. 634, in which last case the exclusive use and enjoyment of a chancel or chapel of the parish church at Icklesham was successfully claimed by the lord of the manor.

(*p*) See *Jones v. Richards*, 6 A. & E. 530.

(331) Pews in churches are, in some of the States, declared by statute to be real, in others personal estate. In the absence of such statute they partake of the nature of realty, although the ownership is that of an exclusive easement for special purposes, since the general property in the house usually belongs to the parish or corporation that erected it. 1 Washb. Real Prop. 20, 3d ed.

"A pew holder, or owner, has no legal interest in the church edifice, or in the land on which it stands. The title to it and the right in the land, whatever that right may be, is in the corporation, and the possession is in the trustees. All that the pew-owner has, or can acquire, is the right to occupy the pew during divine worship, which is a qualified interest and one necessarily limited in point of time, for if the building is taken down, or is destroyed by fire, or the pew is destroyed by a necessary alteration in the internal arrangement of the church, the right is gone." *Abernethy v. Society of Church of Puritans*, 3 Daly, 1, 7; *Voorhees v. Presbyterian Church*, 17 Barb. 103; *Freedigh v. Platt*, 5 Cow. 494; *Fassett v. First Parish Church in Boylston*, 19 Pick. 361; *Kimball v. Second Parish*, 24 id. 347; *Wheaton v. Gates*, 18 N. Y. (4 Smith) 404; *Cooper v. Presbyterian Church*, 32 Barb. 222, 226.

A pew-owner, or holder, however, has such an exclusive right to the possession and enjoyment of it for the purposes of public worship, that he may maintain an action against any one who disturbs him in his seat or possession. *Shaw v. Beveridge*, 3 Hill, 26; *O'Hear v. De Goesbriand*, 38 Vt. 593, 611; *Gorton v. Hadsell*, 9 Cush. 508; *Gay v. Baker*, 17 Mass. 435.

grantor (from whom the claimant deduces his title) and his ancestors (*q*). A prescription for a common appurtenant to a manor, or for an advowson or chancel of a church appendant to the manor will be in the *que estate*, viz., that he, and those whose estate in the manor he has, have used to enjoy the common or hold the advowson (*r*).

A prescription cannot be for a thing which cannot be raised by grant. For the law of prescription arose entirely as a means of supplying the loss of a grant, and therefore every prescription presupposed a grant to have existed. It does not, however, follow that every right which may * be sustainable by grant can be sustained by pre- [* 422] scription (*s*). And although the claim is now in most cases supported not by the presumption of a grant, but by virtue of statutory enactment, yet no extension of prescription to cases not formerly admitted has ever been made. Thus, the lord of a manor cannot prescribe to raise a tax or toll upon strangers; for, as such claim could never have been good by any grant, it cannot be good by prescription (*t*). Again, that which arises by matter of record cannot be prescribed for. Therefore, there can be no prescription for the royal franchise of felon's goods and the like. It is difficult to see any good reason for the last rule, which, however, would doubtless be acted upon, from the weight of authority of those from whom we have received it (*u*). Many instances can be found of charters whereby penalties and forfeitures in courts have been granted by the crown to subjects (*x*). It does not seem very clear * why such a charter may not be presumed by pre- [* 423] scription. Again, a royal grant may be presumed of the franchise of a court palatine, and this franchise carries with it the right to the forfeitures, and thus indirectly the right to forfeitures may, as is admitted, be claimed by prescription (*b*).

The franchises conferring the right to treasure trove, waifs, estrays, and the

(*q*) Co. Litt. 122. *Welcome v. Upton*, 6 M. & W. 536; *Potter v. North*, 1 Vent. 383; *Hopkins v. Robinson*, 2 Pollexf. 13; 1 Mod. 74 a; Saund. 324; 2 Leon. 2; which case seems to have decided the disputed point whether *separalis pastura* could be prescribed for against the owner of the soil. See Mr. Hargrave's note, to Co. Litt.

(*r*) *Bailey v. Appleyard*, 3 N. & P. 257; *Churton v. Frewen*, L. R. 2 Eq. 634.

(*s*) *Dyce v. Hay*, 1 Macq. 305.

(*t*) 1 Vent. 887; 5 N. & M. 518; and see *Hilton v. Lord Granville*, 5 Q. B. 701; *Blackett v. Bradley*, 1 Best & S. 940. A toll for anchorage in a port may be claimed if there be some reasonable consideration given for it, such as maintaining a capstan and rope for hauling vessels on to the beach, *Earl of Falmouth v. George*, 5 Bing. 286; or keeping up buoys, *Free Fishers of Whitstable v. Foreman*, L. R. 3 C. P. 578; affirmed, Law Rep. 4 H. L. 266; but not if there be no such consideration, *Gann v. Free Fishers of Whitstable*, 11 H. L. 192.

(*u*) Co. Litt. 114 b. Lord Coke's explanation is that "such franchises and liberties as cannot be seized as forfeited before the cause of forfeiture appear of record, no man

can make a title by prescription, because that prescription being an *usage in pais*, it cannot extend to such things as cannot be seized without matter of record as to the goods and chattels of traitors, felons, &c." This reasoning is not very clear, but it seems to depend upon a tacit assumption that no grant of the general right to take forfeitures in a particular court was ever known, except as forming part of the grant of a county palatine or other court of record, but this is, as we see, not the case.

(*x*) For instance, Edward IV. by charter granted to the corporation of Dover all penalties to be forfeited of all and every the barons in whatsoever courts the same barons should happen to be adjudged. And Charles II. granted to the same corporation all fines, forfeitures, in the courts aforesaid, i. e. apparently any courts of record in the cinque ports. *R. v. Mayor of Dover*, 1 Cr. & M. & R. 726. In which case the power of the crown to make such grants was admitted. See Com. Dig. *Grant v. Prerog.*, 17 Vin. Ab. Prerog. 91.

(*b*) Co. Litt. 114; *Abbot of Strata Marcella's Case*, 9 Rep. 25.

like, and to hold fairs, markets, and other similar franchises, may unquestionably be thus claimed.

We come now to consider the character and amount of user which must be proved in order to establish a claim by prescription. We have already referred to the fact that a recent act (c) has materially altered the law on this point, but not as regards all prescriptive rights, inasmuch as tithes, rents, and services, which, though rarely so claimed, may be claimed by prescription, are expressly excepted from the operation of the act. Moreover it is expressly provided, that any means whereby the claim might be defeated before the passing of the act, other than those specially provided for by the act, are still available in opposing the claim (d), except where the question concerns the use of light which, as before remarked, is specially favoured by the act.

The primary doctrine was, that if a person, and those under whom he claimed, had enjoyed from time immemorial (i.e., ever since A.D. 1189) the user of an incorporeal hereditament, such as an easement, the presumption of a grant of the easement was irresistible and the right was incontestably valid. To prove this uninterrupted user for several centuries was obviously impossible, and was never required by the court, and a less amount of evidence was therefore accepted. If proof were furnished of

Theory of prescription. **Presumption of an ancient grant.** [* 424] * user for a period of about thirty years (or even less (e)), and there was no evidence contrary to the possibility of the existence for six centuries, the jury were directed to find that the user had been, as a fact, enjoyed for the longer period, and thence the right was held to be established. If, however, it were shown that at some period, however remote, so that it was later than A.D. 1189, the right was not enjoyed, then, of course, there was a limit to the period of uninterrupted user, and the jury could not induce the above finding, consequently there was no prescription,—the presumption of an ancient grant was rebutted.

Such was the theory of prescription; but a further step in this doctrine of presumption from a limited amount of evidence was afterwards made by presuming the existence, not of an ancient, but a modern grant; from the proof of user, as of right, in a manner directly adverse to the interests of the landowner, for a period of twenty years, although no evidence whatever of the grant or of it ever having in fact existed was produced (f).

This presumption of a modern grant which was invented principally to meet the difficulty in establishing a prescription when evidence of non-existence of the right at some remote time was produced, was not so convincing as that arising from the more extended period involved in the idea of prescription (though there can hardly be said to be a difference in principle), it was therefore not resorted to if the evidence was sufficient to support a prescription (g): the presumption itself being of a *somewhat forced character, was [* 425] not considered satisfactory, and was unquestionably inconvenient in practice (h).

(e) 2 & 3 Will. 4, c. 71.

(d) Sects. 1, 2.

(e) *Bailey v. Appleyard*, 8 N. & P. 257.

(f) 1 M. & Mal. 400; 2 B. & P. 206; 11 East, 284. This period of twenty years was adopted in analogy to the provisions of the statute of Limitations of James I., but there was no arbitrary rule; enjoyment for a shorter

period, supported by corroborative evidence, might be sufficient; while enjoyment for a much longer period, under less favourable circumstances, might be insufficient to raise the presumption. 6 East, 214; 3 Saund. 175.

(g) *Blewett v. Tregonning*, 3 A. & E. 554; see 584.

(h) 5 N. & M. 818.

To remedy the defects in these methods of acquiring title, the act, which has already (i) been noticed, commonly called lord Tenterden's Act (k) was passed, by which the user which should render a title to an easement indefeasible is defined.

By the first section it is declared that no claim which might lawfully be made at the common law, by custom, prescription, or grant, to any right of common or other profit *à prendre*, except such matters and things as therein specially provided for (meaning right of way or other easements, watercourses, and lights), shall, if it have been uninterruptedly enjoyed by any person claiming right thereto for thirty years, be defeated by showing the commencement of the enjoyment of such rights prior to the period of thirty years. But any other mode of defeating the claim which was before, is to continue to be available for that purpose, except that an uninterrupted enjoyment for sixty years (unless had by consent, expressly given by deed or writing) is to confer an absolute and indefeasible title.

By the next section, when the right claimed is a right of way or other easement, or a watercourse, or the use of any water (l), the above periods of thirty and sixty years are reduced to twenty and forty respectively.

By the third section the claim to the access and use of light for any dwelling-house, workshop, or other building if actually enjoyed, otherwise than by consent or agreement in writing, is made indefeasible after twenty years user (m), any local usage or custom to the contrary notwithstanding. In this case the necessity for proving that the easement had been used as of [* 426] right is dispensed with. But by other sections (n) provision is made to meet the cases where the persons who are interested in contesting the right are incapacitated or only entitled in reversion, and an explanation is given that nothing is to be deemed an interruption unless it is submitted to for a year (o).

It will be seen from the above statement of the act that if the easement be enjoyed under a parol licence extending over the periods of thirty or twenty years (except in the case of light) this fact is sufficient to defeat the claim: for then the user would not be as of right, and so would not come within the act: and a parol licence was always at common law sufficient to rebut the presumption of a grant (p). And where the nature of the right is such that it could not be claimed as of right, the act evidently does not apply, for instance where the claim is to the overflow of water from a canal consequent upon boats passing through the locks of the canal (q).

(i) Vol. i. p. 69.

(k) 2 & 3 Will. 4, c. 71.

(l) As to these words, see *Webb v. Bird*, 81 L. J. C. P. 335; cited *ante*, p. 42.

(m) If the light claimed is of an unusual amount necessary for a particular business, it must be shown that it has been so used and enjoyed for the period of twenty years. *Lanfranchi v. Mackenzie*, L. R. 4 Eq. 421.

(n) Sects. 7 & 8.

(o) Sect. 4. This provision does not apply to the period of twenty years. *Palk v. Skinner*, 18 Q. B. 568. See also *Flight v. Thomas*, 8 Cl & Fin. 231; 3 Per. & D. 442; and if there be any series of interruptions, each for less than a year, the enjoyment will suffice, although it be taken against the will of the owner, who endeavours to interrupt it. *Id.* But

an interruption shorter than a year may have the effect of showing that the enjoyment was not as of right. *Eaton v. Swansea Water Co.*, 17 Q. B. 267. An interruption for a year of the enjoyment of the easement over a part of the servient tenement will prevent the acquisition of the right even though it be acquired over the rest. *Davies v. Williams*, 10 Q. B. 548. As to what is acquiescence in the interruption, see *Bennison v. Cartwright*, 5 Best & S. 1, where it was held not to be necessary to bring an action to prove that the interruption is not acquiesced in.

(p) *Tickle v. Brown*, 4 A. & E. 369; S. C., 6 N. & M. 230, 239.

(q) *Staffordshire, &c., Canal Navigation v. Birmingham Canal*, L. R. 1 H. L. E. & I. 254.

Numerous questions have arisen upon the construction of this act which [* 427] cannot here be conveniently discussed: * they relate principally either to the mode of determining when the various periods of twenty, thirty, forty, and sixty years, are to be deemed to be running (*r*), or to the nature of the user, whether it is as of right within the intention of the act (*s*).

Somewhat analogous to the creation of incorporeal rights by prescription, is the acquisition of a legal title to existing hereditaments, by long enjoyment.

This species of title depends entirely upon statutory enactment, Title under the statutes of limitation. for at the common law, no length of adverse possession seems to have been sufficient to bar the rightful owner, unless the land was actually recovered from him in a real action of a particular form, and he took no steps for reversing the judgment within a year and a day; but various statutes were successively passed for limiting the period for bringing a writ of right, (formerly the ordinary mode of trying the title to real property), which, till the 32 Hen. VIII., was not any certain period before the commencement of the suit, but dated from some historical event fixed from time to time, as, the beginning of the reign of Henry I., the return of king John out of Ireland, the coronation of king Richard I., &c. (*t*). By the stat. 32 Hen. 8, c. 2, the time for bringing a writ of right on the seisin of an ancestor was limited to sixty years from the commencement of the adverse possession; and for a possessory action on an ancestor's seisin, the time was fifty years. No person was to bring a real action, droitural or possessory, on his own seisin, after thirty [* 428] years; and * real actions by remaindermen and reversioners, and avowries and conuzances for rents and services, were limited to fifty years. This statute did not limit a right of entry, or an action of ejectment founded on such right; nor was the time for exercising such right limited by the common law, otherwise than by the somewhat technical operation of a descent cast, discontinuance, or warranty. But the statute 21 Jac. 1, c. 16, while it limited all writs of formedon (*i. e.* real actions by remaindermen, reversioners, or issue in tail) to twenty years, also provided, that no person should make entry into any lands, but within twenty years after his right of entry accrued; with a saving of the rights of persons under disabilities. But actions in which it was unnecessary to allege any seisin, such as actions of dower, escheat, waste, &c.; the action of *quare impedit*, by which the right to an advowson is tried; and suits by lay impropriators for tithes, remained free from any limitation as to time (*u*).

The statute of James I. and the previous statutes of limitation did not declare, that adverse possession for any time should extinguish the title of the rightful owner, but merely limited his right to recover by action or entry; and hence the law of limitation was formerly treated as belonging "*ad ordinatorem litis*," forming a branch of the practice of the courts, rather than a substantive law of real property (*v*); but now that the recent statute (*x*) has

(*r*) *Parker v. Mitchell*, 11 A. & E. 788; *Clayton v. Corby*, 2 Gal. & D. 181; *Richards v. Fry*, 8 Nev. & P. 67; 7 A. & E. 698; *Wright v. Williams*, 1 M. & W. 77; *Ward v. Ward*, 7 Exch. 838; *Ward v. Robins*, 15 M. & W. 237; *Flight v. Thomas*, 8 Cl. & Fin. 231, 242; *Welcome v. Upton*, 6 M. & W. 536; *Cooper v. Hubbuck*, 12 C. B. N. S. 456.

(*s*) *Warburton v. Parke*, 2 H. & N. 64; *Bright*

v. Walker, 1 Cr. M. & R. 211; *Onley v. Gardiner*, 4 M. & W. 496; *Beasley v. Clarke*, 3 Scott, 263; *England v. Wall*, 10 M. & W. 699; *Eaton v. Swansea Water Co.*, 17 Q. B. 267.

(*t*) First Real Prop. Rep. 51; Stat. Westm. 2, c. 46.

(*u*) First Report of R. P. Com. p. 89.

(*v*) See *Don v. Lippman*, 5 Cl. & Fin. 1.

(*x*) 3 & 4 Will. 4, c. 27.

declared (*y*) that lapse of time shall not only bar the forensic remedy, but also shall actually extinguish the right and title of the person out of possession, the law of the limitation of rights to real property belongs more properly to the present division of the work. (332).

The provisions of the statute are too numerous, and its construction in some respects is too difficult, to allow of *more than a general outline of [* 429] its operation being attempted in this place.

The greater part of its provisions are confined to claims to "land" and "rent," words which have a peculiar meaning throughout the act,—the word "land" signifying manors, messuages, and all other corporeal hereditaments, and tithes (not belonging to a spiritual or eleemosynary corporation sole), and also any share, estate, or interest in them or any of them, whether of a free-

(*y*) *Ib.* s. 4.

(332) The subject or question of title to lands by adverse possession has been discussed and examined, as well as described, in a very great number of cases. And it is not practicable to do more in this note than to state the general nature and requisites of a title by adverse possession. Such a possession must be actual, continued, visible, notorious, distinct and hostile, and under a claim of ownership or title in the possessor. It must be *actual*, and, therefore, there must in all cases be an *entry* so that an ouster may be made and an adverse possession begun. *Hawk v. Senseman*, 6 Serg. & Rawle, 21; *Wall v. Shindler*, 47 Mo. 282; *Crispen v. Hannavan*, 50 id. 586; *Dixon v. Cook*, 47 Miss. 220; *Sorber v. Willing*, 10 Watts, 141.

If the land is such as not to admit of residence or improvement, then such use and occupation of it as from its nature it is susceptible of, together with a claim of title or ownership, will be regarded as an actual possession. *Moore v. Thompson*, 69 N. C. 120; *Clancey v. Houdlette*, 39 Me. 451; *West v. Lanier*, 9 Humph. 761, 771.

It must be a *continued* possession; and where the nature of the property is such that there may be a permanent useful improvement of it, the possession must be kept up by actual residence or by continued cultivation or inclosure. *Jackson v. Schoonmaker*, 2 Johns. 230; *Cahill v. Palmer*, 45 N. Y. (6 Hand) 478; *Sloan v. Martin*, 33 Texas, 417; *Pierre v. Fernald*, 26 Me. 436; *Branch v. Doane*, 18 Conn. 238; *Pollard v. Barnes*, 2 Cush. 191. Merely making surveys of the land, cutting wood or timber, occasional occupancy, or the payment of taxes will not be sufficient. *Parker v. Parker*, 1 Allen, 245; *Mayor v. Riddle*, 25 Penn. St. 259; *Cornelius v. Giberson*, 1 Dutch. (N. J.) 33.

It must be *visible*, *notorious*, *distinct*, or definite in its extent. 2 Smith's Lead. Cas. 600 (7th Am. ed.); *Fynlay v. Cook*, 54 Barb. 9, 23; *Bowman v. Lee*, 48 Mo. 335; *Fugate v. Pierce*, 49 id. 441, 447; *Beatty v. Mason*, 30 Md. 409; *Carroll v. Gillion*, 33 Ga. 539; *Dixon v. Cook*, 47 Miss. 330.

It must be *hostile* or *adverse*. *Russell v. Davis*, 38 Conn. 562; *Thomas v. Babb*, 45 Mo. 384; *Cahill v. Palmer*, 45 N. Y. (6 Hand) 478, 484; *Farish v. Coon*, 40 Cal. 33; *Carroll v. Gillion*, 33 Ga. 539; *Beatty v. Mason*, 30 Md. 409; *Baker v. Swan*, 32 id. 355. What facts are sufficient to constitute an adverse possession, and what evidence is admissible to prove them, are questions of law; but whether the facts are established by the evidence is a question of fact. *Russell v. Davis*, 38 Conn. 562; *Rivers v. Thompson*, 43 Ala. 633; *Brumagim v. Bradshaw*, 39 Cal. 24, 50.

Where an adverse possession is claimed to exist, the burden of proof is on the party who alleges it; and the evidence ought to be clear and positive. *Weaver v. Wilson*, 48 Ill. 125; *Jackson v. Berner*, id. 203; *Jones v. Porter*, 3 Pen. & Watts, 132; *Rung v. Schodeberger*, 2 Watts, 23, 27.

It must be under color or claim of *title* or *ownership*. *Dixon v. Cook*, 47 Miss. 220; *Grube v. Wells*, 34 Iowa, 148; *Sanders v. McAfee*, 42 Ga. 250; *Fritz v. Joiner*, 54 Ill. 101; *Presley v. Holmes*, 33 Texas, 476; *Wall v. Shindler*, 47 Mo. 282, 284; *Crispen v. Hannavan*, 50 id. 586; *Baker v. Swan*, 32 Md. 355; *Wells v. Jackson Iron Manufacturing Co.*, 48 N. H. 491, 530-533; *Stevens v. Brooks*, 24 Wis. 326; *Rivers v. Thompson*, 43 Ala. 633, 641; *McConnell v. McConnell*, 64 N. C. 342. .

hold or chattel interest, and of whatever tenure; the word "rent" extending to all heriots, and to all services and suits for which distress may be made, and to all annuities and periodical sums of money charged upon or payable out of any land (except moduses or compositions belonging to a spiritual or eleemosynary corporation sole). But (except by the provisions applicable to the recovery of arrears of rent) the statute does not provide any bar for the recovery of a rent reserved upon a lease for years, that being a mere incident to the reversion; so that, after non-payment for more than twenty years, if the reversion continues, the reversioner's title to the rent, as distinguished from the arrears beyond six years, is not barred. The word "rent" in the second section, about to be stated, means the estate in the rents, of which a seisin can be had (z).

The second section enacts generally, that (after the year 1833) "no person shall make an entry or distress, or bring an action to recover any land or rent but within twenty years after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to some person through whom he claims, or if such right shall not have accrued to any person through whom he claims, then within twenty years next after the time at which [* 430] the right to make such entry or distress * shall have first accrued to the person making or bringing the same (a).

This general enactment is explained and qualified by subsequent sections, which include within their purview almost every possible case; and those few cases, (such as claims under wills), which are not within any of these explanatory clauses, have been held to be left to the general operation of the second section (b).

At the common law, the rightful owner, having once been in the actual seisin of an estate, could only have been put to his entry by an actual disseisin; and there were many ways in which a stranger might have been in the actual enjoyment of the land for his own benefit, without having disseised the true owner; and during such non-adverse possession, the time of limitation under the stat. of James I. did not run (c). But the distinction has been abolished by the recent act, which has done away with the doctrine of non-adverse possession (d). This effect is accomplished by the explanatory provisions of which we proceed to notice the most important.

Where the person claiming, or some one through whom he claims, having been in possession or in receipt of the profits, shall have been dispossessed or have discontinued such possession, the right to enter is to be deemed to have first accrued at the time of such dispossession or discontinuance (e). And where the claim is made to the estate or interest of some person who died in [* 431] possession or receipt * of the profits, and was the last person who had such possession or receipt, the period is counted from his death.

(e) *Grant v. Ellis*, 9 M. & W. 113; see also, *Manning v. Phelps*, 10 Exch. 59. Held by V. C. Stuart to be applicable to a widow's claim for dower, *Marshall v. Smith*, 34 L. J. Ch. 189. As to advowsons, see *post*, p. 435.

(a) The period is extended in favour of ecclesiastical or eleemosynary corporations sole to two incumbencies and six years, or sixty years, s. 29.

(b) *James v. Salter*, 3 Bing. N. C. 544; 4 Scott, 168.

(c) 1 Salk. 242; 10 B. & C. 816.

(d) *Nepean v. Doe*, 2 M. & W. 894.

(e) Sect. 8. See *Doe d. Johnson v. Liversedge*, 11 M. & W. 517. But there must have been possession by some one; thus where A. sold surface land to B., reserving the minerals beneath, and did nothing for forty years, and no one worked the minerals, A.'s title was not barred. *Smith v. Lloyd*, 9 Exch. 562.

Where the title is derived from an instrument (not being a will) made by a person being in possession, in respect of the same estate or interest, and no possession has been had under such instrument, the right accrues at the time indicated by the instrument.

The right to enter in respect of a remainder or reversion first accrues on the determination of the next preceding estate; and the remainderman or reversioner has twenty years from that time, except in the cases where his right is expectant on the determination of a tenancy at will, from year to year, for years in certain cases, or in tail. And where a remainderman or reversioner has a right to enter for a forfeiture or condition broken, he may do so within twenty years, but his neglect to enter on that ground will not prejudice his right on the natural determination of the particular estate.

Where a tenancy at will has been created, it is, for the purposes of the act, to be considered to have determined at the end of a year from its commencement, from which presumed, or any previous, actual determination of the will, the period of limitation is to be reckoned; and the period barring the right of the true owner runs from that time, unless he obtains from the occupier a sufficient acknowledgment of title in writing (*f*). A *cestui que trust* or mortgagor in possession is considered at law as tenant at will to his trustee or mortgagee, but it is expressly provided, that such a tenancy shall not constitute adverse possession. Doubts which arose as to the effect of the act upon the rights of a mortgagee out of possession (*g*) were removed by the stat. 7 Will. 4 & 1 Vict. c. 28, which directs the twenty years to be counted from * the last payment of any principal or interest under the mort- [* 432] gage (*h*).

Where the possession is in a tenant "from year to year or other period," without writing, the time is counted from the end of the first of such years or other periods, or the last payment of rent (*i*).

Where the possession is under a lease in writing, reserving a yearly rent of twenty shillings or upwards, the period may commence before the determination of the term, viz., if the rent has been received by some person wrongfully claiming it as the immediate reversioner, time runs from the first of such receipts, provided no subsequent payment has been made to the true owner (*k*). And the landlord is barred for the benefit, not of the tenant, but of the person so wrongfully receiving the rent (*l*). Mere discontinuance of the receipt of the rent is no bar; there must be a wrongful payment to another (*m*). But where there is a lease in writing, and no pecuniary rent to the amount of twenty shillings is reserved, the period is reckoned from the determination of the tenancy.

Possession adverse to the issue in tail did not formerly (*n*) commence to be adverse to the remainderman or reversioner until after failure of issue in tail; but now, as soon as the time commences to run against a tenant in tail, it runs also against all those whom he might have barred, whether he lives through

(*f*) Sect. 14. See *Doe d. Curzon v. Edmonds*, 6 M. & W. 295; *Doe d. Bennett v. Turner*, 7 M. & W. 226.

(*g*) *Doe v. Williams*, 6 N. & M. 816.

(*h*) See *Doe d. Palmer v. Eyre*, 17 Q. B. 366; *Doe d. Baddeley v. Massey*, *ib.* 378.

(*i*) Sect. 8.

(*k*) Sect. 9.

(*l*) Sect. 35.

(*m*) *Doe d. Davy v. Ozenham*, 7 M. & W. 131; *Chudwick v. Broadwood*, 8 Beav. 308; see *Ex parte Jones*, 4 Y. & C. 466.

(*n*) *Cannon v. Rimington*, 12 C. B. 54.

the whole period of limitation or not (*o*). But (*p*) possession under any assurance by tenant in tail, inoperative against those in remainder or reversion, (or, [* 433] after such possession has * once been had, possession by any person not entitled in respect of any interest expectant on the estate tail), commences to be adverse to those in remainder or reversion, when the time arrives at which (but for such assurance) a like assurance executed by the tenant in tail for the time being, would, without the consent of any other person, have barred them. That is to say, if a tenant in tail creates a base fee by executing an assurance without the consent of the protector of the settlement (*q*), the time begins to run against the remainderman only from the moment when there ceases to be a protector to the settlement, which is generally when the base fee falls into possession.

What shall be deemed adverse possession in particular cases is for further certainty specified in some additional clauses. The receipt of rent from a tenant from year to year, or other lessee, is to be deemed the receipt of the profits (*r*). A mere entry or continual claim shall not keep alive any right (*s*). The possession of a coparcener, joint-tenant, or tenant in common, for the benefit of himself or any other person than his coparcener, or cotenant, is to be deemed adverse to his coparcener or cotenant (*t*); and the possession of a younger brother or other relation is adverse to the heir (*u*). Possession commences to be adverse to an administrator on the death of the intestate (*x*). A further time beyond the period of twenty years is allowed in case of disability by reason of infancy, coverture, idiocy, lunacy, unsoundness of mind, or absence beyond seas, existing at the time when the right first accrued, in [* 434] the person to whom it * accrued. Such person, or those claiming through him, are allowed ten years from the time of the cesser of such disability. But this provision does not extend (as the old statute did (*y*)) to a succession of disabilities, and whatever disabilities may have existed, the claim is barred at the end of forty years. No part of the United Kingdom, nor the islands of Man, Guernsey, Jersey, Alderney, or Sark, nor any island adjacent to them (being part of the British dominions), shall be deemed to be "beyond seas," within the act (*z*). Any acknowledgment of the title of the person entitled to any land or rent signed by the person in possession or receipt of the profits of the land or of the rent, creates a new epoch in all these cases, from which time begins to run against the claimant (*a*).

We have hitherto dealt with the operation of the statute upon actions at law, but by a further section (*b*), the bar is extended to all suits in equity, with a few exceptions. Where there is an express trust in favour of the claimant, time shall begin to run against him only from the moment when the land or rent has been conveyed for valuable consideration to a purchaser without notice

(*o*) Sects. 21 and 22. See *Austin v. Llewellyn*, 9 Exch. 276; *Goodall v. Skerratt*, 3 Drew. 216.

(*p*) By s. 28. As to this section, see *Penny v. Allen*, 7 De G. M. & G. 409.

(*q*) *Post*, c. 21.

(*r*) Sect. 35.

(*s*) Sects. 10, 11.

(*t*) Sect. 12. As to what is *ouster*, see *Denys v. Shuckburgh*, 4 Y. & C. 42; *In re Peate's Trusts*, L. R. 7 Eq. 802.

(*u*) Sect. 13. The entry of a father of an

infant is interpreted as that of a bailiff to the infant. *Thomas v. Thomas*, 2 K. & J. 79.

(*z*) Sect. 6, repealing the former rule, by which the adverse possession was only considered to commence from the grant of letters of administration.

(*y*) 4 Taunt. 830.

(*a*) Sects. 16, 17, 18 & 19; *Ex parte Hasell*, 8 Y. & C. 617.

(*b*) Sect. 14.

(*b*) Sect. 24.

of the trust (c). Again, where fraud constitutes the ground of the equitable demand, the time begins to run from the moment when the fraud was, or might with reasonable diligence have been, discovered (d); the usual protection afforded by the court to *bona fide* purchasers for valuable consideration without notice being reserved, as well as all other rules of the court in refusing relief on the ground of acquiescence or otherwise.

The rules which the statute has laid down as to the * bar to relief [* 435] in equity, which time affords, are very much the same as those which the court acted upon before the statute (e). The court does not recognize a mistake as a reason for extending the time within which suits may be brought (f); and stale demands generally are looked upon, whatever be their nature, with great disfavour (g).

Claims to advowsons are to be barred after three incumbencies obtained adversely to the right of the claimant, and those through whom he claims, or sixty years, whichever is the longest period (h), an extreme limit of 100 years, from the time of a clerk being presented adversely to the claim, being imposed (i).

The statute we have been discussing does not apply when the Crown or the Duke of Cornwall is the claimant. But by another statute, possession for sixty years gives a title against the Crown (j) and against the Duke.

We may mention as convenient to be here stated as forming part of the same act — though but indirectly connected with the subject of this chapter — that actions and suits to recover money charged upon any lands or rents, or any legacy (whether so charged or not) are made subject to the same limitation as to time as the actions and suits concerning land and rent (k). Moreover, no arrears of *dower or rent or of interest upon money charged upon land or rent are to be recovered by any distress, action [* 436] or suit; but within six years after they become due (l), or after some acknowledgment in writing, signed by the person by whom the same is payable or his agent, shall have been given to the claimant or his agent.

(c) Sect. 25. See *Knight v. Bowyer*, 2 De G. & J. 421; *Lewis v. Duncombe*, 29 Beav. 175; *Dickenson v. Teasdale*, 1 De G. J. & S. 52, where it was held that a general charge of debts did not create an express trust within the section; and the like was held in *Proud v. Proud*, 33 Beav. 234.

(d) Sect. 26. See *Manby v. Bewicke*, 3 K. & J. 342.

(e) *Cholmondeley v. Clinton*, 2 Jac. & W. 1, 152. Sir T. Plumer fully explained the doctrine of the court as to the effect of lapse of time. His judgment was affirmed by the House of Lords.

(f) See *Cully v. Doe d. Taylerson*, 11 A. & E. 1008; *In re Peats' Trust*, L. R. 7 Eq. 302.

(g) *Pickering v. Lord Stamford*, 2 Ves. 581; *Cholmondeley v. Clinton*, *ubi sup.* As to arrears of rent which the court allows, see *Hicks v. Sullitt*, 3 De G. M. & G. 782; *Penny v. Allen*, 7 De G. M. & G. 409.

(h) Sect. 30. By sect. 32 it is declared that incumbrances after a lapse are to be reckoned, but not after a promotion to a bishopric.

(i) Sect. 33.

(j) 9 Geo. 3, c. 16, 24 & 25 Vict. c. 62; *ante*, p. 100; and as to the Duke of Cornwall, 7 & 8 Vict. c. 105, 23 & 24 Vict. c. 53, 24 & 25 Vict. c. 62.

(k) See *Sheppard v. Duke*, 9 Sim. 567; *Prior v. Hornblow*, 3 Y. & C. 200; *Philippo v. Munnings*, 2 M. & Cr. 309; *Cox v. Dolman*, 2 De G. M. & G. 592.

(l) Sects. 41, 42. See *Snow v. Booth*, 8 De G. M. & G. 69. More than six years' arrears charged upon a reversionary interest in land may be recovered after the land falls into possession. *Wheeler v. Howell*, 3 K. & J. 198. *In re Lowe's Settlement*, 30 Beav. 95, and it seems that a mortgagee selling under a power may retain out of the purchase-money all arrears of interest. *Edmunds v. Waugh*, L. R. 1 Eq. 418. Though in a foreclosure suit (it being within the terms of the section) he can only recover six years' arrears. *Shaw v. Johnson*, 1 Dr. & S. 412; *Round v. Bell*, 30 Beav. 121.

These questions as to recovery of arrears of interest and rent are somewhat complicated by the provisions of another act passed in the same session of parliament (*m*), which allows actions or suits for money, secured by covenant, bond, or other specialty, to be recovered at any time within twenty years; which provision, since most rent, interest and other similar payment is usually so secured, often applies to cases falling within the section we have been last noticing.

[* 437]

* CHAPTER XVIII.

TITLE BY FORFEITURE.

FORFEITURE (*forisfactura*) is a punishment annexed by law to some illegal act, or negligence, in the owner of lands, tenements, or hereditaments; whereby he loses his interest therein, which thereupon either vests in the person immediately suffering the injury, or in the crown, or in some other functionary occupying a position representative of public interests.

When the forfeiture is to the crown, the land does not vest in the crown, *ipso facto* by the cause of forfeiture, but it is only after a solemn inquisition on behalf of the crown and the finding by the jury of the facts and recording the same, or as it is phrased, upon "office found," that the land becomes the property of the crown (*a*). And when the forfeiture is to a subject, as for instance the lord of the fee, the title, except against him, remains unaffected by the forfeiture; but the land is subject to the entry of the lord for the forfeiture (*b*).

Lands, tenements, and hereditaments, may be forfeited in various degrees and by various means: 1. By crime. 2. By alienation contrary to law. 3. By wrongful disclaimer. 4. By non-presentation to a benefice; when the forfeiture is denominated a lapse. 5. By simony. * 6. By non-performance of conditions. 7. By breach of copyhold customs (*c*).

I. We have already (*d*) had occasion to notice so much of the law of forfeiture by the crime of the tenant as is sufficient in this part of these commentaries. As we there noticed, the ancient rigour of the law has been much relaxed in this respect: moreover, the common practice of the government of conferring upon the family or relations of the offender the interest which accrues to the crown by the forfeiture (*e*) has still further diminished the substantial importance of this law: which, however, in

(*m*) 3 & 4 Will. 4, c. 42, see sect. 3.

(*a*) Perkins' Profitable Book, tit. Grants, s. 26; Com. Dig. tit. Capacity, D. 6; Shep. Touch. 232; *Doe d. Griffith v. Pritchard*, 5 B. & Ad. 765, where it was held that an attainted felon might bring ejectment, no office having been found.

(*b*) Co. Litt. 2 b; 10 Rep. 30.

(*c*) Formerly waste committed by a tenant for life or for years was a ground of forfeiture. See Statutes of Marlbridge, 52 Hen. 3,

c. 23, and of Gloucester, 6 Edw. 1, c. 5. But the writ of waste by which the forfeiture was enforced by the reversioner having been abolished, 3 & 4 Will. 4, c. 27, s. 36, the relief which the law now affords for wrongful waste is only damages, and injunction restraining its commission.

(*d*) *Ante*, p. 403.

(*e*) See the statutes 39 & 40 Geo. 3, c. 88; 47 Geo. 3, sess. 2, c. 24; and 59 Geo. 3, c. 94; 5 Geo. 4, c. 17.

its present form, is well suited to the ends of justice. The nature of the crimes and the particular circumstances under which the forfeiture is incurred will appear in our future inquiries.

II. Lands and tenements may be forfeited by alienation, or conveying them to another, contrary to law. This is either alienation in mortmain, or alienation to an alien, in which cases the forfeiture arises from the incapacity of the alienee to hold lands (*f*).

II. For alienation
contrary to
law, as

1. Alienation in mortmain, in *mortuâ manu*, is an alienation of lands or tenements to any corporation, sole or aggregate, ecclesiastical or temporal.

These purchases *having been in ancient times chiefly made by religious houses, the consequence of which was [* 439] that the lands became perpetually inherent in one dead hand, the general appellation of mortmain came to be applied to such alienations, and the religious houses themselves to be principally considered in framing the various ancient statutes of mortmain: in deducing the history of which statutes, it will be matter of curiosity to observe the great address and subtle contrivance of the ecclesiastics in eluding from time to time the laws in being, and the zeal with which successive parliaments have pursued them through all their finesses; how new remedies were still the parents of new evasions: till the legislature at last, though with difficulty, obtained a decisive victory.

1. Alienation in
mortmain.

By the common law any man might dispose of his lands to any other private man at his own discretion, especially when the feudal restraints of alienation were worn away. Yet, in consequence of these, it was always, and is still necessary (*g*), for corporations to have a licence in mortmain from the crown to enable them to hold (*h*) lands; for as the king is the ultimate lord of every fee, he ought not, unless by his own consent, to lose his privilege of escheats and other feudal profits, by the vesting of lands in tenants that can never be attainted or die. There are traces of licences of mortmain among the Saxons, above sixty years before the Norman conquest, though the extent of their application seems doubtful (*i*). But, besides this general licence from the king, as lord paramount of the kingdom, it was also requisite, whenever there was a mesne or intermediate lord between the king and the alienor, to obtain his licence also, (for the same reasons founded upon feudal principles,) for the alienation of the specific land. And if no such licence was obtained, the king or other *lord might respectively enter [* 440] on the land so aliened in mortmain as a forfeiture. The necessity of this licence from the crown was acknowledged by the constitutions of Clarendon (*k*), in respect of advowsons, which the monks always greatly coveted, as being the groundwork of subsequent appropriations. Yet, such were the influence and ingenuity of the clergy, that (notwithstanding this fundamental principle) we find that the largest

Licences in mort-
main.

Evasions of the
rule by the
clergy.

(*f*) As we have already (pp. 262, 355) had occasion to notice, formerly tortious alienations by particular tenants, as where a tenant for life aliened by feoffment to another in fee-simple or fee-tail, had the effect of a forfeiture of the life estate. This effect has, since the year 1845, been abolished, 7 & 8 Vict. c. 76, s. 7, repealed, but re-enacted in other words by 8 & 9 Vict. c. 106, s. 4.

(*g*) F. N. B. 121.

(*h*) Co. Litt. 2 b; 10 Rep. 30.

(*i*) Selden, Jan. Angl. 1, 2, s. 45. Mr. Hallam doubts whether there was any restraint on alienations in mortmain prior to Magna Charta. Middle Ages, vol. 2, 321.

(*k*) *Ecclesiae de feudo domini regis non possunt in perpetuum dari, absque assensu et consensione ipsius.* C. 2, A. D. 1164.

and most considerable dotations of religious houses happened within less than two centuries after the conquest. And (when a licence could not be obtained), their contrivance seems to have been this: that, as the forfeiture for such alienations accrued in the first place to the immediate lord of the fee, the tenant who meant to alienate first conveyed his lands to the religious house, and instantly took them back again, to hold as tenant to the monastery; which kind of instantaneous seisin was probably held not to occasion any forfeiture: and then, by pretext of some other forfeiture, surrender or escheat, the society entered into those lands in right of such their newly acquired seignior, as immediate lords of the fee. But, when these dotations began to grow numerous, it was observed that the feudal services so highly valued in those days were every day visibly withdrawn; that the circulation of landed property from man to man began to stagnate; and that the lords were curtailed of the fruits of their seigniories, their escheats, wardships, reliefs and the like; therefore in order to prevent this, it was ordained by the second of king Henry III.'s great charters (l), and afterwards by that printed in our common statute-books, that all such attempts by religious houses should fail in their object, and the land should be forfeited to the lord of the fee (m).

* But, as this prohibition did not extend beyond religious houses, [* 441] bishops and other sole corporations were not included in it: and the aggregate ecclesiastical bodies (who, sir Edward Coke observes (n), in this were to be commended, that they ever had of their counsel the best learned men that they could get) found many means to creep out of this statute, by buying in lands that were *bond fide* holden of themselves as lords of the fee, and thereby evading the forfeiture; or by taking long leases for years, which first introduced those extensive terms, for a thousand or more years, which are now so frequent in conveyances. This produced the statute De religiosis, 7 Edw. 1, stat. 2, A.D. 1279; which provided that no person, religious or other whatsoever, should buy, or sell, or receive from any one under colour of a gift, or term of years, or any other title whatsoever, nor should, by any art or ingenuity, appropriate to himself any lands or tenements in mortmain upon pain that the immediate lord of the fee, or, on his default for one year, the lords paramount, and in default of all of them, the king, might enter thereon as a forfeiture.

This seemed to be a sufficient security against all alienations in mortmain: but these statutes extended only to gifts and conveyances between the parties; the religious houses therefore bethought themselves of a new device, began to set up a fictitious title to the land, which it was intended they should have, and to bring an action to recover it against the tenant; who, by fraud and collusion, made no defence; judgment then was given for the religious house, which thereupon recovered the land by sentence of law upon a supposed prior title, which was, in fact, a mere myth. It was thus that those fictitious adjudications of right, which afterwards became and

(l) A. D. 1217, cap. 43, edit. Oxon.

(m) *Nec liceat de cetero alicui dare terram suam alicui domui religiose, ita quod illam resumat de eadem domo tenendam. Nec liceat alicui domui religiose terram alicujus sic accipere, quod tradat illum illi a quo ipsam*

recepit tenendam. Si quis autem de cetero terram suam alicui domui religiose sic dederit, ut super hoc convineatur, donum suum penitus cassetur, ut terra illa domino suo illius feodi incuratur. Mag. Cart. 9 Hen. 3, c. 38.

(n) 2 Inst. 75.

long *continued the great assurances of the kingdom, under the name of common recoveries, were invented. The honour of their [*442] discovery, such as it is, rests with the clergy (o). But very soon afterwards the statute of Westminster the second, 13 Edw. 1, c. 32, A.D. Statute of Westminster 2nd. 1285, enacted, that in such cases a jury shall try the true right of the demandants or plaintiffs to the land, and if the religious house or corporation be found to have it, they shall still recover seisin; otherwise it shall be forfeited to the immediate lord of the fee, or else to the next lord, and finally to the king, upon the immediate or other lord's default. And the like provision was made by the succeeding chapter (p), in case the tenants set up crosses upon their lands (the badges of knights templars and hospitallers) in order to protect them from the feudal demands of their lords, by virtue of the privileges of those religious and military orders. So careful indeed was this provident prince to prevent any future evasions, that when the statute of Quia emptores, 18 Edw. I., abolished all sub-infeudations, and gave liberty for all men to alienate their lands to be holden of their next immediate lord (q), a proviso was inserted (r) that this should not extend to authorize any kind of alienation in mortmain. And when afterwards the method of obtaining the king's license by writ of *ad quod damnum* had been sanctioned by the statute 27 Edw. 1, st. 2, it was farther provided by statute 34 Edw. 1, st. 3, that no such licence should be effectual, without the consent of the mesne or intermediate lords.

Yet still it was found difficult to set bounds to ecclesiastical ingenuity; for when they were driven out of all their former holds, they devised or turned to this object a new method of conveyance, by which the lands Invention of uses. were granted, not to themselves directly, but to nominal feoffees to the use of the religious houses; thus distinguishing between the possession and the use, and *receiving the actual profits, while the seisin of the lands remained in the nominal feoffee; who was held by the courts of [*443] equity (then under the direction of the clergy) to be bound in conscience to account to his *cestuy que use* for the rents and emoluments of the estate (s). And it is to this last invention that modern practitioners are indebted for the introduction of uses and trusts, the foundation of much of the conveyancing of the present day (t). But, unfortunately for the inventors themselves, they did not long enjoy the advantage of their new devise; for the statute 15 Rich. 2, c. 5, enacts, that the lands which had been so purchased to uses should be amortised by licence from the crown, or else be sold to private persons; and that, for the future, uses shall be subject to the statutes of mortmain, and forfeitable like the lands themselves. And whereas the statutes had been eluded by purchasing large tracts of land, adjoining to churches, and consecrating them by the name of churchyards, such subtilé imagination is also declared to be within the compass of the statutes of mortmain. And civil or lay corporations, as well as ecclesiastical, are also declared to be within the mischief, and of course within the remedy provided by those salutary laws.

But, during all this time, it was in the power of the crown, by granting a

(o) *Ante*, p. 227.

(p) Cap. 33.

(q) 2 Inst. 501.

(r) Cap. 3.

(s) See *post*, vol. iii. p. 88.

(t) *Porter's Case*, 1 Rep. 22 a.

license of mortmain, to remit the forfeiture, so far as related to its own rights;

Power of the crown to grant licenses confirmed. and to enable any spiritual or other corporation to purchase and hold any lands or tenements in perpetuity; which prerogative was declared and confirmed by the statute 18 Edw. 3, st. 3, c. 3.

But, as doubts were conceived at the time of the revolution how far such license was valid (*u*), since the king had no power to dispense with the statutes

[* 444] of mortmain by a clause of *non obstante* (*x*), which was * the usual course, though it seems to have been unnecessary (*y*): and as, by the gradual declension of mesne seignories through the long operation of the statute of *Quia emptores*, the rights of intermediate lords were reduced to a very

small compass; it was therefore provided by the statute 7 & 8 Stat. 7 & 8 Will. 3, c. 37.

Will. 3, c. 37, that the crown for the future at its own discretion might grant licenses to aliene or take in mortmain, of whomsoever the tenements may be holden.

After the dissolution of monasteries under Henry VIII. though the policy of the next popish successor affected to grant a security to the possessors of

Temporary suspension of the statutes of mortmain, by 1 & 2 P. & M. c. 8. abbey lands, yet, in order to regain so much of them as either the zeal or timidity of their owners might induce them to part with, the statutes of mortmain were suspended for twenty years

by the statute 1 & 2 P. & M. c. 8, and, during that time, any lands or tenements were allowed to be granted to any spiritual corporation without any licence whatsoever. And long afterwards, for a much better pur-

Augmentation of poor livings. pose, the augmentation of poor livings, it was enacted by the statute 17 Car. 2, c. 3, that impropiators might annex the great tithes to the vicarages; and that all benefices under 100*l.* per annum might be augmented by the purchase of lands without licence of mortmain in either

Queen Anne's Bounty. case. This statute is no longer in force (*z*); but other statutes having the like effect have been passed, the numerous details of which cannot here be dealt with (*a*). Provisions with a similar object have been since made in favour of the governors of Queen Anne's Bounty (*b*).

[* 445] * In modern times many large charitable and other corporations have been founded or incorporated by act of parliament; whenever this is done, and the necessities of the case require it, power is always given by the act to hold lands without licence in mortmain, that is, so as to exempt them from the penalty of forfeiture (*c*). By the act now in force, under which incorporated companies for trading and other purposes are formed, power is given to them to hold lands (*d*).

Such is the law of mortmain which is now in force as regards the forfeiture which is incurred. We see that the penalty arises from the land being vested

(*u*) 2 Hawk. P. C. 391. See Harg. Co. Litt. 99 a, n. (1).

(*x*) Stat. 1 W. & M. st. 2, c. 2. See also 16 Rich. 2, c. 5; 37 Hen. 8, c. 4; 1 Edw. 6, c. 14; 1 Geo. 1, c. 55; 4 Rep. 104; Bac. Ab., *Charitable Use* (D.); *West v. Shuttleworth*, 2 Myl. & K. 684; 1 Jarm. Wills, 189.

(*y*) Co. Litt. 99.

(*z*) 1 & 2 Vict. c. 106, s. 15.

(*a*) See 29 Car. 2, c. 8; 1 & 2 Will. 4, c. 45; 1 & 2 Vict. c. 107; 3 & 4 Vict. c. 118; 4 & 5 Vict. c. 45; 5 & 6 Vict. c. 26; 19 & 20 Vict. c. 50.

(*b*) Stat. 2 & 3 Ann. c. 11; 43 Geo. 3, c. 107; 2 & 3 Vict. c. 49; 3 & 4 Vict. c. 20. See, also, as to the powers of these, 17 Geo. 3, c. 53; 21 Geo. 3, c. 66; 7 Geo. 4, c. 66; and 1 & 2 Vict. c. 23.

(*c*) As an instance, we may refer to the act incorporating one of the oldest asylums of London, the Asylum for Female Orphans, 39 & 40 Geo. 3, c. 1x. It is needless to do more than mention that the powers of railways and other similar companies always depend upon their special acts of parliament.

(*d*) 25 & 26 Vict. c. 89, s. 18.

in a corporation without licence to hold, and it rests entirely upon the ancient laws which we have noticed. But though not falling within the proper limits of our present subject, it will be convenient here to notice other laws commonly called mortmain laws, which have been made by the authority of parliament, closely allied with those which we have been exhibiting, and arising out of the same principles of policy, which have imposed restrictions upon the alienation of land, not unlike those we have been describing, but which have their effect, not by creating a liability to forfeiture but by declaring the attempted alienation, when made in contravention of their rules, entirely void for all intents and purposes.

It was observed that, during the times of popery, lands were frequently given to superstitious uses, though not to any corporate bodies; or were made liable in the hands of heirs and devisees to the charge of obits, chauntries and the like, which were considered, and with reason, equally pernicious in a well-governed state as actual alienations in mortmain; therefore the statute 23 Hen. 8, c. 10, * declared that [* 446] all future grants of lands for any of the purposes aforesaid, if granted for any longer term than twenty years should be void. By virtue of this Act the land reverts at once to the grantor (e).

This statute of Hen. VIII. specifies the superstitious uses which were to invalidate a grant of land, but there is no statute which makes superstitious uses in general void (f): nevertheless, by the general policy of the law, they were, and are not allowed to have effect (g). But this general policy did not, in the opinion of the judges, extend to render void a gift of lands made for charitable purposes (h), even though they be thereby impressed with trusts to continue in perpetuity. Lands given to a corporation for charitable purposes were, of course, liable to forfeiture, but the gift was valid as against the donor;

and, therefore, a man might give lands for the maintenance of a school, an hospital, or any other charitable uses, subject only to the risk (which in modern practice proved to be nothing) of the crown insisting upon the forfeiture of the lands vested in the corporation. But it was apprehended, from recent experience, that persons on their death-beds might make large and improvident dispositions even for these good purposes, and defeat the political ends which had the grounds of the statutes of mort-

Statute against
superstitious
uses, 23 Hen. 8,
c. 10.

Charitable uses.

Devises to charitable uses prohibited.

9 Geo. 2, c. 36.

main; it is therefore enacted by the statute 9 Geo. 2, c. 36, that no lands or tenements, or money to be laid out thereon, shall be given for or charged with any charitable uses whatsoever, unless by deed indented, executed in the presence of two witnesses, twelve calendar months before the death of the donor, and enrolled in the Court of Chancery within six months after its execution (except stocks in the public funds, which may be transferred * within six months previous [* 447] to the donor's death), and unless such gift be made to take effect immediately, and be without power of revocation: and that all other gifts shall be void (i). The two universities, their colleges, and the scholars upon the foundation of the colleges of Eton, Winchester, and Westminster, are

(e) See *Porter's Case*, Rep. 22a, 23a.

(f) *Cary v. Abbott*, 7 Ves. 495.

(g) See *Martindale v. Martin*, Cro. Eliz. 288; *Porter's Case*, *ubi sup.*

(h) *Re Blundell's Trusts*, 30 Beav. 360.

Porter's Case, *ubi sup.* As to what are charitable uses, see 43 Eliz. c. 4.

(i) The act is now commonly, though inaccurately, described as the Mortmain Act.

excepted out of this act (*k*). Other public charities have, by subsequent statutes, been exempted from the operation of the act, amongst which are the British Museum (*l*), Greenwich Hospital (*m*), and the Foundling Hospital (*n*).

It has been thought; and with seeming correctness, that the exemption does not release the incorporated charities from the old restraints of the mortmain laws, so that a licence of the crown to hold lands remains still necessary when a college or one of the other incorporated charities purchases lands or an advowson without having such license (*o*).

The act contains an exception as regards the necessity for a year to elapse from the date of the conveyance to the death of the grantor, when the conveyance is *bonâ fide* for an adequate and valuable consideration, though the other requisites, such as inrolment, are to be observed in this as in other cases (*p*). The effect of these statutes upon a gift which contravenes their provisions is to render it simply void; the land, notwithstanding the attempted alienation, [* 448] remains the property of the donor, and vests in him or his * heir-at-law, or (if the gift be by a will taking effect under the present wills act) residuary devisee if any (*q*).

Opinion upon the subject of conveyance of lands for charitable uses has somewhat changed since the last century, and many acts have been passed, not however wholly repealing the act of Geo. II., but giving facilities for rectifying defects in titles, which have arisen through disregard of it (*r*). Moreover some of the provisions of the act as to the conveyance being by indenture, and as to the non-reservation of any benefit for the donor, have been altered (*s*).

Many special exceptions also have been introduced by the legislature diminishing the number of cases to which the act applies. Thus conveyances for sites of schools limited to two acres, are to be valid though only one witness attests them; and the death of the donor within the twelve months does not invalidate them (*t*). Similar relaxations have been permitted in favour of literary, scientific, and other institutions of the like character and for public recreation grounds under 22 Vict. c. 27 (*u*). The church building acts also contain provisions for the same purpose (*x*). (333)

(*k*) Originally this exemption was subject to a proviso, limiting the number of advowsons which a college might possess, but the limitation was afterwards repealed by 45 Geo. 3, c. 101.

(*l*) 5 Geo. 4, c. 39.

(*m*) 10 Geo. 4, c. 25.

(*n*) 11 Geo. 2, c. 29; see *Shelf. on Mortmain*, 49.

(*o*) Some colleges are provided with prospective licenses to purchase in mortmain to a specific extent, which has been found sufficient. Indeed, inasmuch as the crown has never in recent times been known to insist upon a forfeiture in these cases, the point noticed in the text is but of slight importance.

(*p*) See *Price v. Hathaway*, 6 Mad. 304; also 9 Geo. 4, c. 85.

(*q*) See *Adlington v. Cann*, 3 Atk. 155; *Doe d. Burdett v. Wright*, 2 B. & Ald. 710.

(*r*) 9 Geo. 4, c. 85; see 24 Vict. c. 9; 25 Vict. c. 17; 27 Vict. c. 13; 29 & 30 Vict. c. 57.

(*s*) 24 Vict. c. 9.

(*t*) 4 & 5 Vict. c. 38, explained and extended by 7 & 8 Vict. c. 87; 12 & 13 Vict. c. 48; 14 & 15 Vict. c. 24; 15 & 16 Vict. c. 49; 26 & 27 Vict. c. 16. Inrolment is necessary.

(*u*) 17 & 18 Vict. c. 112.

(*x*) 6 & 7 Vict. c. 87; 14 & 15 Vict. c. 97; 17 & 18 Vict. c. 32; 18 & 19 Vict. c. 127.

(333) "It was incident at common law to every corporation to have capacity to purchase and alien lands and chattels, unless they were specially restrained by their charters, or by statute. Independent of positive law, all corporations have the absolute *jus disponendi* of lands and chattels, neither limited as to objects nor circumscribed as to quantity." 2 Kent's Com. 281. "We have not in this country re-enacted the statutes of Mortmain, or generally assumed them to be in force; and the only legal check to the acquisition of lands by corpo-

2. Secondly, alienation to an alien is also a cause of forfeiture to the crown of the land so alienated. For an alien cannot hold lands, although he may take them as grantee, and upon inquisition and office found the crown may take them by virtue of the royal prerogative. In this, however, as in other cases, the title is good against all but the crown. And if the alien before office found grant the lands over to a subject, the latter receives a perfectly * valid title, with the single exception of the same liability [* 449] to an inquisition and consequent forfeiture (y).

From this general forfeiture of lands vested in an alien we must except the cases where they are held for a term not exceeding twenty-one years by a friendly alien for the purpose of any trade, business, or manufacture (z).

III. A third instance of forfeiture is from its infrequency rather within the domain of theory than that of practice. It occurs upon the civil crime of disclaimer; as, where a tenant who holds of any lord neglects to render him the due services, and, upon an action brought to recover them, disclaims to hold of his lord. Which disclaimer of tenure in any court of record is a forfeiture of the lands to the lord (a), upon reasons most apparently feudal. And so likewise there is a forfeiture if in any court of record the particular tenant does any act which amounts to a virtual disclaimer. It is said that if he claims any greater estate than was granted him at the first-infeudation, or takes upon himself those rights which belong only to tenants of a superior class (b); or if he affirms the reversion to be in a stranger, by accepting his fine, attorning as his tenant, collusive pleading, and the like (c); such behaviour amounts to a forfeiture of his particular estate.

It has been held that a lessee fraudulently setting up a title hostile to that of his landlord, or assisting in so doing, * forfeits his lease (d). But [* 450] what amount of conduct other than disclaimer by record will in the present day be considered a ground of forfeiture in the absence of contract, it is difficult to say. Mere payment of rent to a stranger is no forfeiture (e), and the tortious effect of attornment no longer exists (f).

(y) *Ante*, p. 400; Co. Litt. 2 b; 5 Rep. 52; 1 Leon. 47. As to copyholds, see 1 Mod. 17.

(z) 7 & 8 Vict. c. 66, s. 5. The law originally was that no alien could hold lands in any case. It was then relaxed in favour of merchants for the sake of commerce. The history of the law on this point will be found in 1 Rapin's Hist. 381; Bac. Ab. *Aliens*. But foreign handicraftsmen and artificers were by no means looked upon with the same favour as was extended to merchants. See 1 Rich. 2, c. 9. And by 32 Hen. 8, c. 16, s. 18, a lease

to a foreign artificer or handicraftsman was declared void.

(a) Finch, 270, 271.

(b) Co. Litt. 251.

(c) *Ib.* 252.

(d) *Doe d. Ellenbroeck v. Flynn*, 1 C. M. & R. 137.

(e) *Doe d. Dillon v. Parker*, Gow. 180.

(f) 11 Geo. 2, c. 19, s. 11. Except the case of *Doe d. Ellenbroeck v. Flynn*, all the cases upon forfeiture by disclaimer have been by matter of record. *Per* Lord Denman, *Doe d. Graves v. Wells*, 10 A. & E. 427.

rations consists in those special restrictions contained in the acts by which they are incorporated, and which usually confine the capacity to purchase real estate to specified and necessary objects; and in the force to be given to the exception of corporations out of the statute of wills, which declares that all persons, other than bodies politic and corporate, may be devisees of real estate." *Ib.* 382.

IV. Lapse is a species of forfeiture, whereby the right of presentation to a church accrues to the ordinary by neglect of the patron to present, to the metropolitan (*g*) by neglect of the ordinary, and to the king by neglect of the metropolitan. For, it being for the interest of religion, and the good of the public, that the church should be provided with an officiating minister, the law has therefore given this right of lapse, in order to quicken the patron, who might otherwise, by suffering the church to remain vacant, avoid paying his ecclesiastical dues, and frustrate the pious intentions of his ancestors. This right of lapse was first established about the time (though not by the authority (*h*)) of the council of Lateran (*i*), which was in the reign of our Henry the Second, when the bishops first began to exercise universally the right of institution to churches (*k*). And therefore, where there is no right of institution, there is no right of lapse: so that no donative can lapse to the ordinary (*l*), unless it has been augmented by the Queen's bounty (*m*). But no right of lapse can accrue, when the original presentation is in the crown (*n*).

[* 451] * The term, at the expiration of which the title to present by lapse accrues from the one to the other successively, is six calendar months (*o*). But, if the bishop be both patron and ordinary, he shall not have a double time allowed him to collate in (*p*); for the forfeiture accrues by law, whenever the negligence

Lapse after six months' default.

has continued six months in the same person. And also if the bishop does not collate his own clerk immediately to the living, and the patron presents, though after the six months are lapsed, yet his presentation is good, and the bishop is bound to institute the patron's clerk (*q*). For as the law only gives the bishop this title by lapse, to punish the patron's negligence, there is no reason that, if the bishop himself be guilty of equal or greater negligence, the patron should be deprived of his turn. If the bishop suffer the presentation to lapse to the metropolitan, the patron also has the same advantage if he presents before the archbishop has filled up the benefice; and that for the same reason. Yet the ordinary cannot, after lapse to the metropolitan, collate his own clerk to the prejudice of the archbishop (*r*). For he had no permanent right and interest in the advowson, as the patron has, but merely a temporary one; which having neglected to make use of during the time, he cannot afterwards retrieve it. But if the presentation lapses to the king, prerogative here intervenes and makes a difference; and the patron shall never recover his right till the king has satisfied

No lapse against the crown.

his turn by presentation: for *nullum tempus occurrit regi* (*s*). And therefore it may seem as if the church might continue void for ever unless the king shall be pleased to present, and a patron thereby be absolutely defeated of his [* 452] * advowson. But to prevent this inconvenience, the law has lodged a power in the patron's hands of as it were compelling the king to

(*g*) *Boswell's Case*, 6 Rep. 48.

(*h*) 2 Roll. Abr. 363, pl. 10.

(*i*) Bracton, l. 4, tr. 2, c. 8.

(*k*) *Ante*, p. 98.

(*l*) Bro. Abr. tit. *Quar. impd. Britton v. Wade*, Cro. Jac. 515.

(*m*) Stat. 1 Geo. 1, st. 2, c. 10, ss. 6, 7.

(*n*) Stat. 17 Edw. 2, c. 8; 2 Inst. 273.

(*o*) *Catesby v. Bishop of Peterboro*, Cro. Jac. 100; 6 Rep. 62; 2 Inst. 861; Registr. 42; *R.*

v. Archbishop of Canterbury, Cro. Car. 355; *ante*, p. 275. As to whether the six months are exclusive of the day of the avoidance, see 15 Ves. 255.

(*p*) Gibs. Cod. 769.

(*q*) 2 Inst. 273.

(*r*) 2 Roll. Abr. 868.

(*s*) Dr. & St., D. 2, c. 36; *R. v. Archbishop of Canterbury*, Cro. Car. 355.

present. For, if during the delay of the crown, the patron himself presents, and his clerk is instituted, the king indeed by presenting another may turn out the patron's clerk; or, after induction, may remove him by *quare impedit*: but, if he does not, and the patron's clerk dies incumbent, or is canonically deprived, the king hath lost his right, which was only to the next or first presentation (*t*).

In case the benefice becomes void by death, or cession through plurality of benefices (*u*), there the patron is bound to take notice of the vacancy at his own peril; for these are matters of equal notoriety to the patron and ordinary; but in case of a vacancy by resignation, or canonical deprivation (*x*), or if a clerk presented be refused for insufficiency, these being matters of which the bishop alone is presumed to be cognisant, here the law requires him to give notice thereof to the patron; otherwise he can take no advantage by way of lapse (*y*). Neither shall any lapse thereby accrue to the metropolitan or to the king; for it is universally true, that neither the archbishop or the king shall ever present by lapse, but where the immediate ordinary might have collated by lapse, within the six months, and has exceeded his time: for the first step or beginning faileth, *et quod non habet principium, non habet finem* (*z*). If the bishop refuse or neglect to examine and admit the patron's clerk, without good reason assigned or notice given, he is styled a disturber by the law, and shall not have any title to present by lapse; for no man shall take advantage of his own wrong (*a*). Also, if the right of presentation be contested, *and an action be brought against the bishop or suit in equity instituted to try the title, no lapse shall incur till the question of right be decided (*b*). [* 453]

V. By simony, the right of presentation to a living is forfeited and vested *pro hac vice* in the crown. Simony is the corrupt presentation of any one to an ecclesiastical benefice for money, gift, or reward. It is so called from the resemblance it is said to bear to the sin of Simon Magus, though the purchasing of holy orders seems to approach nearer to his offence. It was by the canon law a very grievous crime: and is so much the more odious, because, as sir Edward Coke observes, it is ever accompanied with perjury; for the presentee is sworn to have committed no simony (*c*). However, it was not an offence punishable in a criminal way at the common law (*d*); it being thought sufficient to leave the clerk to ecclesiastical censures. But as these did not affect the simoniacal patron, nor were efficacious enough to repel the notorious practice of the thing, divers acts of parliament have been made to restrain it by means of civil forfeitures. Upon this ground they find a place in this chapter.

By the statute 31 Eliz. c. 6, ss. 4, 5, it is for avoiding of simony enacted,

(*t*) 7 Rep. 28; Cro. Eliz. 44.
 (*u*) 1 & 2 Vict. c. 106, s. 11; the earlier acts now repealed were 21 Hen. 8, c. 13, and 57 Geo. 3, c. 99.
 (*x*) 44 Geo. 3, c. 43.
 (*y*) *Dyghy's Case*, 4 Rep. 75; 2 Inst. 632. See the cases collected, Mirehouse on Advowsons, 163.

(*z*) Co. Litt. 344, 345; *Boswell's Case*, 6 Rep. 48.
 (*a*) 2 Roll. Abr. 369.
 (*b*) Co. Litt. 344; *Nicholson v. Knapp*, 9 Sim. 826; see *A.-G. v. Cuming*, 3 Y. & C.C.C. 189.
 (*c*) 8 Inst. 156. See the declaration now required, 23 & 29 Vict. c. 122.
 (*d*) Moor, 564.

that if any person, for any sum of money, by gift or promise, directly or indirectly, shall present or collate any person to an ecclesiastical benefice or dignity, such presentation shall be void, and the presentee be rendered incapable of ever enjoying the same benefice: and the crown shall present to it for that turn only. But if the presentee dies without being convicted of such simony in his life-time, it is enacted by stat. 1 W. & M. c. 16, that the simoniacal contract shall not prejudice any other innocent patron,

on pretence of lapse * to the crown, or otherwise. Also, by the statute 12 Ann. stat. 2, c. 12, if any person for money or profit shall procure, in his own name or the name of any other, the next presentation to any living ecclesiastical, and shall be presented thereupon, this is declared to be a simoniacal contract; and the party is subjected to all the ecclesiastical penalties of simony, is disabled from holding the benefice, and the presentation devolves to the crown.

Upon these statutes many questions have arisen with regard to what is, and what is not, simony. And, among others, these points seem to be clearly settled: 1. That to purchase a presentation, the living being actually vacant, is open and notorious simony (*e*): this being bad at common law as well as expressly in the face of the statute. 2. That for a clerk to bargain for the next presentation, the incumbent being sick and about to die, was simony, even before the statute of queen Anne (*f*), and now, by that statute, to purchase, either in his own name, or another's, the next presentation, and be thereupon presented at any future time to the living, is direct and palpable simony. But, 3. It is held that for a father to purchase such a presentation, in order to provide for his son, is not simony: for the son is not concerned in the bargain, and the father is by nature bound to make a provision for him (*g*), and if the purchase be made without a view to any particular clerk it is good, even though the incumbent be to the knowledge of both patron and purchaser *in extremis* (*h*). 4. That if a simoniacal contract be made with the patron, the clerk not being privy thereto, the presentation for that turn shall indeed devolve to the crown, as a punishment of the guilty patron; but the clerk, who * is innocent does not incur any disability or forfeiture (*i*). 5. That bonds given to pay money to charitable uses, on receiving a presentation to a living, are not simoniacal (*k*), provided the patron or his relations be not benefited thereby (*l*); for this is no corrupt consideration moving to the patron. 6. That bonds of resignation in case of non-residence or taking any other preferment are not simoniacal (*m*). These are now rarely entered into, since residence is enforced, and plurality of benefices prohibited. So, also, bonds to resign when the patron's son comes to a canonical age, are legal; upon the reason before given, that the father is bound to provide for his son (*n*). 7. General bonds to resign at the patron's request are held to be illegal (*o*). A bond, however, to resign in favour of any one person specially named therein, or one or two persons being by blood or mar-

(*e*) *Baker v. Rodgers*, Cro. Eliz. 788; Moor, 914; *Brookesbie's Case*, Cro. Eliz. 174; 1 Leon. 256; *Bishop of Lincoln v. Wolforstan*, 3 Burr. 1504.

(*f*) *Winchcome v. Pulleston*, Noy, 25; Hob. 165.

(*g*) Cro. Eliz. 686; Moor, 916.

(*h*) *Fox v. Bishop of Chester*, 6 Bing. 1.

(*i*) 8 Inst. 154; *R. v. Bishop of Norwich*, Cro. Jac. 885.

(*k*) Noy, 142.

(*l*) Stra. 534.

(*m*) Cro. Car. 180; see 1 & 2 Vict. c. 106.

(*n*) Cro. Jac. 248, 274.

(*o*) *The Bishop of London v. Ffytche*, 2 Bro. P. C. Toml. ed. 211; overruling many earlier cases, Cunn. Sim. 52.

riage an uncle, son, grandson, nephew, or grandnephew, of the patron, has been by a subsequent act (*p*) rendered good, if the resignation be duly made in pursuance of it, and the subsequent presentation also accord with the conditions of the bond; otherwise the resignation will be void (*q*). 8. An agreement by a vendor of an advowson, not being the incumbent, to pay interest on the purchase-money until a vacancy, has been held to be unobjectionable on the score of simony (*r*).

VI. The next kind of forfeitures are those by breach or non-performance of a condition annexed to the estate, either expressly, by deed, at its original creation, or *impliedly, by law, from a principle of natural reason. Both which we considered at large in [* 456] a former chapter (*s*).

VII. The seventh and last species of forfeiture is that of copyhold estates, by breach of the customs of the manor. Copyhold estates are not only liable to the same forfeitures as those which are held in socage, for treason, felony, alienation, and waste: whereupon the sovereign or the lord may seize them without any presentment by the homage (*t*): but also to peculiar forfeitures annexed to this species of tenure, which are incurred by the breach of either the general customs of all copyholds, or the peculiar local customs of certain particular manors.

We have already, in treating of copyholds, noticed this liability as incident to the tenure; we need only here observe that, as these tenements were originally held by the lowest and most abject vassals, the marks of feudal dominion continue much the strongest upon this species of property. Most of the offences which occasioned a resumption of the fief by the feudal law, and were denominated *feloniæ, per quas vasallus amitteret feudum* (*u*), still continue to be causes of forfeiture in many of our modern copyholds. As, by subtraction of suit and service (*x*): *si dominum deservire noluerit* (*y*): by disclaiming to hold of the lord, or swearing himself not his copyholder (*z*); *si dominum ejuravit, i. e. negavit se a domino feudum habere* (*a*): by neglect to be admitted tenant within a year and a day (*b*); *si per annum et diem cessaverit in petenda investitura* (*c*): by contumacy in not appearing in court after three proclamations (*d*); *si a domino ter citatus non comparuerit* (*e*): or by refusing, *when sworn of the homage, to present the truth according to his oath (*f*); [* 457] *si pares veritatem noverint, et dicant se nescire, cum sciant* (*g*). When a cause of forfeiture has arisen, it is usual for presentation of the facts to be made by the homage (*h*), and this has been said to be necessary in some cases (*i*). At all events, the lord must insist upon the forfeiture by entry, or some other similar act (*k*), and that within the period fixed by the statute of limitations (*l*).

(*p*) 9 Geo. 4, c. 94.
 (*q*) S. 5; see 7 & 8 Geo. 4, c. 25, a retrospective act passed in consequence of the decision in *Fletcher v. Lord Sondes*, 1 Bli. N. S. 144.
 (*r*) *Sweet v. Meredith*, 3 Giff. 610.
 (*s*) See ch. 10.
 (*t*) 2 Ventr. 38; Cro. Eliz. 499.
 (*u*) Feud. l. 2, t. 26, in cal.
 (*x*) 3 Leon. 108.
 (*y*) Feud. l. 1, t. 21.
 (*z*) Co. Copyh. s. 57.
 (*a*) Feud. l. 2, t. 84, & t. 26, s. 3.

(*b*) Plowd. 372.
 (*c*) Feud. l. 2, t. 24.
 (*d*) Co. Copyh. s. 57.
 (*e*) Feud. l. 2, t. 22.
 (*f*) Co. Copyh. s. 57.
 (*g*) Feud. l. 2, t. 58.
 (*h*) See Scriv. Copyh. 511.
 (*i*) See Co. Copyh. s. 58.
 (*k*) See *Doe d. Grubb v. Earl of Burlington*, 5 B. & Ad. 507; *R. v. Lady St. John Mildmay*, ib. 254.
 (*l*) 3 & 4 Will. 4, c. 27, s. 3.

[* 458]

* CHAPTER XIX.

TITLE BY JUDGMENT AND BANKRUPTCY.

ONE of the primary duties which a man owes to society is the due discharge of all his pecuniary debts and liabilities; correlative to this there necessarily exists, or ought to exist, a function of the law, that of enforcing the discharge of this duty. And one of the most obvious modes of doing this seems to be by insisting upon the application of the debtor's property to this purpose.

Land not liable
for payment of
debts by the
common law.

By the common law of England, however, no provision was made by which a creditor could obtain satisfaction of his debt from the real property of his debtor, however great an extent of land might be possessed by him. (334)

Such laws as now fulfil this function owe their existence entirely to statutory enactment. The object in view, as we have stated, seems to be simple; yet it has not been found easy to devise satisfactory measures for accomplishing it, and the present condition of the law can be described as little more than transitory; and in view of the change now in progress we shall not dwell longer than is necessary to exhibit the outlines of the present law, without entering into detail.

We have seen (a) that by the Statute of Westminster 2, as enlarged by a recent act, some provision was introduced by the legislature by which a creditor gained means of applying the rent and profit of land in payment of his debt. This, though useful, is not so complete a remedy as is required, nor is it so effectual as that which exists

[* 459] * and always has existed in the case of personal chattels. The want of the creditor is speedy payment in full. A sale of the debtor's property and payment out of the proceeds alone meets the creditor's wishes.

By an act passed in the year 1838 (b), it was declared that a judgment recovered against a debtor should become, subject to certain conditions, a charge enforceable in the court of Chancery, upon all lands belonging to the debtor at the time of entering up the judgment, or any time afterwards (c). The effect of this change was that an order could be obtained, in a suit in equity instituted for the purpose, for a sale of the lands, thus for the first time enabling a creditor to force a sale of his debtor's lands.

Judgment debts
made a charge
upon lands.

It was necessary for the creditor to register his judgment in the court of Common Pleas, as a means of giving notice to other persons dealing with the same debtor of his right (d); and in order to keep the charge alive as against

(a) *Ante*, p. 318.

(b) 1 & 2 Vict. c. 110. The same act that enlarged the effect of an elegit.

(c) Sect. 31.

(d) Sect. 19. The rules as to this registering and its effect were altered and amended by 2 & 3 Vict. c. 11, s. 6; 3 & 4 Vict. c. 84, s. 2; 18 & 19 Vict. c. 15, s. 4.

(334) In this country it is the general practice to sell lands for the satisfaction of decrees or judgments rendered against a debtor. By proceeding according to law the creditor may obtain a judgment, which may be made a lien upon the debtor's real estate. And the judgment may be satisfied by a sale of such real estate, if the debtor's personal property is not sufficient for that purpose. As the proceedings are not precisely alike in all particulars in the different States, it is not deemed proper to discuss the question at length. See 4 Kent's Com. 429-439; also, 2 Washb. Real Prop. 26-34, note (8d ed.), where most of the statutes of the several States are referred to.

subsequent judgment creditors, it was necessary to re-register at intervals of five years (e). Many objections to the provisions of this act were found in practice, and in the year 1860 a further alteration was made by which it was rendered necessary, in order to obtain a charge, that not only should a judgment be registered, but a writ of execution issued and registered (f). This was further altered by a subsequent act of the year 1864 (g), by which the creditor must, before he gains any * power of disposing of the land, issue a writ of elegit and actually take the lands in execution under [* 460] the writ, and register this fact in the court of Common Pleas. After he has

Power given to
the court of
Chancery to sell.

done this, however, the act gives him power to apply in a summary and inexpensive way to the court of Chancery for an order for sale of the lands (h). It would seem from the language of the last act (i), that a creditor who has thereunder obtained a charge will be able to enforce it even against a subsequent *bond fide* purchaser from the debtor, without notice of the judgment; it may have been considered perhaps that after the land has been delivered over by the sheriff under the writ of elegit it is impossible for any person dealing with the land to be ignorant of the fact. The act affords a glaring example of the imperfections attending our English method of amending law by ill-considered legislation. Some defects have

Difficulties attend-
ing the act 27 &
28 Vict. c. 112.

already been pointed out (k). We may add the following amongst many other difficulties which the act has introduced. First, since an equity of redemption cannot be extended under an elegit, it would seem that a judgment creditor of a mortgagor is powerless to reap the benefit of his judgment out of the land in mortgage. Again, if land has already been delivered in execution, a second judgment creditor would be remediless, for the sheriff will not, and indeed obviously cannot, deliver the same land twice; therefore, although the first creditor's debt may only amount to half the value of the land, the second creditor could take no advantage of the existence of the property. Possibly, these difficulties might in some degree be surmounted by the courts declaring the creditor, thus left out in the cold, entitled to redeem the prior incumbrancer, though this could by no means be * a satisfactory solution in all cases. But the act ought to have provided for this, and not left it to the chance of a [* 461] judge having courage to manufacture such law. The law must be amended in these respects, and that soon (l).

We may here notice that by the aid of suits in the court of Chancery, the land of a deceased debtor can now be taken from the heir or devisee, to be

Land of a de-
ceased debtor
applicable in
the court of
Chancery to
payment of
debts.

applied in payment of his ancestor's debt. This liability depends upon another series of statutes by which it has been slowly established, the completeness which now exists being however of but very recent date. For it seems clear that in the fourteenth century an heir, unless expressly bound by the deed of his ancestor,

(e) See, as to releasing part of the lands from the effect of a judgment; 22 & 23 Vict. c. 35, s. 11.

(f) 23 & 24 Vict. c. 38, s. 1. As to registry, s. 2. This act has no operation upon the rights of persons as created by judgments entered up before the 23rd July, 1860.

(g) 27 & 28 Vict. c. 112, taking effect upon judgments entered up after the 29th July, 1864. The act extends to statutes and recognizances.

(h) Sect. 4.

(i) See s. 6.

(k) *Ante*, p. 96. See the remedies noticed on p. 314, as given by courts of equity to judgment creditors when unable to reap the fruits of their judgments. These would, no doubt, be further extended, if possible, without openly contravening the act.

(l) See *Re Cowbridge R. Co.*, L. R. 5 Eq. 413; *Guest v. Cowbridge R. Co.*, L. R. 6 Eq. 619.

was free from any liability on his ancestor's account except to the king (*m*). If, however, the ancestor had bound himself and his heirs by deed, they being expressly mentioned, and creating thereby what is in modern phrase called a debt by specialty, by which the heir was bound, the latter was compelled to see that the debt was paid out of the personalty, or, in default, to pay it to the extent of the lands descended, which were therefore called assets (*n*). This doctrine, however, could not extend to devisees, for devises were not then permitted; and afterwards, when a will of lands was allowable, the devisee not being included under the term heir, took the lands free even from his ancestor's specialty debts: unless indeed the testator had impressed a trust upon them [*462] for the payment of debts: in which *case the court of Chancery enforced the execution of the trust in favour of all the creditors equally.

Next the act 3 & 4 W. & M. c. 14 (*o*), declared that a devise to defeat the debt of the testator by specialty in which the heirs were expressly bound should be considered fraudulent and void as against such creditor, unless the devise was for payment of debts generally (*p*). But now, by a very recent act (*q*), when any person dies seised of or entitled to any interest in any lands or hereditaments, whether corporeal or incorporeal, which he shall not have charged by his will with, or devised subject to, the payment of debts, the same are made assets, to be administered in courts of equity for the payment of all his debts. But the act preserves the preference which before existed in favour of those creditors by specialty in whose favour the heirs are bound. It will be noticed that the act excepts from its operation those estates which have been devised for payment of debts. These, therefore, are still administered under the court as within its ordinary jurisdiction over trusts, and with the same equality of distribution as obtained before (*r*).

Such is the present remedy given to a creditor against his debtor's lands. But, in addition to the case of a judgment obtained by an individual on his own behalf, another remedy for creditors is provided by law, by Bankruptcy. which lands and all the debtor's property are made available for the payment of his debts. This is when he becomes a bankrupt. The laws relating to bankruptcy have received many alterations in recent times, and are in process of still further modification. We shall therefore be brief in noticing [*463] them. Inasmuch as the whole property, both *real and personal, is applied in bankruptcy to the discharge of debts, we shall hereafter have occasion to recur to them. In bankruptcy, it will be observed, individual

(*m*) See Britton 1. A difference of opinion has existed, whether in the Saxon and early feudal times an heir was bound to pay his ancestor's debt to an extent equal to the value of his inheritance, if the goods and chattels, which without doubt always constituted the primary fund for that purpose, were insufficient. 1 Reeves, Hist. Eng. Law, 118, citing Glanville, lib. vii. c. 8; Bract. lib. 61 a; Bacon, Ab. tit. Heir and Ancestor. The authorities seem to show that the heir was so bound.

(*n*) From *asses*.

(*o*) Made perpetual by 6 & 7 Will. 3, c. 14.

(*p*) The act did not extend to covenants generally. *Wilson v. Knubley*, 7 East, 128.

(*q*) 3 & 4 Will. 4, c. 104, enlarging the operation of 47 Geo. 3, c. 74, and 11 Geo. 4 & 1 Will. 4, c. 47, which applied only to traders.

(*r*) 2 Jarm. Wills. 552. All unsecured contract creditors of every person who shall die on or after the 1st January, 1870, will be placed on an equality by 32 & 33 Vict. c. 46 (an act passed since the text was written). No preference will be given to any by reason that their debts are secured by bonds, deeds, or other instruments under seal (even if the heirs be expressly bound), or are otherwise constituted specialty debts.

creditors obtain no direct control over the property. It is administered according to the provisions of the statute for the equal benefit of all creditors (*s*), all the property of the debtor vesting, upon his appointment, in the trustee of the estate, whose duty it is to sell it and distribute the proceeds.

* CHAPTER XX.

[* 464]

TITLE BY ALIENATION.

THE most usual and universal method of acquiring a title to real estates is that of alienation; under which may be comprised any method wherein estates are voluntarily resigned by one man, and accepted by another: whether that be effected by sale, gift, marriage settlement, devise, or other transmission of property by the mutual consent of the parties.

This means of taking estates by alienation is not of equal antiquity in the law of England with that of taking them by descent. For we may remember that, by the feudal law, a pure and genuine feud could not be transferred from one feudatory to another without the consent of the lord; lest thereby a feeble or suspicious tenant might have been substituted and imposed upon him to perform the feudal services, instead of one on whose abilities and fidelity he could depend. Neither could the feudatory then subject the land to his debts: for, if he might, the feudal restraint of alienation would have been easily frustrated and evaded (*a*). And, as he could not aliene it in his lifetime, so neither could he by will defeat the succession, by devising his feud to another family; nor even alter the course of it, by imposing particular limitations, or prescribing an unusual path of descent. Nor, in short, could he aliene the estate, even with the consent of the lord, unless he had also obtained the * consent of his own next apparent or presumptive heir (*b*). And therefore it was very usual in ancient feoffments to express that the alienation was made by consent of the heirs of the feoffor; or sometimes for the heir apparent himself to join with the feoffor in the grant (*c*). And, on the other hand, as the feudal obligation was looked upon to be reciprocal, the lord could not aliene or transfer his seignory without the consent of his vassal: for it was esteemed unreasonable to subject a feudatory to a new superior, with whom he might have a deadly enmity, without his own approbation; or even to transfer his fealty, without his being thoroughly apprized of it, that he might know with certainty to whom his renders and services were due, and be able to distinguish a lawful distress for rent from a hostile seizing of his cattle, by the lord of a neighbouring clan (*d*). This consent of the vassal

(*a*) The earliest bankrupt law appears to be 13 Eliz. c. 7, followed by 21 Jac. 1, c. 19, and by numerous other statutes. A short statement of the present law, which is under legislative review whilst these sheets are

going through the press, will be found in a subsequent chapter.

(*a*) Feud. l. 1, t. 27.

(*b*) Co. Litt. 94; Wright, 168.

(*c*) Madox, Formul. Angl. No. 816, 819, 427.

(*d*) Gilb. Ten. 75.

was expressed by what was called attorning (*e*), or professing to become the tenant of the new lord: which doctrine of attornment was afterwards extended to all lessees for life or years. For if one bought an estate with any lease for life or years standing out thereon, and the lessee or tenant refused to attorn to the purchaser, and to become his tenant, the grant or contract was in most cases void, or at least incomplete (*f*); which was also an additional clog upon alienations.

But by degrees this feudal severity has worn off (*g*); and experience has shown, that property best answers the purposes of civil life, especially in commercial countries, when its transfer and circulation are totally free and *unrestrained. The road was cleared in the first place by a law of king Henry I., which allowed a man to sell and dispose of lands which he himself had purchased; for over these he was thought to have a more extensive power than over what had been transmitted to him in a course of descent from his ancestors (*h*): a doctrine which is countenanced by the feudal constitutions themselves (*i*): but he was not allowed to sell the whole of his own acquirements, so as totally to disinherit his children, any more than he was at liberty to aliene his paternal estate (*k*). Afterwards, a man seems to have been at liberty to part with all his own acquisitions, if he had previously purchased to him and his assigns by name; but, if his assigns were not specified in the purchase deed, he was not empowered to aliene (*l*): and also he might part with one-fourth of the inheritance of his ancestors without the consent of his heir (*m*). By the great charter of Henry III. (*n*), no subinfeudation was permitted of part of the land, unless sufficient was left to answer the services due to the superior lord, which sufficiency was probably interpreted to be one half or moiety of the land (*o*). But these restrictions were in general removed by the statute of *quia emptores* (*p*), whereby all persons, except the king's tenants *in capite*, were left at liberty to aliene all or any part of their lands at their own discretion (*g*). And even these tenants *in capite* were by the statute 1 Edw. 3., c. 12, permitted to aliene, on paying a fine to the king (*r*). By the temporary statutes 7 Hen. *7, c. 3, and 3 Hen. 8, c. 4, all persons [*467] attending the king in his wars were allowed to aliene their lands without licence, and were relieved from other feudal burdens. And lastly, these very fines for alienations were, in all cases of freehold tenure, entirely abolished by the statute 12 Car. 2, c. 24. As to the power of charging lands with the debts of the owner, this was introduced so early as statute Westm. 2 (*s*), which subjected a moiety of the tenant's lands to executions, for debts

(*e*) The same doctrine and the same denomination prevailed in Bretagne — *possessiones in jurisdictionibus non aliter apprehendi posse, quam per attournances et avirances, ut loqui solent; cum vasallus, ejurato prioris domini obsequio et fide, novo se sacramento novo item domino acquirenti obstringebat; idque jussu auctoritatis.* D'Argentre Antiq. Consuet. Brit. apud Dufresne, i. 819, 820.

(*f*) Litt. s. 551.

(*g*) See 1 Eden, 191.

(*h*) *Emptiones vel acquisitiones suas det cui magis velit. Si bocland habeat quam ei parentes dederunt, non mittat eam extra cognitionem suam.* LL. Hen. 1, c. 70.

(*i*) Feud. l. 2, t. 39.

(*k*) *Si questum tantum habuerit is, qui partem terrae suas donare voluerit, tunc quidem hoc ei licet; sed non totum questum, quia non potest filium suum haeredem exhaereditare.* Glanvil, l. 7, c. 1.

(*l*) Mirr. c. 1, s. 3. This is also borrowed from the feudal law. Feud. l. 2, t. 48.

(*m*) Mirr. *ibid.*

(*n*) 9 Hep. 3, c. 32.

(*o*) Dalrymple of Feuds, 95.

(*p*) 18 Edw. 1, c. 1.

(*q*) *Ante*, p. 204.

(*r*) 2 Inst. 67.

(*s*) 13 Edw. 1, c. 18.

recovered by law ; as the whole of them was likewise subjected to be pawned in a statute merchant by the statute *de mercatoribus*, made the same year, and in a statute staple by statute 27 Edw. 3, c. 9, and in other similar recognizances by statute 23 Hen. 8, c. 6. And now, the whole of them is not only subject to be pawned for the debts of the owner, but likewise to be absolutely sold for the benefit of his creditors in the manner appearing in the last chapter. The restraint⁺ of devising lands by will, except in some places by particular custom, lasted longer ; not being totally removed, till the abolition of the military tenures. The doctrine of attornments continued still later than any of the rest, and became extremely troublesome, though many methods were invented to evade it ; till at last, they were, by statute 4 & 5 Ann. c. 16, made no longer necessary to complete the grant or conveyance ; and by statute 11 Geo. 2, c. 19, the attornment of any tenant is declared not to affect the possession of any lands, unless made with consent of the landlord, or to a mortgagee after the mortgage is forfeited, or by direction of a court of justice. An attornment, then, is now unnecessary ; nevertheless, it is not altogether useless, for after an attornment, in an action by the landlord against the tenant, it is unnecessary to adduce evidence of the plaintiff's title ; unless, indeed, the tenant shows that he had attorned by mistake (*t*).

Necessity for
attornments
abolished.

* In examining the nature of alienation, let us first inquire briefly, who may aliene, and to whom ; and then, more at length, how a man [* 468] may aliene, or the several modes of conveyance. (335)

I. Who may aliene, and to whom : or, in other words, who is capable of conveying and who of purchasing. And herein we must consider rather the incapacity, than capacity, of the several parties ; for all persons I. Who may aliene, and to whom. are *primâ facie* capable both of conveying and purchasing, unless the law has laid them under any particular disabilities (*u*).

Persons attainted of treason, felony, and *praemunire*, are incapable of making a completely valid conveyance, from the time of the offence committed, provided attainder follows (*v*) : for such conveyance by them may Incapacity of traitors, felons, &c. tend to defeat the king of his forfeiture, or the lord of his escheat.

The conveyance, however, is good for all purposes except as against the crown or lord. But they may purchase for the benefit of the crown, though they are disabled to hold. We have already pointed out the extent of the forfeiture in different cases. So also, corporations, religious or others, may purchase lands ; yet, unless they have a licence to Corporations.

(*t*) 6 Taunt. 202 ; *Doe d. Thompson v. Thompson*, 6 Ad. & E. 721.

(*u*) Until lately there were many exceptions to the general power of alienation. Thus mere rights of entry or of property without any estate, contingent interests, and the like, were not capable of being aliened, though they might be released. See Co. Litt.

214 ; Shep. Touch. 238, and similar restrictions on the power of devising by will existed. But by the Wills Act, 7 Will. 4 & 1 Vict. c. 26, all these were made devisable ; and by 8 & 9 Vict. c. 106, they were made alienable by deed, estates tail being of course excepted.

(*v*) Co. Litt. 42.

(335) A title to lands can only be acquired and lost according to the laws of the State in which they are situated. *Clark v. Graham*, 6 Wheat. 577 ; *White v. Howard*, 46 N. Y. (1 Sick.) 144, 159 ; *Hosford v. Nichols*, 1 Paige, 230 ; *Osborn v. Adams*, 18 Pick. 245 ; *Godard v. Sawyer*, 9 Allen, 78 ; *Houston v. Nowland*, 7 Gill. & J. 430 ; *Wells v. Cowper*, 2 Hamm. 124 ; *Rabun v. Rabun*, 15 La Ann. 471.

hold in mortmain, they cannot retain such purchase; but it shall, with a few exceptions, be forfeited to the lord of the fee (*x*).

Idiots and persons of unsound mind, and those who, being born deaf and blind, are not distinguished from *idiots (*y*), infants, [* 469] and persons under duress, are not totally disabled either to convey or purchase, but *sub modo* only. For their conveyances and purchases are voidable, but not actually void. (336) This position has been established by degrees. The king, indeed, on behalf of an idiot, might always avoid his grants or other acts (*z*). But it was formerly said, that a *non compos* himself, though he be afterwards brought to a right mind, should not be permitted to allege his own insanity in order to avoid such grant: for that no man shall be allowed to stultify himself, or plead his own disability. The progress of this notion was somewhat curious. In the time of Edward I., *non compos* was a sufficient plea to avoid a man's own bond (*a*): and there is a writ in the register (*b*) for the alienor himself to recover lands aliened by him during his insanity; *dum fuit non compos mentis suæ, ut dicit, &c.* But under Edward III. a scruple began to arise, whether a man should be permitted to blemish himself, by pleading his own insanity (*c*): and, afterwards, a defendant in assise having pleaded a release by the plaintiff, since the last continuance, to which the plaintiff replied (*ore tenus*, as the manner then was) that he was out of his mind when he gave it, the court adjourned the assise; doubting whether, as the plaintiff was sane both then and at the commencement of the suit, he should be permitted to plead an intermediate deprivation of reason; and the question was asked, how he came to remember the release, if out of his senses when he gave it (*d*). Under Henry VI. this reasoning (that a man should not be allowed to disable himself, by pleading his own incapacity, because he could not know what he did under such a situation) was seriously adopted by the judges in argument (*e*); upon a question, whether the [* 470] *heir was barred of his right of entry by the feoffment of his insane ancestor. And from these loose authorities, which Fitzherbert does not scruple to reject as being contrary to reason (*f*), the maxim that a man shall not stultify himself was treated as settled law (*g*). They have, however, been overruled, and it is now settled the other way, that a man himself (*h*), as well as his representatives (*i*), may establish his lunacy in order to impeach a deed which he has executed. (337) If a contract, however, entered into by

(*x*) *Ibid.* 2. For some exceptions, see *ante*, p. 448; and, in addition, the acts for Museums (8 & 9 Vict. c. 43) and Volunteer Corps, 26 & 27 Vict. c. 65.

(*y*) Co. Litt. 42 b.

(*z*) *Ibid.* 247.

(*a*) Britton, c. 28, fol. 66.

(*b*) Fol. 228. See also Memorand. Scacch. 22 Edw. 1 (prefixed to Maynard's Year-book, Edw. 2), fol. 23.

(*c*) 5 Edw. 3, 70.

(*d*) 35 Assis. pl. 10.

(*e*) 39 Hen. 6, 42.

(*f*) F. N. B. 202.

(*g*) Litt. s. 405; *Stroud v. Marshall*, Cro. Eliz. 398; *Beverley's Case*, 4 Rep. 123; Jenk. 40.

(*h*) *Moulton v. Camroux*, 2 Exch. 487, 501; 4 Exch. 17.

(*i*) Perkins, s. 107; Co. Litt. 3.

(336) The American cases are to the same effect. *Wait v. Maxwell*, 5 Pick. 217; *Allis v. Billings*, 6 Metc. 415; *Arnold v. Richmond Iron Works*, 1 Gray, 434; *Ingraham v. Baldwin*, 9 N. Y. (5 Seld.) 45; *Breckenridge v. Ormsby*, 1 J. J. Marsh. 245; *Dennett v. Dennett*, 44 N. H. 538; *Doe v. Prettyman*, 1 Houst. 389; *Henderson v. McGregor*, 30 Wis. 78.

(337) The same rule prevails in this country. *Rice v. Peet*, 15 Johns. 503; *Lang v. Whidden*, 3 N. H. 435; *Grant v. Thompson*, 4 Conn. 208; *Mitchell v. Kingman*, 5 Pick. 431; *Horner v. Marshall*, 5 Munf. 466; *Lasell v. Pinnick*, 1 Tyler, 247.

an idiot lunatic with another without any notice of the incapacity, be so far carried into effect that the parties cannot be restored to their former rights, it will be supported (*j*).

The contracts of an infant are not absolutely void, for he may ratify them on attaining majority; they are voidable only (*k*). (338) But they must be actually ratified, either expressly or by necessary implication from conduct, else they may be set aside after the infant's death by his representatives. With the aid of the Court of Chancery infants may make binding settlements on marriage (*l*).

Persons also, who purchase or convey under duress, may affirm or avoid such transaction, whenever the duress is ceased (*m*). For all these are under the protection of *the law; which will not suffer them to be imposed upon, through the imbecility of their present condition; so that their acts are only binding, in case they be afterwards agreed to, when such disability ceases. (339)

(*j*) *Beavan v. McDonnell*, 10 Exch. 184; *Elliot v. Ince*, 7 De G. M. & G. 475, 488. The distinction between voidable and void instruments which formerly existed, leoffments being considered voidable only by reason of their publicity and solemnity, other deeds being void, is now abolished. 8 & 9 Vict. c. 106, s. 4.

(*k*) Co. Litt. 2; *Baylis v. Dineley*, 3 M. & S. 477; see *Thompson v. Leach*, 3 Mod. 801, 810. (*l*) 18 & 19 Vict. c. 43.

(*m*) 2 Inst.; 5 Rep. 119. The duress or infancy must be specially pleaded, and cannot be given in evidence under the plea of *non est factum*, Bull. N. P. 172. As to how far drunkenness may invalidate a deed, see *Johnson v. Midlicott*, 3 P. W. 131 n; *Cooke v. Clayworth*, 18 Ves. 12; *Nagle v. Baylor*, 8 Dru. & War. 60; *Davies v. Cooper*, 5 M. & Cr. 270; and see, as to other points, *Williams v. Bayley*, L. R. 1 H. L. 200.

(338) In this country the settled general rule is, that the contracts of an infant are voidable, not absolutely void. *Oliver v. Houdlet*, 18 Mass. 237; *Reed v. Batchelder*, 1 Metc. 559; *Cole v. Pennoyer*, 14 Ill. 161; *Irvine v. Irvine*, 9 Wall. 636; *Bool v. Mix*, 17 Wend. 120, 132; *Gillett v. Stanley*, 1 Hill, 122, 125; *Kline v. Beebe*, 6 Conn. 494, 504; *Dana v. Coombs*, 6 Greenl. 89, 90; *Drake v. Ramsey*, 5 Ohio, 251; *Wheaton v. East*, 5 Yerg. 41; *Freeman v. Bradford*, 5 Port. (Ala.) 270, 272; *Breckinridge v. Ormsby*, 1 J. J. Marsh. 236, 242; *Benton v. Saunders*, Busbee, 360.

Notwithstanding the general rule just stated, there is a well-established exception to it, which is, that an infant is liable for necessities furnished, though such liability is founded upon an implied promise; and this implied liability is the only one which is absolutely binding upon an infant. And to render him liable upon this contract the articles furnished must be such as are actually necessary in the particular case. *Wailing v. Toll*, 9 Johns. 141; *Guthrie v. Murphy*, 4 Watts, 80; *Freeman v. Bridger*, 4 Jones' Law, 3.

Whether the articles furnished are of that class for which an infant may be made liable, as necessary, is a question of law; but, whether they were necessary as to quantity, and as to their not being otherwise supplied, or as to the value or price, this is a question of fact. *Bent v. Manning*, 10 Vt. 225; *Tupper v. Caldwell*, 12 Metc. 559, 563; *Grace v. Hale*, 2 Humph. 27, 29; *Beeler v. Young*, 1 Bibb, 519, 521.

If an infant would avoid his conveyance of real estate, he must wait until he is of full age. *Tucker v. Moreland*, 10 Pet. 59, 79; *Bool v. Mix*, 17 Wend. 120, 132; *Stafford v. Ross*, 9 Cow. 626, 628. See 1 Am. Lead. Cas. 280-330 (5th ed.).

(339) In this country duress is a sufficient ground for avoiding any contract executed under its influence. *Baker v. Morton*, 12 Wall. 150; *Bogle v. Hammons*, 2 Heisk. (Tenn.) 136; *Richardson v. Duncan*, 3 N. H. 508; *Watkins v. Baird*, 6 Mass. 511; *Stouffer v. Lathau*, 2 Watts, 167; *Nelson v. Suddarth*, 1 Hen. & M. 350.

"Actual violence is not necessary to constitute duress even at common law, as understood in the parent country, because consent is the very essence of a contract, and if there be compulsion there is no consent; and it is well-settled law that moral compulsion, such as that produced by threats to take life or to inflict great bodily harm, as well as that produced

It must be remembered that under the acts for the regulation of the affairs of lunatics, deeds may be executed by the committee, under the direction of the lord chancellor, or the lords justices of the court of appeal in chancery, sitting as judges in lunacy (*n*).

The case of a married woman is, as the law now stands, somewhat different. She may purchase an estate without the consent of her husband, and the

conveyance is good during the coverture, till he avoids it by some
Feme covert. act declaring his dissent (*o*). And, though he does nothing to avoid it, or even if he actually consents, she herself may, after the death of her husband, waive or disagree to the same: nay, even her heirs may waive it after her, if she dies before her husband, or if in her widowhood she does nothing to express her consent or agreement (*p*). But the conveyance or other contract of a feme covert, with certain exceptions, is absolutely void and not merely voidable, and, therefore, cannot be affirmed or ratified by any subsequent agreement (*q*). The exceptions are as follows:—

First, a married woman may, with the concurrence of her husband, dispose of or disclaim any estate or interest in real estate, or money subject to a trust to be laid out in the purchase of real estate or any reversionary interest in personalty (not settled by her marriage settlement, and when the deed or instrument under which she claims is dated subsequent to the 31st Dec. 1857 (*r*)) by executing and acknowledging a deed in the manner prescribed by the act which abolished fines and recoveries (*s*): that is * to say, she [* 472] must acknowledge her free consent to the deed, upon an examination apart from her husband by a judge, or two of the commissioners appointed for that purpose.

(*n*) See vol. iii. p. 82, *et seq.*

(*o*) Co. Litt. 3.

(*p*) *Ibid.*

(*q*) Perkins, s. 154; 1 Sid. 120.

(*r*) The reversionary interest in personalty

is assignable by virtue of 20 & 21 Vict. c. 57, commonly called Malins' Act.

(*s*) 3 & 4 Will. 4, c. 74, ss. 77, 78, *et seq.* See 8 & 9 Vict. c. 106, s. 7.

by imprisonment, is sufficient to destroy free agency, without which there can be no contract, as in that state of the case there is no consent."

"Where a party enters into a contract for fear of loss of life, or for fear of loss of limb, or fear of mayhem, or for fear of imprisonment, the contract is as clearly void as when it was procured by duress of imprisonment, which is where there is an arrest for an improper purpose without just cause, or where there is an arrest for a just cause but without lawful authority, or for a just cause but for an unlawful purpose; and the rule is that in either of those events the party arrested, if he was thereby induced to enter into a contract, may avoid it as one procured by duress." Per CLIFFORD, J. *Baker v. Morton*, 12 Wall. 157, 158; *Severance v. Kimball*, 8 N. H. 386; *Fisher v. Shattuck*, 17 Pick. 252; *Whitefield v. Longfellow*, 13 Me. 146; *Richards v. Vanderpoel*, 1 Daly, 71; *Topley v. Topley*, 10 Minn. 460; *Phelps v. Zuschlag*, 34 Texas, 371; *Bane v. Detrich*, 52 Ill. 19. See *ante*, 109, note 57.

Whether duress of goods is such duress as to avoid a contract is a point upon which the authorities are not in harmony. The English cases hold that duress of goods will not afford ground for avoiding a contract. *Atlee v. Backhouse*, 3 Mees. & Wels. 650; *Skate v. Beale*, 11 Ad. & El. 983; *Glynn v. Thomas*, 11 Exch. 878. See, also, *Bingham v. Sessions*, 6 Sm. & Marsh. (Miss.) 13, 22.

But in this country there are several cases which hold that such a duress is entirely sufficient to avoid a contract entered into under its influence. *United States v. Huckabee*, 16 Wall. 414, 482; *Foshay v. Ferguson*, 5 Hill, 154, 158; *Central Bank v. Copeland*, 18 Md. 318; *Sasportas v. Jenning*, 1 Bay. 470; *Collins v. Westbury*, 2 id. 211; *Nelson v. Suddarth*, 1 Hen. & Munf. 350.

Previously to the passing of the last-mentioned act, a married woman could only deal with her real estate by a fine or recovery, that is, by one of the fictitious proceedings of which we have before spoken. And previously to the year 1858, when the restricted power above noticed was conferred upon her by the legislature, a married woman could not deal with any reversionary interest in personalty, by any means whatever. Her husband could, of course, make an assignment which would be valid against himself or his representatives and bind the fund if it fell into possession during the coverture, subject only to the equity to a settlement in favour of the wife out of the fund, which the court of chancery has established; but the concurrence of the wife with her husband had simply no effect, and if she survived her husband, and the fund fell into possession after his death, it became hers free from any incumbrance (t).

Before the Fines and Recoveries Abolition Act, in most manors a husband and wife could surrender copyhold tenements belonging to the wife so as to effect a valid alienation, the wife being usually examined by the *steward separately from her husband; the power of doing so still has been [*473] expressly reserved by the act, so that no acknowledgment of a deed before a judge or commissioners is in these cases requisite (u).

Since the establishment of the doctrines of the court of equity, by which married women are permitted to have complete control over property, whether real or personal, settled to their separate use, a woman is permitted to contract in respect of such property, and deeds executed by her will be effectual in all respects as if she were a feme sole (x). (340) And where by the instrument of settlement, power of appointment is given to a married woman, her deed in execution of the power will be perfectly valid if made in due accordance with the power. She may release or extinguish any power which she possesses by a deed duly acknowledged (y). And her election, even without a deed, will

(t) *Pierce v. Thorneley*, 2 Sim. 167; *Purdeu v. Jackson*, 1 Russ. 1; *Honner v. Morton*, 3 Russ. 65. As to a wife's equity to a settlement out of her own property, see *Elibank v. Montolieu*, 5 Ves. 737. The doctrine is that a wife shall have as against her husband or his assignees a provision by way of settlement upon herself and children out of any personalty belonging to her which may fall into possession during the coverture; the amount of which will be so settled is wholly within the discretion of the court. See *Re Suggitt's Trusts*, L. R. 3 Ch. 215. It arose originally in those cases where the husband was obliged to have recourse to the court to assist him in obtaining possession of the money, and the court, as a price of its assist-

ance, insisted upon the settlement. *Bosvil v. Brander*, 1 P. W. 457. Afterwards the wife was permitted to file her bill for the simple purpose of obtaining the settlement. *Sturgis v. Champneys*, 5 My. & Cr. 97.

(u) See 3 & 4 Will. 4, c. 74, s. 77.

(x) *Hulme v. Tennant*, 1 Bro. C. C. 16, where a bond was held to bind the separate estate. *Johnson v. Gallagher*, 3 D. G. F. & J. 494, where a general review of the position of married women with respect to their separate estates will be found. *Taylor v. Mead*, 34 L. J. Ch. 203, where L. C. Westbury held that a married woman might by a simple deed, unacknowledged, dispose of the fee-simple of lands settled to her separate use.

(y) 3 & 4 Will. 4, c. 74, s. 77.

(340) The general principles of the English law in relation to the rights of married women over their real estate have been generally adopted and followed in this country, if no statute has introduced a different rule. But the tendency of legislation in the different States is to give to a married woman many, if not most, of the rights she would have to such property if she were a single woman. The power which the common law gave to a husband over the wife's property, and the rights which creditors possessed of taking her property for the husband's debts, have been materially curtailed by legislation. As the details of the statutes differ in the several States, this is no place to give them, on account of the space required for their insertion. See 1 Pars. on Cont. 367 to 382, note, for a reference to many of the statutes and decisions; see, also, Bishop on the Law of Married Women.

bind her interest (z). It must not be forgotten, however, that the same court has also established the doctrine of restraint upon alienation by a married woman, and therefore, where this is contained in the settlement, the power of disposition does not apply (a).

Except in these cases any deed of a married woman is void. Still, if a married woman so act, that for her afterwards to plead the disability would constitute a gross fraud, she will not be permitted, in a court of equity at least, to avail herself of the fact of coverture (b). But *the whole [* 474] law as to property of married women will soon be materially altered.

The case of an alien born is also peculiar. For he may purchase anything; but after purchase he can hold nothing, except a lease for years of a house for convenience of merchandize, in case he be an alien friend: all other purchases (when found by an inquest of office) being immediately forfeited to the king (c). (341)

Lay civil corporations may in general, unless specially restricted by acts of parliament, aliene their lands as freely as individuals (d). But ecclesiastical eleemosynary and collegiate corporations are specially restricted in a manner presently to be noticed. Spiritual persons are absolutely incapacitated from assigning the patronage belonging to them by virtue of their office (e). The last cases we need here notice are those of persons upon whom and whose families land has been inalienably conferred by the crown (f) or legislature, as a reward for great public services: as in the case of the first duke of Marlborough (g), or the late duke of Wellington (h). Though, when the land has been given by the crown for an estate-tail, if the reversion become vested in a private individual, the estate-tail may be converted into a fee-simple, and so the reversion may be barred (i). We may [* 475] *also remember that the owners of dignities, peerages and the like, are incapable of aliening them (j).

We are next, but principally, to inquire, how a man may aliene or convey; which will lead us to consider the several modes of conveyance.

In consequence of the admission of property, or the giving a separate right by the law of society to those things which by the law of nature were in common, there was necessarily some means to be devised, whereby that separate right or exclusive property should be originally acquired; which we have more than once observed, was that of occupancy or first possession. But this pos-

(z) *Ib.* s. 78.

(a) *Pybus v. Smith*, 3 Bro. C. C. 347; *Tullett v. Armstrong*, 4 My. & Cr. 377.

(b) *Vaughan v. Vanderstegen*, 2 Drew. 408; *Re Lush's Trust*, L. R. 4 Ch. 591.

(c) Co. Litt. 2, ante, p. 448. The disabilities of Roman Catholics which were formerly imposed by parliament, see 11 & 12 Will. 3, c. 4; 18 Geo. 3, c. 60, have all been removed by the like authority; 2 & 3 Will. 4, c. 115; 23 & 24 Vict. c. 134, and an act of the present session, 32 & 33 Vict. c. 109.

(d) 4 Cruise, Dig. 13.

(e) 3 & 4 Vict. c. 113; 9 & 10 Vict. c. 88.

(f) See 34 & 35 Hen. 8, c. 20.

(g) 3 & 4 Anne, c. 6; 5 Anne, cc. 3 & 4. So pensions cannot be aliened, at least in those cases where the pensioners are considered as receiving their pensions not only as a reward for past services, but also in consideration of their being still liable when called upon to render public service. See 5 & 6 Ed. 6, c. 16; 49 Geo. 3, c. 12; 11 Geo. 4 & 1 Will. 4, c. 20, s. 47.

(h) 54 Geo. 3, c. 161.

(i) Pig. Recov. 88; 1 Prest. Conv. 18, 145.

(j) 3 Cruise, Dig. 176; *Berkeley Peerage*, 8 H. L. 21; *R. v. Viscount Purbeck*, Show. P. C. 1.

(341) See ante, 286, note 115, as to the disabilities or the rights of aliens in this country; see, also, *State v. Killian*, 51 Mo. 80; *Stetgast v. Schrimpf*, 35 Texas, 323; *Goodrich v. Russell*, 42 N. Y. (3 Hand) 177; *Crane v. Reeder*, 21 Mich. 24.

session, when once gained, was also necessarily to be continued; or else, upon one man's dereliction of the thing he had seized, it would again become common, and all those mischiefs and contentions would ensue, which property was introduced to prevent. For the purpose, therefore, of continuing the possession, the municipal law has established descents and alienations: the former to continue the possession in the heirs of the proprietor, after his involuntary dereliction of it by his death; the latter to continue it in those persons to whom the proprietor, by his own voluntary act, shall choose to relinquish it in his life-time. A translation, or transfer, of property being thus admitted by law, it became necessary that this transfer should be properly evidenced: in order to prevent disputes, either about the fact, as whether there was any transfer at all; or concerning the persons, by whom and to whom it was transferred; or, with regard to the subject matter, as what the thing transferred consisted of; or lastly, with relation to the mode and quality of the transfer, as for what period of time (or, in other words, for what estate and interest) the conveyance was made. The legal evidences of this translation of property are called the common assurances of the kingdom; whereby every man's estate is assured to him, and all controversies, doubts, [*476] and difficulties are either prevented or removed.

These common assurances are of four kinds:—1. By matter *in pais*, or deed; which is an assurance transacted between two or more private persons *in pais*, in the country; that is (according to the old common law) upon the very spot to be transferred. 2. By matter of record, or an assurance transacted only in the king's public courts of record. 3. By special custom, obtaining in some particular places, and relating only to some particular species of property. Which three are such as take effect during the life of the party conveying or assuring. 4. The fourth takes no effect till after his death; and that is by devise, contained in his last will and testament.

In a former chapter (*k*), when treating of copyholds, we had occasion to dwell upon the peculiar mode by which they are aliened. Our third head, which applies to copyholds only, has therefore been sufficiently dealt with. Of the others we will treat in order.

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* CHAPTER XXI.

ALIENATION BY DEED.

IN treating of deeds we will consider, first, their general nature; and, next, the several sorts or kinds of deeds, with their respective incidents, and the manner in which they take effect. And, in explaining the former, we will examine, first, what a deed is; secondly, its requisites; and thirdly, how it may be avoided. (342)

I. First, then, a deed is a writing sealed and delivered by the parties (a). It is sometimes called a charter, *carta*, from its materials; but most usually, when applied to the transactions of private subjects, it is called

I. What is a deed. a deed, in Latin *factum*, κατ' ἐξοχήν, because it is the most solemn and authentic act that a man can possibly perform, with relation to the disposal of his property; and therefore a man shall always be estopped at law, by his own deed, or not permitted to aver or prove anything in contradiction to what he has once so solemnly and deliberately avowed, though in equity this rule is not adhered to when justice requires otherwise (b). If a deed be

Indenture. [* 478] made * by more parties than one, there ought to be regularly as many copies of it as there are parties, and each should be cut or indented (formerly in acute angles *instar dentium*, like the teeth of a saw, but at present in a waving line) on the top or side, to tally or correspond with the other; which deed, so made, is called an indenture (c). Formerly, when deeds were more concise than at present, it was usual to write both parts on the same piece of parchment, with some word or letters of the alphabet written between them; through which the parchment was cut, either in a straight or indented line, in such a manner as to leave half the word on one part, and half on the other. Deeds thus made were denominated *syn-*

(a) Co. Litt. 171. As to estoppel at law. where the doctrine of a vendor retaining a lien upon an estate for unpaid purchase-money, notwithstanding the deed expressed it to be paid, was much discussed and established.

Veale v. Warner, 1 Wms. Saund. 325; *Crosley v. Dixon*, 10 H. L. Cas. 293; *Phillpotts v. Phillpotts*, 10 C. B. 85. As an example of the course a court of equity takes to secure justice, notwithstanding the expressions in a deed, see *Mackreth v. Symmons*, 15 Ves. 328,

(b) Plowd. 434.

(c) Co. Litt. 148.

(342) It may be assumed that all of the States have statutes relating to the requisites of deeds. Many, and perhaps most of these statutes refer directly or indirectly to the common-law modes of conveyance. In preparing or executing deeds, or in giving them a construction, it will be necessary to examine and consider the statutes of the State in which the conveyed lands are situated. Before considering in detail the general requisites of a deed, it may be well to notice some essential particulars in relation to the conveyance of lands. In this country it is the general policy of the laws to favor and facilitate the sale and transfer of real estate. But there is one restriction upon the sale of real estate which prevails quite extensively, if not generally, in the several States; this restriction is a prohibition of the sale of pretended titles, or the sale of lands which are not in the possession of the grantor, but are in the possession of a third party, who claims to hold them adversely to the grantor. See 4 Kent's Com. 446 to 450, and notes.

Such sales of land held adversely are, as a general rule, void in those States in which they are prohibited (see 4 Kent's Com. 448 to 450, and notes), though the deed may be good and pass the title as between the grantor and the grantee. *Ib.*

grapha by the canonists (*d*); and with us *chirographa*, or handwritings (*e*); the word *cirographum* or *cyrographum* being usually that which was divided in making the indenture. But at length indenting only has come into use, without cutting through any letters at all; and even this now serves no other purpose than to give a name to the species of the deed (*f*). And the legislature has declared that a deed purporting to be an indenture shall have the effect of one, whether actually indented or not (*g*). When the several parts of an indenture are interchangeably executed by the several parties, that part or copy which is executed by the grantor is usually called the original, and the

rest are counterparts: though of late it is most frequent for all the parties to execute every part; which renders them all originals.

A deed made by one party only was not indented, but polled or shaven quite even; and therefore called a deed-poll, or a single deed (*h*). The distinction between indentures and deeds-poll was formerly important, as it was held that every person who took an immediate benefit under an indenture must *be a party to it, whereas this was not the case under a deed-poll, to which, indeed, there being only the grantor [* 479] a party, it would have been inoperative if the same rule had applied. This ground of distinction is now done away with, for by the act just referred to, any person not a party to an indenture may take an immediate interest under it. The only essential importance which now remains in the question as to whether an instrument ought to be a deed-poll or indenture depends upon the necessities imposed by acts of parliament (*i*).

We are in the next place to consider the requisites of a deed. The first of which is, that there be persons able to contract and be contracted with, for the purposes intended by the deed (*k*): (343) and

(*d*) Lyndew. l. 1, t. 10, c. 1.

(*e*) Mirror, c. 2, s. 27; Co. Litt. 143, 4.

(*f*) See Butl. Co. Litt. 229 a, n. Com. Dig. & 9 Vict. c. 18, s. 81; 19 & 20 Vict. c. 120, s. 34.

Fitz. C. 1.

(*g*) 8 & 9 Vict. c. 106, s. 5.

(*h*) Ib. Litt. s. 371, 372.

(*i*) See 27 Hen. 8, c. 16; 32 Hen. 8, c. 28; 8

& 9 Vict. c. 18, s. 81; 19 & 20 Vict. c. 120, s. 34.

(*k*) *Dand v. Kingscott*, 6 M. & W. 174, 200.

(343) To render a deed valid the parties to it must be legally competent to contract, and they must be truly and sufficiently described. Where the grantor is legally incompetent, his deed may be absolutely void, or it may be merely voidable. And the tendency of modern adjudications is to hold them voidable rather than void.

It is a general rule that the deed of a married woman is void, unless joined in the deed by her husband, or unless authorized by statute to convey the lands without her husband. *Lowell v. Daniels*, 2 Gray, 161; *Perrine v. Perrine*, 8 Stockt. (N. J.) 142, 144; *Cope v. Meeks*, 8 Head. 888; *Baxter v. Bodkin*, 25 Ind. 172; *Shumaker v. Johnson*, 35 id. 33; *Davis v. Andrews*, 30 Vt. 681; *Beckman v. Stanley*, 8 Nev. 257; *Hoyt v. Swar*, 53 Ill. 184; *Dunham v. Wright*, 53 Penn. St. 167; *Ezelle v. Parker*, 41 Mo. 520; *Dow v. Jewell*, 18 N. H. 340; *Camden v. Vail*, 23 Cal. 633.

To render a conveyance of land valid, there must be a grantee competent to take it; therefore, a deed of land to the trustees *de facto* of an unincorporated religious society does not convey any title to the society. *Bundy v. Birdsall*, 29 Barb. 81; see, also, *Jackson v. Cory*, 8 Johns. 385; *Hornbeck v. Westbrook*, 9 id. 73; *German Land Association v. Scholler*, 10 Minn. 331; *Sloans v. McConahy*, 4 Ohio, 157; *Thomas v. Marshfield*, 10 Pick. 364.

A deed executed by a person of non-sane mind, whether insane, imbecile or an idiot, is voidable. *Wait v. Maxwell*, 5 Pick. 217; *Grisvold v. Butler*, 3 Conn. 231; *Ingraham v. Baldwin*, 9 N. Y. (5 Seld.) 45; *Breckenridge v. Ormsby*, 1 J. J. Marsh. 245; *Hovey v. Hobson*, 53 Me. 451, 456; *Miles v. Lingerman*, 24 Ind. 387; *Doe v. Prettyman*, 1 Houst. 339; *Dennett v. Dennett*, 44 N. H. 538.

also a thing or subject-matter to be contracted for; all which must be expressed by sufficient names (*l*). So, as in every grant there must be a grantor, a grantee, and a thing granted; in every lease a lessor, a lessee, and a thing demised. (344)

Secondly, the deed must be founded upon good and sufficient consideration.

As to what is a good consideration, sufficient to support the deed, it is in some cases difficult to determine. (345) A grant, made without any consideration, is, as it were, of no effect: for it is construed to enure, or to be effectual, only to the use of the grantor himself (*m*). (346) Yet mere inadequacy of consideration, where there is no fiduciary relation between the parties, is

(*l*) Co. Litt. 85.

(*m*) Perk. s. 533.

So of the deed of an infant. *Kendall v. Lawrence*, 22 Pick. 540; *Bool v. Mia*, 17 Wend. 119; *Roof v. Stafford*, 7 Cow. 180; *Phillips v. Green*, 3 A. K. Marsh. 11; *Tucker v. Moreland*, 10 Pet. 58.

In regard to the names of the parties to a deed, it may be stated that it is not absolutely necessary to name the grantee, if he be so designated that it is certain who is intended; and therefore, a deed to A. or his heirs is good, for if A. is alive he has no heirs, and if dead his heirs can be ascertained, *abunde*. *Ready v. Kearsey*, 14 Mich. 235; *Hogan v. Page*, 2 Wall. 607; see, also, *Boone v. Moore*, 14 Mo. 420; *Moore v. Carpenter*, 19 Vt. 618.

(344) A proper designation or description of the lands granted is an essential part of a deed, for if the subject of the grant cannot be ascertained from the description in the deed, the grant will be void. *Wofford v. McKinna*, 28 Tex. 86, 44; *Lessee of Massie's Heirs v. Long*, 2 Ohio, 287; *Erwin v. Helm*, 13 Serg. & Rawle, 151; *Haven v. Crane*, 1 N. H. 93; *Bal-lance v. Freyeth*, 18 How. (U. S.) 18, 23.

"In the description of the land conveyed, the rule is, that known and fixed monuments control courses and distances. So, the certainty of metes and bounds will include and pass all the lands within them, though they vary from the given quantity expressed in the deed. The least certain and material parts of the description must yield to those which are the most certain and material, if they cannot be reconciled; though in construing deeds the courts will give effect to every part of the description, if practicable." 4 Kent's Com. 466. The lines of the lot will be run by the needle if there is nothing in the deed to control the courses and distances. *White v. Gay*, 9 N. H. 126; *Brooks v. Tyler*, 2 Vt. 848; *Pernam v. Wead*, 6 Mass. 181; *Higley v. Bidwell*, 9 Conn. 447; *Clark v. Wethey*, 19 Wend. 320; *Lessee of Wyckoff v. Stephenson*, 14 Ohio, 13, 15, 17; *Trammell v. Nelson*, 2 Harr. & McHen. 4; *Doe v. Porter*, 8 Ark. 18, 57; *Welch v. Phillips*, 1 McCord, 215; *Preston v. Boumar*, 6 Wheat. 580.

If the land is described by definite boundaries, or its quantity is qualified by the words "more or less," or other similar words, the statement is a mere matter of description, and the buyer takes the risk of the quantity, if there is no fraud in the transaction. *Faure v. Martin*, 7 N. Y. (3 Seld.) 210; *Noble v. Goggins*, 99 Mass. 281; *Wearb v. Rose*, 1 C. E. Green, 290, 297; *Slothower v. Gordon*, 23 Md. 1; *Stebbins v. Eddy*, 4 Mason, 414.

(345) One of the first requisites of a consideration is that it be legal, for if it be of an immoral or illegal nature, the deed will be void. *Florentine v. Wilson*, Hill & Denio, 303; *German, etc., Ins. Co. v. Grim*, 82 Ind. 249. See the leading case, *Collins v. Blantern*, 2 Wils. 341; 1 Smith's Lead. Cas. 489 (367).

(346) A recital in a deed that the consideration has been paid will prevent any trust from resulting to the grantor. *Meeker v. Meeker*, 16 Conn. 383, 387; *Stackpole v. Robbins*, 47 Barb. 212; S. C. affirmed, 43 N. Y. (3 Sick.) 665; *Kimball v. Walker*, 80 Ill. 511; *Sprigg v. Mt. Pleasant Bank*, 14 Pet. 206.

Where there is no fraud toward the grantor or his creditors, a deed of lands which is executed without any consideration is sufficient to pass the title from the grantor to the grantee. *Fouty v. Fouty*, 84 Ind. 438; *Labaree v. Carleton*, 53 Me. 211; *Ryan v. Brown*, 18 Mich. 196; *Rogers v. Hillhouse*, 8 Conn. 398, 402; *Perry v. Price*, 1 Mo. 553, 555; *Jackson v. Dillon*, Overt. 261, 264; *Den v. Hawks*, 5 Ired. 80, 82; *Ruth v. King*, 9 Kan. 17.

not sufficient ground for impeaching the deed (n). (347) The consideration may be either a good or a valuable one. A good consideration is such as that of blood, or of natural love and affection, when a man grants an estate to a near relation, being founded on motives of generosity, prudence, and natural * duty; a valuable consideration is such as money, marriage, or the like, which the law esteems an equivalent given for the grant (o); (348) and is therefore founded in motives of justice. Conveyances made upon good consideration only, are considered as merely voluntary, and are frequently set aside in favour of creditors, and *bona fide* purchasers. For by a statute passed in the reign of queen Elizabeth (p), it is enacted that a conveyance of lands (of whatever tenure (q)) for the purpose of defrauding purchasers for valuable consideration, shall as against such purchasers be void. The Voluntary conveyances. construction put upon this act is that the mere fact of the conveyance being for no valuable consideration, i. e., a voluntary conveyance, is sufficient evidence of fraud within the act (r). Consequently a subsequent purchaser for valuable consideration gains a perfect title, notwithstanding the voluntary deed, and that even if he has notice of it (s). (349) But the deed will not be set aside in favour of a purchaser from the heir-at-law or devisee or the grantor, unless it was really fraudulent (t).

By another act of Elizabeth (u), conveyances made for the purpose of defeating creditors are void, unless made *bona fide* on the part of the purchaser, and for valuable consideration (x). (350) We may here Conveyances to defeat creditors. refer to what is said as to equitable doctrines concerning the

- (n) *Harrison v. Guest*, 8 H. L. 481.
 (o) *Twyne's Case*, 8 Rep. 83.
 (p) 27 Eliz. c. 4, made perpetual by 39 Eliz. c. 18.
 (q) *Doe v. Bottrill*, 5 B. & Ad. 181; *Currie v. Nind*, 1 My. & Cr. 17.
 (r) *Doe v. Manning*, 9 East, 59; *Doe v. James*, 16 East, 212; *Acton v. Woodgate*, 3 My. & K. 492.
 (s) *Upton v. Bassett*, Cro. Eliz. 444; *Doe v. Hopkins*, 9 East, 70; *Gully v. Bishop of Exeter*, 9 B. & C. 601.
 (t) Sug. V. & P. 718 (14th ed.); *Doe d. Newman v. Rusham*, 17 Q. B. 723, where the subject is much discussed.
 (u) 18 Eliz. c. 5.
 (x) *Twyne's Case*, 8 Rep. 81. The creditors are future creditors as well as those who are so at the date of the deed. *Barling v. Bishop*, 29 Beav. 417. The deed may be void though valuable consideration be given, unless it be *bona fide*, *Bott v. Smith*, 21 Beav. 511.

(347) To the same effect, see the cases cited in the last note, and also *Green v. Thomas*, 11 Me. 318; *Taylor v. King*, 6 Munf. 358; *Thompson v. Thompson*, 9 Ind. 823; *Pierson v. Armstrong*, 1 Clarke (Iowa), 282.

(348) A deed of lands executed by a parent to a child, in consideration of natural love and affection, is founded upon a sufficient consideration, and is valid. *Pierson v. Armstrong*, 1 Clarke (Iowa), 282. So of a deed to a step-daughter. *Randall v. Ghent*, 19 Ind. 271. So of a deed to a grandchild. *Stovall v. Barnett*, 4 Lit. (Ky.) 207; *Huss v. Stephens*, 51 Penn. St. 282. But see *Kinnebrew v. Kinnebrew*, 35 Ala. 628, 638; *Duvall v. Wilson*, 9 Barb. 487, which hold that an executory promise will not be enforced when founded solely upon love and affection toward a grandchild; and so as to a wife. *Whitaker v. Whitaker*, 52 N. Y. (7 Sick.) 368. A deed to a nephew is valid, though founded upon love and affection. *Eckman v. Eckman*, 68 Penn. St. 460.

(349) As has been seen, ante, 722, notes 346, 347, 348, a deed which is purely voluntary is valid as between the parties; and where a subsequent purchaser from such a grantor has notice of the prior deed, he will not be regarded as a *bona fide* holder, and he will not hold the land as against the prior grantee. *Salmon v. Bennett*, 1 Conn. 525; *Ricker v. Ham*, 14 Mass. 189; *Beal v. Warren*, 2 Gray, 447; *Jackson v. Town*, 4 Cow. 608; *Atkinson v. Phillips*, 1 Md. Ch. 507; *Cathcart v. Robinson*, 5 Pet. 280; *Douglas v. Dunlop*, 10 Ohio, 162; 4 Kent's Com. 464.

(350) See the last note.

[* 481] * consideration for contracts, in the Third Volume of these Commentaries (y).

We see, then, that a good consideration, as it is called, is not sufficient to ensure the validity of the deed, and, in fact, the expression has little other meaning than to distinguish the intention of the deed from that where an illegal or immoral purpose is the object. A deed executed with or for a consideration of the latter kind is absolutely void. (351) A *bond fide* valuable consideration of more than mere nominal amount is, therefore, a requisite to make a deed absolutely good. The deed ought to show clearly on the face of it what the consideration is, not only in order that there should be no fraud upon the revenue in respect of the stamp, but also to obviate all questions of fraud as between the parties. Yet in the absence of such fraud, an incorrect and consequently improper statement of the consideration does not vitiate the deed (z), though it casts upon those who introduce it the serious responsibility of proving that no fraud was intended (a).

Thirdly, the deed must be written, or printed; it may be in any character or any language, but it should be upon paper or parchment. For it is said that if it be written on stone, board, linen, leather, or the like, it is no deed (b). Wood or stone may be more durable, and linen less liable to rasures; but writing on paper or parchment unites in itself, more perfectly than in any other way, both those desirable qualities: for there is nothing else so durable, and at the same time so little liable to alteration; nothing so secure from alteration, that is at the same time so durable. It must also have the regular stamps imposed on it by the several statutes *for the increase of the public revenue (c). (352) The deed is not, however, absolutely void for want of a stamp, for on payment of a penalty the deed may always be stamped: and it may even be admitted in evidence in court though unstamped, upon payment to the registrar of the court the amount of the stamp and penalty, together with a small additional penalty (d).

Formerly, many conveyances were made by parol, or word of mouth only, without writing; but this giving rise to a variety of frauds, the statute 29 Car. 2, c. 3, enacts, that no lease, estate or interest in lands, tenements, or hereditaments, made by livery of seisin, or by parol only, (except leases, not exceeding three years from the making, and whereon the reserved rent is at least two-thirds of the real value,) shall be looked upon

(y) Vol. iii. p. 62, *et seq.*

(z) *Harrison v. Guest*, 8 H. L. 481; *Clifford v. Turrell*, 1 Y. & C. C. C. 638. *affd.* 9 Jur. 138; *Leifchild's Case*, L. R. 1 Eq. 231.

(a) In *Re Stewart*, L. R. 2 P. C. 88, 103; *Gibson v. Russell*, 2 Y. & C. C. C. 104.

(b) Co. Litt. 229; F. N. B. 122.

(c) The act now regulating these stamps is 18 & 14 Vict. c. 97; the stamp is 10s. for every

100l. of the consideration money; a sliding scale being arranged for sums below 600l.; when the consideration is nominal, the stamp is 1l. 15s. There is also a further progressive duty depending upon the length of the deed. Before the 10th Oct. 1850, the duties were somewhat different, being regulated by 55 Geo. 3, c. 184.

(d) See 17 & 18 Vict. c. 125, s. 29.

(351) See, *ante*, 722, note 345.

(352) In this country no stamp is required upon deeds under the existing laws. By the Laws of Congress of 1864, ch. 173, 18 Gen. Statutes, pp. 223, 299, a stamp was necessary upon a deed. But by Act of Congress of 1872, ch. 315, § 86, 17 Gen. Statutes, 256, the law requiring such stamp was repealed. The decisions upon the various questions relating to these stamps are very numerous, though it is not important to notice them here.

as of greater force than a lease or estate at will: nor shall any assignment, grant, or surrender of any interest in any freehold hereditaments be valid; unless in both cases the same be put in writing, and signed by the party granting, or his agent lawfully authorized, in writing. (353) And now in all these cases, as before observed, a deed is requisite.

Fourthly, the matter written must be legally and orderly set forth; that is, there must be words sufficient to specify the agreement and bind the parties;

4. The deed must explain itself. which sufficiency must be left to the courts of law to determine. (354) For it is not absolutely necessary in law, to have

(853) The substance of this statute, 29 Car. II, c. 8, has been re-enacted in all the States of the Union, or the English law has been assumed to be in force, or has been adopted and followed by the courts. 4 Kent's Com. 450; 8 Washb. Real Prop. 214, 215, 3d ed.

Contracts for the sale of lands must be in writing, and signed by the party to be charged, or they will not be obligatory. *Thompson v. Elliott*, 28 Ind. 55; *Mather v. Scoles*, 85 Ind. 1; *Walker v. Herring*, 21 Gratt. 878; *Henry v. Colby*, 3 Brewst. (Pa.) 171; *Harper v. Spainhour*, 64 N. C. 629; *Hogsett v. Ellis*, 17 Mich. 351; *Huff v. McCauley*, 53 Penn. St. 256; *Kingley v. Holbrook*, 45 N. H. 313; *Rutan v. Hinchman*, 1 Vroom (N. J.), 265; *Bozza v. Rowe*, 30 Ill. 198; *MacKubin v. Clarkson*, 5 Minn. 247; *Fraser v. Ford*, 2 Head (Tenn.), 464.

So an oral agreement to execute and deliver a written contract to convey land is within the statute and therefore void. *Lawrence v. Chase*, 54 Me. 196; *Trammell v. Trammell*, 11 Rich. (S. C.) 471; *Leiford v. Farrell*, 12 Ired. (N. C.) 285; *Yates v. Martin*, 1 Chand. (Wis.) 118.

Judicial sales, in which the entire proceedings are under the guidance and direction of the court, are not within the statute. *Smith v. Arnold*, 5 Mason's C. C. 420; *Hutton v. Williams*, 35 Ala. 508; *Fulton v. Moore*, 25 Penn. St. 463; *Halleck v. Guy*, 9 Cal. 181; *Watson's Admr. v. Violet*, 2 Duvall (Ky.), 332.

(354) The interpretation or construction of all contracts or instruments belongs exclusively to the courts; and the rule is the same whether the agreement be oral or written, sealed or unsealed. *Nash v. Drisco*, 51 Me. 417; *Drew v. Toule*, 80 N. H. 538; *Wason v. Rowe*, 16 Vt. 525; *Smith v. Faulkner*, 12 Gray, 251; *McAvoy v. Long*, 13 Ill. 147; *Collins v. Banbury*, 5 Ired. 118; *Emery v. Owings*, 6 Gill. 191; *Monadnock R. R. v. Felt*, 52 N. H. 379; *Williams v. Waters*, 36 Ga. 454; *Kane v. Hood*, 13 Pick. 282; *State v. Lefaiere*, 53 Mo. 470; *Lippett v. Kelley*, 46 Vt. 516, 523.

If the contract be oral, and there is a dispute as to its terms, that question is one of fact, to be tried by a jury or by the court. *Guptill v. Damon*, 42 Me. 271; *Globe Works v. Wright*, 106 Mass. 216; *Illinois, etc. v. Cassell*, 17 Ill. 389; *Chapin v. Potter*, 1 Hilt. 366; *Bradbury v. Marbury*, 12 Ala. 520.

But after its terms are settled or agreed upon, the construction is for the court. *Pratt v. Langdon*, 12 Allen, 544; *Short v. Woodward*, 13 Gray, 96; *Globe Works v. Wright*, 106 Mass. 216; *Fosterman v. Parker*, 10 Ired. 477; *Rhodes v. Chesson*, Busbee's Law, 336.

In the construction of deeds there are some general rules which are resorted to in cases of dispute or doubt as to the true meaning of the instrument. As a general rule, a deed ought to be construed upon a consideration of what is contained in it. *Caldwell v. Fulton*, 31 Penn. St. 475, 439; *Bond v. Fay*, 12 Allen, 86, 88; *Rutherford v. Tracy*, 48 Mo. 325, 323; *Ewing v. Burnet*, 11 Pet. 41, 54; *Warren v. Jones*, 51 Me. 146.

The construction ought to be such as will carry into effect the intention of the parties, if it can be done consistently with the rules of law. *Bruensmann v. Carroll*, 52 Mo. 313; *Rutherford v. Tracy*, 48 id. 325; S. C., 8 Am. Rep. 104; *Barlow v. Scott*, 24 N. Y. (10 Smith) 40; *Gray v. Clark*, 11 Vt. 533.

And in seeking for such intention, the grammatical construction is not always, in judgment of law, to be followed; for neither bad English nor false grammar will render a deed void, when the meaning of the party is apparent. Broom's Leg. Max. 686.

Punctuation is a most fallible standard by which to interpret a writing; it may be resorted to when all other means fail; but the court will first take the instrument by its four corners in order to ascertain its true meaning; if that is apparent on judicially inspecting

all the formal parts that are usually drawn out in deeds, so as there be sufficient words to declare clearly and legally the party's meaning. We had occasion to notice a few instances in which technical language is essential, as [* 483] * "heirs" to create a fee-simple, and words of procreation to create a fee-tail; but in general no special form of words is necessary. Formerly the word "warrant" used by a grantor or feoffor had a special force and effect, binding him and his heirs not only to forego all title, however derived, to the land, but also to compensate the grantee in case of eviction (e). The word "grant" also was considered to carry with it the force of a warranty valid as against the grantor (f) though not extending to his heirs: as also the word "give" (g). The former word has received a sanction to this construction by several acts of parliament (h). Again, the word "exchange," in a deed of that character implied a warranty to the extent of the lands received in exchange. These technical expressions have, however, lost their force, partly

(e) Co. Litt. 365.

(f) Co. Litt. 384 a.

(g) *Spencer's Case*, 5 Rep. 17, where it is

said the word "*dedi*" implies a warranty but not a covenant.

(h) 1 & 2 Vict. c. 20, s. 23; 8 & 9 Vict. c. 18, s. 182.

the whole, the punctuation will not be suffered to change it. *Ewing v. Burnet*, 11 Pet. 41, 54. See, also, *Waugh v. Middleton*, 8 Exch. 852, 857; *Nettleton v. Billings*, 18 N. H. 446; *Gray v. Clark*, 11 Vt. 568; *Churchill v. Reamer*, 8 Bush (Ky.), 256, 260.

Every deed ought to be construed with reference to its object and the whole of its terms; and, therefore, the whole context must be considered for the purpose of ascertaining the intention of the parties, even when the immediate object of inquiry is to ascertain the meaning of some separate clause. *Collins v. Lavelle*, 44 Vt. 230; *Flagg v. Eames*, 40 id. 16; *Churchill v. Reamer*, 8 Bush (Ky.), 256; *Folsom v. McDonough*, 6 Cush. 208; *Babcock v. Wilson*, 17 Me. 372; *Morris v. Showerman*, 2 Doug. (Mich.) 16; *Jackson v. Blodget*, 16 Johns. 172.

In cases of doubt as to the meaning of the words used, the rule is to construe the deed in favor of the grantee, and against the grantor. *Hathaway v. Power*, 6 Hill, 453, 457; *Saunders v. Hanes*, 44 N. Y. (5 Hand) 853, 859; *Mills v. Catlin*, 23 Vt. 98; *Winslow v. Patten*, 34 Me. 25; *Cocheco Manufacturing Co. v. Whittier*, 10 N. H. 305; *Barney v. Newcomb*, 9 Cush. 46; *Palmer v. Warren Ins. Co.*, 1 Story, 360-365. This rule, however, is not applied where a satisfactory construction can be reached by any other legal rules of analysis and interpretation. *Clough v. Bowman*, 15 N. H. 504; *Sanborn v. Clough*, 40 id. 830; *Marshall v. Niles*, 8 Conn. 469; *Carroll v. Norwood*, 5 Harr. & J. 155, 163; *Vance v. Fore*, 24 Cal. 446.

If the words used are susceptible of two different meanings, one of which is in accordance with the law and the other against it, that construction will be adopted which will render the words consistent with the law. *Townsend v. Stearns*, 32 N. Y. (5 Tiff.) 209, 215; *Riley v. Vanhousen*, 4 How. (Miss.) 428.

A deed is to be construed with reference to the situation and surroundings of the property at the time it is conveyed; and the grantee will be entitled to any advantages resulting therefrom. *Lampman v. Milks*, 21 N. Y. (7 Smith) 505; *New Ipswich Factory v. Batchelder*, 3 N. H. 190; *United States v. Appleton*, 1 Sumner, 492; *Thayer v. Payne*, 2 Cush. 327.

If there be in the former part of a deed, an adequate and sufficient description which shows with convenient certainty the subject-matter to which it was intended to apply, a subsequent erroneous addition will not vitiate that description. *Lippett v. Kelley*, 46 Vt. 516; *Doane v. Willcutt*, 16 Gray, 868, 871; *Morrell v. Fisher*, 4 Exch. 591, 604; *Abbott v. Abbott*, 53 Me. 380, 381; *Law v. Hempstead*, 10 Conn. 23; *Bass v. Mitchell*, 22 Texas, 285, 294; *Harvey v. Mitchell*, 31 N. H. 575; *Jackson v. Clark*, 7 Johns. 217.

Some things will pass by the conveyance of land as incidents appendant or appurtenant thereto; such as a right of way, or to flow water over lands, and the like. See 4 Kent's Com. 467, 468; 8 Washb. Real Prop. 843, 844.

through disuse and also by the indirect and direct effect of several acts of parliament (i), and they are not now relied on in conveyancing. Except, therefore, as above-mentioned, a conveyancer is not restricted in the language he may employ: nevertheless, certain forms of expression having been universally adopted, great convenience follows from their invariable use; whereas much trouble and uncertainty would be introduced by the use of new expressions. Consequently the phraseology of formal deeds is found to be pretty uniform; the tendency of the present day, however, is to a considerable extent to revert as far as is possible to the simplicity and conciseness of ancient times, *and to abandon the prolix verbosity which was prevalent during the [*484] last century. Two acts have indeed been passed with this object specially in view, but they are rarely, if ever, made use of (j).

The same remark as to convenience applies with even greater force to the arrangement of the parts of a deed than to the words employed. The usual order should not be departed from without good reason; therefore we may shortly describe what that order is in a conveyance.

First, the date, and the name and descriptions of the parties are set forth, (355) followed immediately by the recitals of such deeds, agreements, or matters of fact, as are necessary to explain the reasons upon which the present transaction is founded (k). In these recitals

Arrangement
of the parts of
a deed.

Date and names
of parties.

(i) 6 Edw. 1, c. 8; 18 Edw. 1 (which protected the issue in tail from the warranty of a tenant in tail; Litt. s. 712; 2 Inst. 293); 11 Hen. 7, c. 20; 4 & 5 Anne, c. 16; 8 & 4 Will. 4, cc. 27, ss. 29, 36, and 74. See 8 & 9 Vict. c. 106, which however preserves the implied covenant, contained in the word grant, by virtue of act of parliament. See 8 & 9 Vict. cc. 119, 124, as to a parliamentary construction of words.

(j) 8 & 9 Vict. cc. 119, 124.

(k) As to the advantage of recitals, see *Bailey v. Lloyd*, 5 Russ. 330; *Furrell v. Hu-*

ditch, 5 O. B. N. S. 840. They do not usually control the effect of the deed, except in releases, in which it is presumed the parties do not intend to do more than the history of facts and statement of intention contained in the recitals indicate. Yet more general words contained in the operative part may be controlled so as to have a restricted meaning by the recitals, *Childers v. Hardley*, 28 Beav. 648; and so where there is an ambiguity in the operative part, the recitals may be referred to in order to discover the meaning. *Walsh v. Trevanion*, 15 Q. B. 738.

(355) A date is not essential to a deed, yet it is the common and correct practice to insert one. When a deed has a date it will be presumed to have been delivered at the time of its date. *Robinson v. Wheeler*, 25 N. Y. (11 Smith) 252; *Jackson v. Hull*, 5 Wend. 532; *McConnell v. Brown*, Litt. Sel. Cases (Ky.), 459; *Ellsworth v. Central R. R. Co.*, 34 N. J. L. 98; *Jayne v. Gregg*, 43 Ill. 418; *Blake v. Fush*, 44 id. 302; *County of Henry v. Bradshaw*, 20 Iowa, 355.

This presumption may be rebutted, and the true time of the delivery shown by competent evidence. *Harris v. Norton*, 16 Barb. 264; *Sweetser v. Lowell*, 33 Me. 446; *Ford v. Gregory*, 10 B. Monr. 175; *McKenais v. Roper*, 2 Strobb. 306.

The usual parties to a conveyance of land are the grantors and the grantees. The person who executes the deed is the grantor, and the opposite party is the grantee. The parties to a deed are those persons who grant or convey some estate, and those persons to whom such grant or conveyance is made with their assent. *Endsley v. Strock*, 50 Mo. 506; *Caraway v. Caraway*, 7 Cald. 245.

A party who executes a deed and delivers it cannot avoid it because his name is not correctly spelled in it. *O'Meara v. North Americus, etc., Co.*, 2 Nev. 112.

Nor can the grantor avoid his deed on the ground that he signed it by a wrong name, where he is designated by his true name in the body of the deed. *Middleton v. Findla*, 25 Cal. 76.

there often appears the consideration upon which the deed is made, and a general description of the subject matter (*l*). (356)

Then is introduced the operative part of the deed, prefaced usually by the words "now this indenture witnesseth," or other similar words. Here is com-

Operative part. monly stated in precise terms the consideration, if not sufficiently mentioned in the recitals. These premises, constituting the vital part of the deed, are followed by the *habendum* and *tenendum*. The office

Habendum. of the *habendum* is properly to determine what estate or interest is granted by the deed: though this may be performed, and some-

times is performed in the premises. In which case the *habendum* may enlarge, explain, or qualify, but not totally *contradict or be repugnant to [* 485] the estate granted. (357) As, if a grant be "to A. and the heirs of his body," in the premises, *habendum* "to him and his heirs for ever," or *vice versa*; here A. has an estate-tail, and a fee-simple expectant thereon (*m*). But, had it been in the premises "to him and his heirs," *habendum* "to him for life," the *habendum* would be utterly void (*n*); (358) for an estate of inherit-

(*l*) See the specimen of a modern grant in Appendix, No. II. (*n*) 2 Rep. 23; 8 Rep. 56; 5 B. & C. 716. See also 5 B. & Ad. 788.

(*m*) Co. Litt. 21; 2 Roll. Rep. 19, 23; Cro. Jac. 476.

(356) The recital is generally contained in the premises of the deed, and usually commences with the formal word "whereas," which, when there are several recitals in connection, is repeated accordingly, "and whereas." This, however, is not the only way of introducing recitals, nor are they always confined to the mere statement of the inducement and purpose of the deed.

Recitals are sometimes inserted in a deed by way of explanation of certain things, or for some other purpose, and though they are not a necessary part of the deed, they may be of use in ascertaining the intention of the parties. It has been stated that every deed is to be construed with reference to its object, and the whole of its terms, etc., as it appears from the entire instrument (*ante*, 725, note 854); therefore, every deed is to be construed according to the intention of the parties, as manifested by the entire instrument, although it may not comport with the language of a particular part of it. Thus, a recital or a preamble in a deed may qualify the generality of the words of a covenant or other parts of a deed. *Allen v. Holton*, 20 Pick. 463, 464.

A recital in a deed of a particular fact, which all the parties to the deed have agreed to admit as true, is an estoppel upon all. *Carpenter v. Buller*, 8 M. & W. 209, 212; *Stronghill v. Buck*, 14 Q. B. 781, 787; *Cutler v. Dickinson*, 8 Pick. 886; *Doane v. Willcutt*, 16 Gray, 368; *Farrar v. Cooper*, 34 Me. 394; *Hovey v. Woodward*, 33 id. 470; *Bruce v. United States*, 17 How. (U. S.) 437; *Williams v. Sweetland*, 10 Iowa, 51.

Recitals in a deed are binding on the parties and privies, but not generally on strangers to it. *Whitaker v. Garnett*, 8 Bush (Ky.), 402.

57) Where a grant is indefinite on account of its generality in respect to the estate in lands conveyed, which it is intended to create in the grantee, the *habendum* serves to enlarge, to define, qualify, or control it. *Corbin v. Healy*, 20 Pick. 514; *Moss v. Sheldon*, 8 Watts & Serg. 160; *Berry v. Billings*, 44 Me. 416, 423; *Sumner v. Williams*, 8 Mass. 162, 174; *Jamaica Pond, etc., Corp. v. Chandler*, 9 Allen, 159, 168, 169.

(358) Where the whole interest in property is conveyed to one person in the premises of a deed, but in the *habendum* is limited to another, the latter is repugnant to the former and void, and the property is vested in the grantee named in the premises. *Hafner v. Irwin*, 4 Dev. & Bat. 433; *Nightingale v. Hidden*, 7 B. L. 115, 118. See *Stockton v. Martin*, 2 Bay. 471; *Moss v. Sheldon*, 8 Watts & Serg. 160, 162; *Corbin v. Healy*, 20 Pick. 514; *Humphrey v. Foster*, 18 Gratt. 653.

ance is vested in him before the *habendum* comes, and shall not afterwards be taken away or divested by it.

If the premises do not indicate the estate which is granted, then the *habendum* is essential to the deed, or at least to render it free from ambiguity, for in such a case the grantee, if he take anything at all under the premises, can do so only by implication, or presumption of law, a not very satisfactory foundation to rest upon. (359) The "*tenendum*" "and to hold," though

Tenendum. it is still in use, is only kept in by custom. It was sometimes formerly used to signify the tenure by which the estate granted was to be holden; viz. "*tenendum per servitium militare, in burgagio, in libero socagio, &c.*" But, all these being now reduced to free and common socage, the tenure is never specified. Before the statute of *quia emptores*, 18 Edw. I., it was also sometimes used to denote the lord of whom the land should be holden: but that statute directing all future purchasers to hold, not of the immediate grantor, but of the chief lord of the fee, this use of the *tenendum* has been long antiquated; though for a long time after we find it mentioned in ancient charters, that the tenements shall be holden *de capitalibus dominis feodi* (o); but, as this expressed nothing more than the statute had already provided for, it gradually grew out of use.

Next follow the terms of stipulation, if any, upon which the grant is made:

Reddendum. the first of which is the "*reddendum*" or reservation, whereby the grantor creates or reserves some new thing [* 486] to himself out of what he had before granted, as "rendering therefor yearly the sum of ten shillings, or a pepper corn, or two days' ploughing, or the like" (p). Under the pure feudal system, this render, *reditus*, return or rent, consisted, in chivalry, principally of military services, in villenage, of the most slavish offices; and in socage, it usually consists of money, though it may still consist of services, or of any other certain profit (q). To make a *reddendum* good, if it be of anything newly created by the deed, the reservation must be to the grantors, or some, or one of them, and not to any stranger to the deed (r). But if it be of ancient services or the like, annexed to the land, then the reservation may be to the lord of the fee.

We must distinguish between exception and a reservation. The former, meaning that a part of the whole hereditament which has been described is

Exceptions and reservations. not to pass, should obviously be mentioned in the "parcels" or description of the subject matter of the grant; as when the grant is "of all that house except the rooms on the basement," or "all that piece of land except the underwood" (s). "A reservation is always of a thing not in esse, but newly created or reserved out of the land or tenement" granted (t),

(o) See 4 Ed. 1, c. 6.

(p) Madox, Formul.

(q) *Ante*, p. 164.

(r) Plowd. 18; 8 Rep. 71.

(s) See *Pannell v. Mill*, 8 C. B. 695.

(t) Co. Litt. 476.

There is sometimes a repugnancy between the granting part of the deed and the *habendum* as to the estate which the grantee is to take in the land, and when the contradiction cannot be reconciled, if the language of the grant is definite in limiting the estate, the *habendum* must yield to the terms of the granting part. *Budd v. Brooks*, 8 Gill. 236; *Farquharson v. Eichelberger*, 15 Md. 68. See *Tyler v. Moore*, 42 Penn. St. 374, 387.

(359) See notes 357, 358.

that is, something issuing out of the land, not part of the land itself, and not issuing out of any other land or thing (u). (360)

Another of the terms upon which a grant may be made is a condition; which is a clause of contingency, on the happening of which the estate granted may be defeated; (361) as "provided always, that if the mortgagor

Conditions. shall pay the mortgagee 500*l.* upon such a day, the whole estate granted shall determine;" or, as the modern form * of mortgage [* 487] runs, "provided always that if the mortgagor shall pay the mortgagee 500*l.* upon such a day, the mortgagee shall, whenever requested by the mortgagor, reconvey the estate." This clause follows the *tenendum*.

The last part of a conveyance usually consists of covenants, or conventions, which are clauses of agreement contained in a deed, whereby either party may stipulate for the truth of certain statements, or may bind himself

Covenants. to perform, or give, something to the other. (362) Thus, the grantor may covenant that he has a right to convey; or for the grantee's quiet

(u) Shep. Touch. 80. See *ante*, p. 85.

(360) See *Cass v. Haight*, 8 Wend. 682, 685; *Dyer v. Sanford*, 9 Metc. 395, 404; *Outler v. Tufts*, 8 Pick. 272, 278.

(361) A father who conveys real estate to a married daughter by a deed which contains a condition that, if the daughter shall die without children living at the time of her decease, the property shall revert to the grantor and his heirs, and the daughter dies, leaving one child, this is a performance of the condition, and upon the death of such child the estate will go to its heirs. *Pierson v. Armstrong*, 1 Iowa, 282, 295.

(362) The importance of covenants in a deed will be fully seen, when it is remembered that, in a conveyance of real estate, there is no warranty of title if the deed does not contain any covenants. And, in such a case, the purchaser has no remedy either at law or in equity. In this country, the usual covenants inserted in a conveyance of real estate in fee, are,

1. That the grantor is lawfully seized of the premises described in the deed. *Parker v. Brown*, 15 N. H. 186; *Mills v. Catlin*, 22 Vt. 106; *Lockwood v. Sturdevant*, 6 Conn. 285; *Mott v. Palmer*, 1 Comst. 564; *Fitchugh v. Crogan*, 2 J. J. Marsh. 480; *Martin v. Baker*, 5 Blackf. 282; *Woods v. North*, 6 Humph. 809; *Brandt v. Foster*, 5 Clarke (Iowa), 287.

2. That he has good right and lawful authority to convey such land. *Griffin v. Fairbrother*, 10 Me. 91; *Wheeler v. Hatch*, 8 Fairf. (Me.) 889; *Raymond v. Raymond*, 10 Cush. 184; *Abbott v. Allen*, 14 Johns. 252; *Collier v. Gamble*, 10 Mo. 472; *Brandt v. Foster*, 5 Iowa, 294.

It is sometimes said that covenants of seisin and of right to convey amount to the same thing. *Id.* See Rawle on Cov. for Title, 53, etc., 4th ed.

3. That the land is free from any incumbrances. *Townsend v. Weld*, 8 Mass. 146; *Harlow v. Thomas*, 15 Pick. 66; *Sedgwick v. Hollenback*, 7 Johns. 376; *Butler v. Gale*, 27 Vt. 739; *Wilson v. Cochran*, 46 Penn. St. 282; *Mitchell v. Warner*, 5 Conn. 527; *Varter v. Denman*, 8 Zab. (N. J.) 278; *Bean v. Mayo*, 5 Me. 94; *Norton v. Babcock*, 2 Metc. (Mass.) 510; *Jones v. Davis*, 24 Wis. 229.

4. That the grantee shall peaceably enjoy the premises. *Wilder v. Ireland*, 8 Jones' Law, 88; *Mayor of N. Y. v. Mable*, 18 N. Y. (3 Kern.) 156; *O'Keefe v. Kennedy*, 8 Cush. (Mass.) 325; *Switzky v. Canning*, 38 Cal. 806; *Greenwalt v. Davis*, 4 Hill, 645; *Booth v. Starr*, 5 Day, 282; *Funk v. Creswell*, 5 Iowa, 86; *Cable v. Wellborn*, 2 Dev. (N. C.) 890; *Leary v. Durham*, 4 Ga. 598; *Rickert v. Snyder*, 9 Wend. 422; *Clarke v. McAnulty*, 8 Serg. & R. 372; See Rawle on Cov. for Title, 147, 4th ed.

5. That the grantor will warrant and defend the title against all lawful claims. *Fowler v. Poling*, 6 Barb. 165, 170; *Homes Life Ins. Co. v. Sherman*, 46 N. Y. (1 Sick.) 870; *Rea v. Minkler*, 5 Lana. 196; *Crutcher v. Stump*, 5 Hayw. (Tenn.) 100; *Witty v. Hightower*, 12 Sm. & M. 478; *Patton v. McFarlane*, 8 Penn. St. 422; *Caldwell v. Kirkpatrick*, 6 Ala. 62; *Athens v. Male*, 25 Ill. 198; *Kellogg v. Platt*, 33 N. J. L. (4 Vroom) 328, 333.

enjoyment; or the like: the grantee may covenant to pay his rent, or keep the premises in repair, &c. If the covenantor, as is usual, covenants for himself

and his heirs, it is then sometimes called a covenant real (x), and descends upon the heirs; who are bound to perform it, provided they have assets by descent, but not otherwise; if he covenants also for his executors and administrators, his personal assets, as well as his real, are likewise pledged for the performance of the covenant; which makes such covenant a better security than any warranty.

These covenants for title in purchase deeds are usually restricted so as to extend only to the acts and omissions of the grantor, and all persons through whom he claims by descent or devise, but do not go beyond the acts of the last purchaser of the estate. In mortgage deeds the practice is different, as it is invariable that a mortgagor gives absolute covenants for title.

Covenants on the part of the grantee are sometimes inserted restricting the free use of the land and giving rights to the grantor in respect of adjoining land retained by him. Such covenants are, of course, enforceable against the covenantor personally; but how far they will continue to be binding upon the land in the hands of subsequent owners is a question involving points of the *nicest character. The general result of the cases seems to [*488] be, that, except where by reason of notice or otherwise, there would be a breach of good faith in violating the covenant, the burden of it does not continue to bind subsequent owners (y).

We may notice, however, that an important distinction has been established between covenants entered into between landlord and tenant and those between vendor and purchaser; the former being much more favoured in law; as seems reasonable from the continuing nature of the relation existing between the parties, and also because such covenants being between persons interested in the same land and relating solely to that land, do not constitute any impediment to its free alienation, further than arises from the fact of there being the two parties—the landlord and tenant.

Lastly, comes the conclusion, which mentions the execution and date of the deed, or the time of its being given or executed, either expressly, or by reference to some day and year before mentioned (z). Not but a

The conclusion.

deed is good, although it mention no date, which indeed in early times was very common: or bears a false date; or even if it has an impossible date, as the thirtieth of February; provided the real day of its being dated or given, that is delivered, can be proved. For then the day of delivery constitutes the date of the deed (a). (363)

(z) Though the expression has been also used with a different meaning, see Shepp. Touch. 161.

(y) See *Spencer's Case*, 5 Rep. 16, where the law is laid down by Lord Coke, but not so as to meet the numerous complications which have since arisen. See *Keppell v. Bailey*, 3 M. & K. 517; and *Coles v. Sims*, 5 De G. M. & G. 1. Recent cases have principally arisen out of the restrictions which persons who have laid out an estate for build-

ing endeavoured to impose upon purchasers from them in regard to the character of the house to be erected. See *Western v. Macdermott*, L. R. 2 Ch. 72; *Morland v. Cook*, L. R. 6 Eq. 252; *Keates v. Lyon*, L. R. 4 Ch. 218. The earlier cases are very numerous.

(s) Appendix, No. II.

(a) Co. Litt. 46; Dyer, 28; Com. Dig. Falt. B. Dates began to be added in the reigns of Edw. 2 and Edw. 3. See 3 Ld. Raym. 1076; 4 B. & Cr. 908; and Bac. Ab. Leases, I. 1.

(363) The American cases are to the same effect. *Jackson v. Schoonmaker*, 2 Johns. 234; *Genter v. Morrison*, 31 Barb. 155; *Geiss v. Odenheimer*, 4 Yeates, 378; *Thompson v. Thompson*, 9 Ind. 383; *Swan v. Hodges*, 3 Head. 254; *Banning v. Edes*, 6 Minn. 403; *Colquhoun v. Atkinson*, 6 Munf. 550.

[* 489] The fifth requisite for making a good deed is the * reading of it, which is necessary, wherever any of the parties desire it, though not otherwise (b); (364) and, if it be not done on his request, the deed is void as to him. If he can, he should read it himself: if he be blind or illiterate, another must read it to him, if he request it. If it be read falsely, it will be void; at least for so much as is mis-recited: unless it be agreed by collusion that the deed shall be read false, on purpose to make it void; for in such case it shall bind the fraudulent party (c).

Sixthly, it is requisite that the party, whose deed it is should seal it. (365) The use of seals, as a mark of authenticity to letters and other instruments in writing, is extremely ancient. We read of it among the Jews and Persians in the earliest and most sacred records of history (d). And in the book of Jeremiah there is a very remarkable instance, not only of an attestation by seal, but also of the other usual formalities attending a Jewish purchase (e). In the civil law also (f), seals were the evidence of truth; and were required, on the part of the witnesses at least, at the attestation of every testament. But in the times of our Saxon ancestors, they were not much in use in England. For though Sir Edward Coke (g) relies on an instance of king Edwin's making use of a seal about an hundred years before the conquest, yet it does not follow that this was the usage among the whole nation: and perhaps the charter he mentions may be of doubtful authority, from this very circumstance, of being sealed; since we are assured by all our ancient [* 490] historians, that sealing was not then in common use. The method of the Saxons was for such as could write to subscribe their names, and, whether they could write or not, to affix the sign of the cross: which custom illiterate persons do, for the most part, to this day keep up; by signing

(b) *R. v. Longnor*, 4 B. & Ad. 647; see 8 Car. & P. 124.

(c) 2 Rep. 3, 9; 11 Rep. 37.

(d) 1 Kings, c. 21; Daniel, c. 6; Esther, c. 8.

(e) "And I bought the field of Hanameel, and weighed him the money, even seventeen shekels of silver. And I subscribed the evidence, and sealed it, and took witnesses, and

weighed him the money in the balances. And I took the evidence of the purchase, both that which was sealed according to the law and custom, and also that which was open." c. 32.

(f) Inst. 2, 10. 2 & 8.

(g) Co. Litt. 7.

(364) Although a grantor be very illiterate, and cannot read or write, yet a deed executed by him will not be void for the omission to read the deed to him, unless he requested its reading. *Hallenbeck v. Dewitt*, 2 Johns. 404; *Harris v. Story*, 2 E. D. Smith, 364; *Ellis v. McCormick*, 1 Hilt. 818. So where the party can read and write, a deed executed by him will not be declared void on the ground of fraud or mistake because the whole of the deed was not read by the grantor. *Jackson v. Oroy*, 12 Johns. 427. See *Wittington v. Warren*, 10 Metc. 431, 434. But where an illiterate man is induced to sign a deed by a misrepresentation of its contents, the deed is void. *Jackson v. Hayner*, 12 Johns. 469; *Suffern v. Butler*, 18 N. J. Eq. (3 C. E. Green) 220. See *Taylor v. King*, 6 Munf. 358. Until evidence to the contrary is offered, it is to be presumed that a grantor knew the contents of the deed he executed. *Kimball v. Eaton*, 8 N. H. 391.

(365) The general rule stated in the text is the rule in this country. But what a seal is, or what act constitutes sealing a deed, is to be determined by the laws of the State in which the land is situated. "In the eastern States, sealing, in the common-law sense, is requisite; but in the southern and western States, from New Jersey inclusive, the impression on wax has been disused to such an extent as to induce the courts to allow (but with certain qualifications in some of the States) a flourish with the pen at the end of the name, or a circle of ink or scroll, to be a valid substitute for a seal." 4 Kent's Com. 452, 453. See 3 Washb. Real Prop. (8d ed.) 246, 247; 1 Am. Law. Rev. 638.

a cross for their mark when unable to write their names. It was very common also to attach some instrument, the handle of a knife or other similar object to the deed, as a symbol of the property transferred (*h*). This inability to write, and therefore making a cross in its stead, is honestly avowed by Caedwalla, a Saxon king, at the end of one of his charters (*i*). In like manner, and for the same unsurmountable reason, the Normans, a brave but illiterate nation, at their first settlement in France, used the practice of sealing only, without writing their names: which custom continued, when learning made its way among them, though the reason for doing it had ceased; and hence the charter of Edward the Confessor to Westminster Abbey, himself being brought up in Normandy, was witnessed only by his seal, and is generally thought to be the oldest sealed charter of any authenticity in England (*k*). At the conquest, the Norman lords brought over into this kingdom their own fashions; and introduced waxen seals only, instead of the English method of writing their names, and signing with the sign of the cross (*l*). And in the reign of Edward I. every *freeman, and even such of the more substantial villeins as were fit to be put upon juries, had their distinct particular [* 491] seals (*m*). The impressions of these seals were sometimes a knight on horseback, sometimes other devices: but coats of arms were not introduced into seals, nor indeed into any other use, till about the reign of Richard the First, who brought them from the crusade in the holy land; where they were first invented and painted on the shields of the knights, to distinguish the variety of persons of every christian nation who resorted thither, and who could not, when clad in complete steel, be otherwise known or ascertained. One piece of wax may serve as a seal for several persons, if each of them impresses it himself, or one for all, by proper authority, or in the presence of all, and if it appear by the deed to be the seal of all (*n*). (366)

Signing formerly was not, and indeed appears still not to be, essential to the validity of a deed as such, though this point since the statute of frauds is not altogether free from doubt (*o*). No prudent person now would think of executing a deed without signing it either by writing or a mark (*p*); (367) yet

(*h*) Among the muniments of Trinity Coll. Cambridge, is an ancient deed of Saxon times, with the handle of a knife attached to it.

(*i*) "*Propria manu pro ignorantia litterarum signum sanctae crucis expressit et subseripsit.*" Seld. Jan. Angl. l. 1, s. 42. And this (according to Procopius), the emperor Justin in the east, and Theodoric king of the Goths in Italy, had before authorised by their example, on account of their inability to write.

(*k*) Lamb. Archeion. 51.

(*l*) *Normanni chirographorum confectionem, cum crucibus aureis, aliisque signaculis sacris, in Anglia firmari solitam, in caeram impressam mutant, modumque scribendi Anglicum rejiciunt.*" Ingulph. See also for like infor-

mation, Florentius Vigornensis, cited in Dugd. Off. Ch. 2.

(*m*) Stat. Exon. 14 Edw. 1.

(*n*) Park. ss. 130, 132, 134; 4 T. R. 313; 6 M. & S. 319.

(*o*) 19 Ves. 459; 8 Ves. 185, 504; 3 N. & P. 228.

(*p*) Where the signature was appended by another, and afterwards shown to and approved by the party, it was left to the jury to judge from all the circumstances, including subsequent conduct, whether the deed was well executed, although the son had not been authorised to execute the deed by an instrument under seal. *Tupper v. Foulkes*, 9 C. B. N. S. 797.

(366) See, to the same effect, *Mackay v. Bloodgood*, 9 Johns. 285; *Van Alstyne v. Van Slyck*, 10 Barb. 383, 387; *Townsend v. Hubbard*, 4 Hill, 351; *Tasker v. Bartlett*, 5 Cush. 359, 364; *Lambden v. Sharp*, 9 Humph. 224; *Bohannons v. Lewis*, 3 T. B. Monr. 376; *Farborough v. Monday*, 3 Dev. L. (N. C.) 420.

(367) In this country it is so general a practice to sign a deed in some manner that no purchaser would knowingly accept an unsigned deed. See 3 Washb. Real Prop. (3d ed.) 244

the common form of attestation "sealed and delivered" (if it has even now entirely gone out of use in favour of the more full "signed, sealed, and delivered,") may still be found on deeds of very moderate antiquity.

But we must bear in mind, with reference to the necessity for signature to validate a deed, that by reason of * the provisions of several acts of [* 492] parliament and principally the one just mentioned (29 Car. 2, c. 3, the Statute of Frauds), signature by the party or by an agent lawfully authorised in writing, is rendered necessary for many purposes. That statute requires such signature in the following among other cases; the assignment, grant, or surrender of leases, estates, or interests of freehold for years, or any uncertain interest in lands, tenements, and hereditaments, not being copyholds. This certainly seems to include all assurances by deed, though the opinion that it does so is by no means universal (g). The statute provides also that contracts for sale of lands, tenements, or hereditaments, and declarations of trust relating to them, not arising by operation of law, must be in writing, duly signed by the party or his agent (r). (368)

A seventh requisite to a good deed is that it be delivered, by the party himself or his certain attorney: which therefore is also expressed in the attestation; "sealed and delivered." (369) A deed takes effect only from
 7. Delivery of deed. this tradition or delivery; for, as we before said, if the date be

(g) See Mr. Preston's note to *Shep. Touch.* mentioned case of *Tupper v. Foulkes*, 9 C. B. 56; also *Cooch v. Goodman*, 2 Q. B. 580; *Aveline v. Whisson*, 4 M. & G. 801; and the above N. S. 797.

(r) See vol. iii. p. 56. Another act requiring signature is 9 Geo. 4, c. 14.

(368) See *ante*, 725, note 353.

(369) It is universally agreed that delivery is essential to the validity of a deed. The cases are very numerous, and but a few of them need be cited. *Stiles v. Brown*, 16 Vt. 563; *Fairbanks v. Metcalf*, 8 Mass. 230, 239; *Jackson v. Leet*, 12 Wend. 105; *Church v. Gilman*, 15 id. 656, 658; *Hulick v. Scott*, 4 Gilm. 175; *Fletcher v. Mansur*, 5 Ind. 267; *Hughes v. Easton*, 4 J. J. Marsh. 572; *Overman v. Kerr*, 17 Iowa, 485, 490.

The delivery of a deed consists in its voluntary transfer by the grantor to the grantee in such a manner as to vest in the grantee all the right, title or interest intended to be conveyed by the grantor, and expressed in such deed. The grantor must give up dominion or control over the deed, and the grantee must expressly or impliedly accept the deed and the estate conveyed by it. The grantor and the grantee may act by their duly authorized agents, and the delivery and acceptance will be as valid as though the acts had been performed by them in person. *Belden v. Carter*, 4 Day, 66; *Hatch v. Hatch*, 9 Mass. 307; *Foster v. Mansfield*, 3 Metc. (Mass.) 413; *Turner v. Whidden*, 22 Me. 121; *Lessee of Shirley v. Ayres*, 14 Ohio, 307.

To render the act of the agent valid he must pursue the directions given to him. *Smith v. South Royalton Bank*, 32 Vt. 341; *Hinman v. Booth*, 21 Wend. 267; *Black v. Shreeve*, 13 N. J. Eq. (3 Beas.) 455; *Everts v. Agnes*, 6 Wis. 453; *Cincinnati, etc., R. R. Co. v. Iliff*, 13 Ohio St. 285.

A complete delivery of a deed requires its acceptance by the grantee, and this may be presumed from his possession of it. *Ward v. Winslow*, 4 Pick. 518; *Den v. Farlee*, 21 N. J. L. (1 Zab.) 279; *Green v. Yarnall*, 6 Mo. 326; *Clarke v. Ray*, 1 Harr. & Johns. 318; *Southern Life Ins., etc., Co. v. Cole*, 4 Fla. 359; *Stewart v. Redditt*, 8 Md. 67; *Comer v. Baldwin*, 16 Minn. 173.

This presumption may be rebutted, and it may be shown that the grantee took possession of the executed deed without the grantor's consent. *Little v. Gibson*, 39 N. H. 505; *Mills v. Gore*, 20 Pick. 36; *Hadlock v. Hadlock*, 22 Ill. 388; *Den v. Farlee*, 21 N. J. L. (1 Zab.) 279; *Morris v. Henderson*, 37 Mo. 501; *Williams v. Sullivan*, 10 Rich. Eq. 217.

false or impossible, the delivery ascertains the time of it. And if another person seals the deed, yet if the party delivers it himself, he thereby adopts the sealing (s), and by a parity of reason the signing also, and makes them both his own. A delivery may be either absolute, that is, to the party or grantee himself; or to a third person, to hold till some conditions be performed

on the part of the grantee: in which last case it is not delivered
Escrow.

as a deed, but as an escrow; that is, as a scroll or writing, which is not to take effect as a deed till the conditions be performed; and then it is a deed to all intents and purposes (t). (370) This delivery constitutes the * formal declaration of the party that he thereby determines to com- [* 493] plete the conveyance or contract (u), yet where the signing and sealing is attested, but not the delivery, though it was admitted that the deed was executed as it purported to be, the court presumed that there had been delivery, and declared the document to be a valid deed (x).

Lastly, though this is not essential to the validity of a deed, though of the highest importance, for the purpose of establishing it if impeached, is the

attestation, or execution of it in the presence of witnesses: this
Attestation. is necessary for preserving the evidence, but does not constitute the essence of the deed (y). (371)

A particular class of deeds require especial mention here in respect of the manner of their execution: these are deeds made in compliance with and

exercise of powers conferred by some previous settlement or will,
Appointments under powers. such as where a power is given to a tenant for life of a family property to appoint a rentcharge or life estate to his widow. It is common for the instrument creating the power to prescribe some special formalities to be observed in exercising it, that three witnesses at least should witness it, or otherwise: and formerly, unless all the formalities were very strictly complied with, the appointment made under the power was absolutely bad at law, and frequently even in equity it could not be supported (z). So that it was found

(s) Perk. s. 130; *Tupper v. Foulkes*, 9 C. B. N. S. 797.

(t) Co. Litt. 86; Com. Dig. 3 B. & C. 5; *Gudgen v. Beaset*, 6 E. & B. 986; *Millership v. Brookes*, 5 H. & N. 797. The question whether the deed is or not a mere escrow is one of evidence. *Bowkes v. Burdakin*, 11 M. & W. 128.

(u) Plowd. 308.

(x) *Hall v. Bainbridge*, 12 Q. B. 699.

(y) Com. Dig. Falt. B. 4; Phil. on Evid. 418 to 421, 4th ed.; Peake, Rep. 28, 146; 2 Camp. 635. See 10 Ves. 436; 11 Mee. & W. 161.

(z) See *Chapman v. Gibson*, 8 Bro. C. C. 229; Sug. Powers, 533, et seq. 8th ed.

(370) A deed may be executed and delivered upon a condition which is to be performed before the deed is to take effect. A deed thus delivered is called an *escrow*. In such a case the deed must be delivered to some third person to hold until the condition is performed; for a deed can never be an *escrow* if delivered to the grantee himself, even though it be accompanied with an express condition that it is not to take effect unless such condition is performed; for the title will, nevertheless, pass by such delivery. *Fairbanks v. Metcalf*, 8 Mass. 280, 288; *Dawson v. Hall*, 2 Mich. 390; *Cincinnati, etc., R. R. Co. v. Iliff*, 18 Ohio St. 249, 254; *Brown v. Reynolds*, 5 Sneed, 639; *Graves v. Tucker*, 6 Sm. & Marsh. 9; *Hagood v. Harley*, 8 Rich. Law, 825; *Jordan v. Pollock*, 14 Ga. 145; *Worrall v. Munn*, 5 N. Y. (1 Seld.) 229.

A deed delivered as an *escrow* does not take effect as a deed until the condition upon which it was delivered has been performed. *Fairbanks v. Metcalf*, 8 Mass. 280, 288; *Hinman v. Booth*, 21 Wend. 267; *Black v. Shreve*, 13 N. J. Eq. (2 Beas.) 455, 458; *Boerts v. Agnes*, 4 Wis. 843, 851; *Stiles v. Brown*, 18 Vt. 568.

(371) See 3 Washb. Real Prop. (8d ed.) 247, 248; 4 Kent's Com. 457, 458, 459.

that the reasonable expectations of a family were disappointed through the incautious or ignorant way in which the provision had been attempted * to be made. To remedy this the legislature has provided that the exercise of every power, whatever may be the formalities prescribed by the instrument creating it, shall be absolutely valid if it be attested by two witnesses (a). And, by another act, a lease under a power, if made *bonâ fide*, but invalid through some deviation from the prescribed formalities, operates as a valid contract for a lease (b).

Our modern deeds are in reality nothing more than an improvement or amplification of the *brevia testata* mentioned by the feudal writers (c); which were written memorandums, introduced to perpetuate the tenor of the conveyance and investiture, when grants by parol only became the foundation of frequent dispute and uncertainty. To this end they registered in the deed the persons who attended as witnesses, which was formerly done without their signing their names (that not being always in their power), but they only heard the deed read; and then the clerk or scribe added their names, in a sort of memorandum; thus: "*hijis testibus, Johanne Moore, Jacobo Smith, et aliis ad hanc rem convocatis*" (d). This, like all other solemn transactions, was originally done only *coram paribus* (e), and frequently when assembled in the court baron, hundred, or county court; which was then expressed in the attestation, *teste comitatu, hundredo, &c.* (f). Afterwards the attestation of other witnesses was allowed, the trial in case of a dispute being still reserved to the * *pares*; with whom the witnesses (if more than one) were associated and joined in the verdict (g): till that also was abrogated by the statute of York 12 Edw. II. st. 1, c. 2. And in this manner, with some such clause of *hijis testibus*, are all old deeds and charters, particularly *magna carta*, witnessed. And in the time of Sir Edward Coke, creations of nobility were still witnessed in the same manner (h). But in the king's common charters, writs, or letters patent, the stile is now altered: for at present the king is his own witness, and attests his letters patent thus: "*Teste meipso, witness ourself at Westminster, &c.,*" a form which was introduced by Richard I. (i), but not commonly used till about the beginning of the fifteenth century; nor the clause of *hijis testibus* entirely discontinued till the reign of Henry VIII. (j); which was also the era of discontinuing it in the deeds of subjects, learning being then revived, and the faculty of writing more general; and therefore ever since that time, or somewhat later, the witnesses have usually subscribed their attestation, either at the bottom, or on the back of the deed (k).

(a) 22 & 28 Vict. c. 85, s. 12, applying only to execution of powers by deed subsequently to the 13 Aug. 1859. See as to some of the former difficulties, *Wright v. Wakeford*, 4 Taunt. 218; *Vincent v. Bishop of Sodor and Man*, 5 Erch. 688; and 54 Geo. 3, c. 168; a retrospective act for remedying some past defects. Powers exercised by will are well exercised if the will be well executed, according to the recent act, 7 Will. 4 & 1 Vict. c. 26, s. 10. See however as to sealing a will, *West v. Ray, Kay*, 885; *Collard v. Sampson*, 4 De G. M. & G. 224.

(b) 12 & 18 Vict. c. 26; 18 & 14 Vict. c. 17.

(c) Feud. 1. 1, t. 4.

(d) Co. Litt. 6.

(e) Feud. 1. 2, t. 32.

(f) Spelm. Gloss. 228; Madox, Formul. No. 231, 822, 660.

(g) Co. Litt. 6.

(h) 2 Inst. 77.

(i) Madox, Formul. No. 515.

(j) Ib. Dissert. fol. 53.

(k) 2 Inst. 78; see p. 378.

III. We are next to consider, how a deed may be avoided, or rendered of no effect. And from what has been before laid down it will follow, that if a deed

III. Deeds, how wants any of the essential requisites before-mentioned; either, 1. avoided.

Proper parties, and a proper subject-matter: 2. A good and sufficient consideration: 3. Writing on paper or parchment, duly stamped: 4. Sufficient and legal words, properly disposed: 5. Reading, if desired, before the execution: 6. Sealing; and, as we see, in most cases signing also: or, 7. Delivery: it is a void deed *ab initio*. It may also be avoided by matter *ex post facto*: as, 1. By rasure, interlining, or other alteration in any material

Erasure or alter- part; * unless a memorandum be made thereof at the [* 496] ation. time of the execution and attestation (l). (372) 2. By

Breaking the seal intentionally breaking off, or defacing the seal with the consent of all parties. For a man after duly executing an instrument whereby another obtains a benefit cannot by afterwards destroying the deed,

(l) 11 Rep. 27. See in general Com. Dig. the execution of the deed by the mortgagor Falt. as to interlineation. *Adsett v. Hives*, 88 did not avoid the deed. See also *Felgate's* Beav. 52, where it was held that a mortgagee Case, 3 De G. J. & S. 456. filling up dates and names of tenants after

(372) This subject is fully discussed in the note to *Master v. Miller*, 1 Smith's Lead. Cas. 934-968 (1254-1289). See, also, 3 Washb. Real Prop. (3d ed.) 220-224; 1 Wait's Law & Pr. 903-918.

A few of the general rules will be noticed. When an alteration appears upon the face of a deed, the question whether it was made before or after its execution is a question of fact for a jury, or for the court sitting in the place of a jury. After reviewing several cases it was said: "In this conflict of opinion, it appears to me that the sensible rule, and the rule most in accordance with the decisions in our own State, is that the instrument, with all the circumstances of its history, its nature, the appearance of the alteration, the possible or probable motives to the alteration or against it, and its effect upon the parties respectively, ought to be submitted to the jury; and that the court cannot presume, from the mere fact that an alteration appears on the face of the instrument (whether under seal or otherwise), that it was made *after* the signing." Per WOODRUFF, J., in *Maybee v. Sniffen*, 2 E. D. Smith, 10; *Acker v. Ledyard*, 8 Barb. 514; *Tillot v. Clinton & Essex Mut. Ins. Co.*, 7 id. 564; *Gooch v. Bryant*, 18 Me. 386; *Crabtree v. Clark*, 20 id. 387, 340; *Beaman v. Russell*, 20 Vt. 205, 215; *Cumberland Bank v. Hall*, 6 N. J. L. (1 Halst.) 215; *Mathews v. Coalin*, 9 Mo. 705; *Wilson v. Henderson*, 9 Sm. & Marsh. 375; *McCormick v. Fitzmorris*, 39 Mo. 84.

The question whether the alteration is to be presumed to have been made before or after the execution of the instrument is one upon which the authorities are conflicting. See 1 Smith's Lead. Cas. 962, 963 (1282, 1283); 2 Pars. Notes & Bills, 577, and note *w*; 1 Wait's Law & Pr. 911-918.

Those cases which act upon the presumption that the alteration was made after execution require the holder of the instrument to furnish some explanation for the appearances of alteration. *Ib.* And those cases also hold that such presumption may be rebutted by proof. *Ib.* Other cases hold that the legal intendment is that the alteration was made before execution, in the absence of evidence to the contrary. *Ib.*

When a presumption of alteration is indulged, and the note or instrument has been in the possession of the party claiming upon or under it, the presumption will be that the alteration was made by him, and the burden of proof is upon him to show that he was not privy to it. *Chesley v. Frost*, 1 N. H. 145; *Bowers v. Jewell*, 2 id. 548; *Barrington v. Bank of Washington*, 14 Serg. & R. 423; *Elbert v. McClelland*, 8 Bush (Ky.), 577.

As to the effect of alterations by consent, see 1 Smith's Lead. Cas. 965, 966 (1286, 1287); 1 Wait's Law & Pr. 901-903.

The effect of an unauthorized alteration, made after execution, by one who claims a benefit under the deed, destroys the instrument as to him, and he can never sue upon it. So far as the spoliator is concerned, the instrument, after alteration, is destroyed and extinguished. And yet its past operation is not contracted or affected; executed contracts evinced by it are

revoke its effect (*m*). 3. By delivering it up to be cancelled; that is, to have lines drawn over it in the form of lattice work or *cancelli* (though the phrase is now used figuratively for any manner of obliteration or defacing it); but even this cannot be said to avoid the effect of the deed, so as, for instance, to

retransfer the estate (*n*). (373) 4. By the disagreement of such, whose concurrence is necessary, in order for the deed to stand:

as, the husband, where a feme-covert is concerned; (374) an infant, or person under duress (*o*), when those disabilities are removed; or disclaimer of a trustee or other person to whom land has been conveyed without his assent (*p*).

By judgment or decree. 5. By the judgment or decree of a court of judicature. This, so far as regards a proceeding instituted for the purpose of cancelling the deed, was anciently the province of the court of star chamber, and now of the chancery; when it appears that the deed was obtained by fraud, force,

[* 497] or other foul practice; or is proved to be an absolute * forgery (*q*).

In any of these cases the deed may be voided, either in part or totally, according as the cause of avoidance is more or less extensive. (375) A court of law may, if the deed be pleaded and questioned, of course, decide upon its validity (*r*).

(*m*) 5 Rep. 28. See in general, Com. Dig. Fait. F. 2. Touchst. c. 4, s. 6, 2. *Smith v. Lyne*, 3 Y. & C. C. 345; 1 B. & C. 683.

(*n*) 2 H. Bl. 259; 6 East, 86; 4 B. & A. 465.

(*o*) See *Williams v. Bayley*, L. R. 1 H. L. 200, where the contract made by a father, whose name had been forged by his son, under a threat that the son should be prosecuted, was set aside.

(*p*) The disclaimer need not be by deed, though such a course is proper for purposes of evidence. See *Stacey v. Elph*, 1 M. & K. 195. In the absence of evidence, the assent

of a grantee is presumed, particularly if it be to his benefit, 1 Moore & Sc. 179, after once assenting whether by executing the deed or by conduct, no disclaimer will be allowed, *Crewe v. Dicken*, 4 Ves. 97.

(*q*) Toth. numo. 24; 1 Vern. 348. In *Clarke v. Malpas*, 31 L. J. Ch. 696, it was thought safer to direct a reconveyance than to rely upon the invalidity of the deed.

(*r*) *Cockshott v. Bennett*, 2 T. R. 763; *Woods v. Foote*, 1 H. & C. 841; *Boulnois v. Mann*, L. R. 1 Ex. 28; as to the equitable jurisdiction, see vol. iii. p. 70.

not rescinded; estates and titles vested by transmutation of possession, whether by common law or the statute of uses, are not divested; but that party can derive no future benefit from the deed, and no covenants, obligations or other executory contracts contained therein can be enforced by him, or by those deriving title under him. 1 Smith's Lead. Cas. 960 (1280).

(373) Where the title to land passes by the making and delivery of a deed, no subsequent alteration of such deed, nor even its cancellation or destruction, can operate to defeat or divest a title which has once passed. *Miller v. Gilleland*, 19 Penn. St. 119; *Chessman v. Whittemore*, 23 Pick. 281; *Raynor v. Wilson*, 6 Hill, 469; *Morgan v. Elam*, 4 Yerg. 375; *Mallory v. Stodder*, 6 Ala. 801; *Kimball v. Greig*, 47 id. 230; *Jordan v. Pollock*, 14 Ga. 145; *Washington v. Ogden*, 1 Black (U. S.), 450; *Van Hook v. Simmons*, 25 Tex. (Supp.) 323.

(374) See *Melvin v. Proprietors, etc.*, 16 Pick. 161, 167.

(375) It is a general rule that a court of equity will usually set aside, cancel, and direct to be delivered up, agreements and other instruments, where they are voidable, and not merely in cases in which there is actual fraud in the defendant, in which the plaintiff has not participated; where there is a constructive fraud against public policy, and the plaintiff has not participated therein, where there is a fraud against public policy, and the plaintiff has participated therein, but public policy would be defeated by allowing it to stand, and where there is a constructive fraud by both parties, but they are not in *pari delicto*. 1 Story's Eq. Jur., § 695, 695 a.

And, having thus explained the general nature of deeds, we are next to consider their several species, together with their respective incidents and the mode of their operation. And herein we will examine the particulars of those, which, from long practice and experience of their efficacy, have been generally used in the alienation of real estates: for it would be tedious, nay infinite, to descant upon all the several instruments made use of in personal concerns, but which fall under our general definition of a deed; that is, a writing sealed and delivered. The former, being principally such as serve to convey the property of lands and tenements from man to man, are commonly denominated conveyances: which are either conveyances at common law, or such as receive their force and efficacy by virtue of the statute of uses. And of conveyances, modern improvements (*s*) have materially reduced the number of those which are used in practice: many having become now obsolete, although they, not having lost their power, may still be employed.

Of conveyances by the common law, some may be called original, or primary conveyances; which are those by means whereof the benefit or estate is created or first arises: others are derivative or secondary; whereby the benefit or estate, originally created, is enlarged, restrained, transferred or extinguished.

* Original conveyances are the following: 1. Feoffment; 2. Gift; [* 498] 3. Grant; 4. Lease; 5. Exchange; 6. Partition: derivative are, 7. Release; 8. Confirmation; 9. Surrender; 10. Assignment; 11. Defeazance.

1. A feoffment, *feoffamentum*, is a substantive derived from the verb, to enfeoff, *feoffare* or *infeudare*, to give one a feud: and therefore feoffment is properly *donatio feudi* (*t*). It is the most ancient method of conveyance, the most solemn and public, and therefore the most easily remembered and proved. And it may properly be defined, the gift of any corporeal hereditament to another by the delivery of seisin and possession of the thing given (*u*). He that so gives, or enfeoffs, is called the feoffor; and the person enfeoffed is denominated the feoffee.

This is plainly derived from, or is indeed itself the very mode of the ancient feudal donation; for though it may be performed by the word "enfeoff" or "grant," yet the aptest word of feoffment is, "*do* or *dedi*" (*v*). And it is still directed and governed by the same feudal rules; insomuch that the principal rule relating to the extent and effect of the feudal grant, "*tenor est qui legem dat feudo*," is in other words become the maxim of our law with relation to feoffments, "*modus legem dat donationi*" (*x*). And therefore as in pure feudal donations the lord, from whom the feud moved, must expressly limit and declare the continuance or quantity of estate which he meant to confer, "*ne quis plus donasse præsumatur, quam in donatione expresserit*:" so, if one grants by feoffment lands or tenements to another, and limits or expresses no estate, the grantee (due ceremonies of law being performed) has merely an

(*s*) Principally the act to amend the law of real property, 8 & 9 Vict. c. 106.

(*t*) Co. Litt. 9.

(*u*) Shepp. Touchst. 203.

(*v*) *Ib.*

(*x*) Wright, 21.

estate for life (y). For, as the personal liabilities of the feoffee were originally presumed to be the immediate or principal inducements to the feoffment, the [*499] *feoffee's estate ought to be confined to his person and subsist only for his life: unless the feoffor, by express provision in the creation and constitution of the estate, has given it a longer continuance. These express provisions are indeed generally made; for this was for ages the only conveyance, by which our ancestors were wont to create an estate in fee-simple (z), by giving the land to the feoffee, to hold to him and his heirs for ever; though it serves equally well to convey any other estate of freehold (a).

But by the mere words of the deed the feoffment is by no means perfected, there remains a very material ceremony to be performed, called livery of seisin; without which the feoffee has but a mere estate at will (b). This Livery of seisin. livery of seisin is no other than the pure feudal investiture, or delivery of corporal possession of the land or tenement; which was held absolutely necessary to complete the donation. "*Nam feudum sine investitura nullo modo constitui potuit*" (c): and an estate was only perfect, when, as the author of Fleta expresses it in our law, "*fit juris et seisinæ conjunctio*" (d).

The advantage of this mode of conveyance in ancient times no doubt consisted in the publicity of it, for when writings were, to say the least, rare, it was necessary that the evidence of right should be preserved by those whose personal interest in the matter would engage their attention. Therefore the ceremony took place on the land, in the presence of the neighbours, who, should litigation subsequently arise, would constitute at once the witnesses and the jury to decide the right. Moreover, it was thought a matter of high policy that no secret dealing with the possession of land should be encouraged.

With our Saxon ancestors the delivery of a turf was a necessary solemnity, [*500] to establish the conveyance of *lands (e). And, to this day, the conveyance of our copyhold estates is usually made from the seller to the lord or his steward by delivery of a rod or verge, and then from the lord to the purchaser by re-delivery of the same, in the presence of a jury of tenants.

Conveyances in writing were the last and most refined improvement. The mere delivery of possession, either actual or symbolical, depending on the ocular testimony and remembrance of the witnesses, was liable to be forgotten or misrepresented, and became frequently incapable of proof. Besides, the new occasions and necessities, introduced by the advancement of commerce, required means to be devised of charging and encumbering estates, and of making them liable to a multitude of conditions and minute designations for the purposes of raising money, without an absolute sale of the land; and sometimes the like proceedings were found useful in order to make a decent and competent provision for the numerous branches of a family, and for other domestic views. None of which could be effected by a mere simple, corporal transfer of the soil from one man to another, which was principally calculated for conveying an absolute unlimited dominion. Written deeds were therefore introduced, in order to specify and perpetuate the peculiar purposes of the party who conveyed: yet still, for a very long series of years, they were never made use of, but in company with the more ancient and notorious method of

(y) Co. Litt. 42.

(z) See Appendix, No. 1.

(a) Co. Litt. 9.

(b) Litt. s. 70; 4 Cru. Dig. t. 32, c. 4.

(c) Wright, 37.

(d) L. 8, c. 15, s. 5.

(e) Hickes, Dissert. Epistolar. 85.

transfer, by delivery of corporal possession. But until recently a deed was not necessary for a feoffment, though the Statute of Frauds required a writing (*f*). The act to amend the law of real property now requires a feoffment to be by deed (*g*).

Livery of seisin, by the common law, is necessary to be made upon every grant of an estate of freehold in hereditaments corporeal, whether of inheritance or for life * only. In incorporeal hereditaments it is impossible to be made; for they are not the object of the senses: and in leases [* 501] for years, or other chattel interests, it is not necessary. In leases for years indeed an actual entry is necessary to vest the estate in the lessee; for the bare lease gives him only a right to enter, which is called his interest in the term, or *interesse termini*: and, when he enters in pursuance of that right, he is then, and not before, in possession of his term, and complete tenant for years (*h*). This entry by the tenant himself serves the purpose of notoriety, as well as livery of seisin from the grantor could have done; which it would have been improper to have given in this case, because that solemnity is appropriated to the conveyance of a freehold. And this is one reason why freeholds cannot by a common law assurance be made to commence *in futuro*, because they cannot (at the common law) be made but by livery of seisin; which livery, being an actual manual tradition of the land, must take effect *in præsenti*, or not at all (*i*).

On the creation of a freehold remainder, at one and the same time, with a particular estate for years, we have before seen that at the common law livery must be made to the particular tenant (*k*). But if such a remainder be created afterwards, expectant on a lease for years now in being, the livery must not be made to the lessee for years, for then it operates nothing; "*nam quod semel meum est, amplius meum esse non potest*" (*l*); but it must be made to the remainderman himself, by consent of the lessee for years: for without his consent no livery of the possession can be given (*m*); partly because such forcible livery would be an ejectment of the tenant from his term, and partly for the reasons before given (*n*) for introducing the doctrine of attornments.

* Livery of seisin is either in deed, or in law. Livery in deed is thus performed. The feoffor, lessor, or his attorney, together with [** 502*] the feoffee, lessee, or his attorney, (for this may as effectually be done by deputy or duly authorised attorney, as by the principals themselves in person) come to the land, or to the house; and there, in the presence of witnesses, declare the contents of the feoffment or lease, on which livery is to be made. And then the feoffor, if it be of land, delivers to the feoffee, all other persons being out of the ground, a clod or turf, or a twig or bough there growing, with words to this effect: "I deliver these to you in the name of seisin of all the lands and tenements contained in this deed." But if it be of a house, the feoffor must take the ring, or latch of the door, the house being quite empty, or at least the person in possession being a consenting party (*o*), and deliver it to the feoffee in the same form; and then the feoffee

(*f*) 3 Prest. Ab. 110.

(*g*) 8 & 9 Vict. c. 106, s. 8, with an exception presently noticed.

(*h*) Co. Litt. 46.

(*i*) *Ante*, p. 319.

(*k*) *Ante*, p. 320.

(*l*) Co. Litt. 49.

(*m*) *Ib.* 48.

(*n*) *Ante*, p. 465.

(*o*) Dig. 38 a. 362; Cro. El. 322; 2 Nev. & M. 508; 2 Cr., M. & R. 120. Of course, if a person enter wrongfully, his feoffment during the presence of the true owner is void. Perk. 45, A. 219.

must enter alone, and shut to the door, and then open it, and let in the others (*p*). If the conveyance or feoffment be of divers lands, lying scattered in one and the same county, then in the feoffor's possession, livery of seisin of any parcel, in the name of the rest, suffices for all (*q*); but if they be in several counties, there must be as many liveries as there are counties. For, if the title to these lands comes to be disputed, there must be as many trials as there are counties, and the jury of one county are not judges of the notoriety of a fact in another. Besides, anciently this seisin was obliged to be delivered *coram paribus de vicineto*, before the peers or freeholders of the neighbourhood, who attested such delivery in the * body or on the back of the deed; [* 503] according to the rule of the feudal law (*r*), *pares debent interesse investituræ feudi, et non alii*: for which this reason is expressly given; because the peers or vassals of the lord, being bound by their oath of fealty, will take care that no fraud be committed to his prejudice, which strangers might be apt to connive at. And though, afterwards, the ocular attestation of the *pares* was held unnecessary, and livery might be made before any credible witnesses, yet the trial, in case it was disputed (like that of other attestations), was still reserved to the *pares* or jury of the county (*s*). Also, if the lands be out on lease, though all lie in the same county, there must be as many liveries as there are tenants: because no livery can be made in this case but by the consent of the particular tenant; and the consent of one will not bind the rest (*t*). And in all these cases it is prudent, and usual, to endorse the livery of seisin on the back of the deed, specifying the manner, place, and time of making it; together with the names of the witnesses (*u*). And thus much for livery in deed.

Livery in law is where the same is not made on the land, but in sight of it only: the feoffor saying to the feoffee, "I give you yonder land, enter and take possession." Here, if the feoffee enters during the life of the feoffor, it is a good livery, but not otherwise; unless he dares not enter, through fear of his life or bodily harm: and then his continual claim, made yearly, in due form of law, as near as possible to the lands (*x*), will suffice without an entry (*y*). This livery in law cannot however be given or received by attorney, but only by the parties themselves (*z*).

We have dwelt somewhat at length upon this ancient method of conveyance, on account of the former * universality with which it was employed, [* 504] a circumstance that cannot but be attended with great interest. It is now however, and has for some time been, out of use, with the single exception of the customary alienation of land of gavelkind tenure by an infant, for, as we have seen, an infant of the age of fourteen years or upwards may by feoffment convey lands of this tenure (*a*). A feoffment under this custom is an exception to the rule that a deed is requisite. It only remains to remind the reader that the tortious effect which feoffments formerly had, whereby a feoffment by a particular tenant as a tenant for life conveyed by wrong, as it was said, a fee-simple, thereby putting the remainder-man to his legal remedy

(*p*) Co. Litt. 48; West. Symb. 251.

(*q*) Litt. s. 61, 414, 418. By the act of induction into a benefice, a parson is put into actual possession of a part for the whole. *Bulwer v. Bulwer*, 2 B. & AL. 470.

(*r*) Feud. l. 2, t. 58.

(*s*) Gilb. 10, 35.

(*t*) Dyer, 18.

(*u*) See Appendix, No. I.

(*x*) Litt. s. 421, &c.

(*y*) Co. Litt. 48, 254.

(*z*) *Id.* 52.

(*a*) *Ante*, p. 170.

to recover the property, has been abolished, and now such a feoffment would but convey the estate for life, and have no further or other effect (*b*).

2. The conveyance by gift, *donatio*, is properly applied to the creation of an estate-tail, as feoffment is to that of an estate in fee, and lease to that of an estate for life or years. It differs in nothing from a feoffment,

2. *Gifts.*

but in the nature of the estate passing by it: for the operative words of conveyance in this case are *do* or *dedi* (*c*); and gifts in tail are equally imperfect without livery of seisin, as feoffments in fee-simple (*d*). And this is the only distinction that Littleton seems to take, when he says (*e*), "it is to be understood that there is feoffor and feoffee, donor and donee, lessor and lessee;" viz. feoffor is applied to a feoffment in fee-simple, donor to a gift in tail, and lessor to a lease for life, or for years, or at will.

3. We come next to the third, and now, since the recent amendments, by far the most important of all assurances—grants—*concessionēs*. (376) Feoffment and gifts can operate only on corporeal hereditaments

2. *Grants.*

(thence said to lie in livery) and those in possession. Incorporeal [* 505] hereditaments and estates in reversion and remainder, as they were incapable of being corporally delivered (*f*), could only be conveyed by grant, and were therefore said to lie in grant (*g*). But before the recent act, a grant was inapplicable to convey the immediate freehold, which did not lie in grant. This has been altered, and an immediate estate now lies in grant as well as in livery (*h*).

From this circumstance the conveyance of any estate of freehold, whether in possession or reversion, when it is made to a stranger to the title, is always made by grant; and the estate passes by the delivering of the deed. The words were *concedi et concessi*, and the proper phrase is now "grant." The mode in which grants are modelled so as to operate under the statute of uses, will presently appear.

In this place we may very shortly notice that, by virtue of divers modern acts of parliament passed for the purpose of meeting the difficulties in conveying land when there is some personal incapacity on the part of the alienor, and yet a paramount necessity exists for conveyance, deeds of various kinds are authorised to be executed which operate in a wholly abnormal way. Thus, where land is purchased for a railway, and it is impossible, either by reason of incapacity or otherwise, that an ordinary conveyance can be made, a person having only a limited interest may convey the inheritance; or even a deed-poll executed by the company itself in a form prescribed by the act, will, if all preliminaries which are necessary for the protection of those interested in the

(b) 8 & 9 Vict. c. 106, s. 8; *ante*, pp. 262, 855, 488.

(c) West. Symbol. 256.

(d) Litt. s. 59.

(e) Sect. 57.

(f) Co. Litt. 9.

(g) Co. Litt. 172; "*Traditio* (or livery), *nil aliud est quam rei corporalis de persona in personam, de manu in manum, translatio aut in possessionem inductio; sed res incorporeales, quæ sunt ipsum jus rei vel corpori*

inhaerens, traditionem non patiuntur." Bract. l. 2, c. 18.

(h) 8 & 9 Vict. c. 106, s. 1, which act (s. 4) abolished the obsolete doctrines as to the effect of the words 'give' and 'grant,' *ante*, p. 488. The preceding act, 7 & 8 Vict. c. 76, which remained in force from the 1st January, 1845, to the 1st October, 1845, had a similar object, but was inartificially drawn, and was therefore repealed.

land, have been duly observed, * have the effect of vesting the land [* 506] in the company (i). Again, in other cases, where a similar necessity for a conveyance exists, and a similar difficulty in finding a grantor, the court of chancery may appoint a person to convey, and his deed will operate even though he has no estate whatever in the land (k).

4. A lease is properly a conveyance of any lands or tenements (usually in consideration of rent or other annual recompense), made for life, for years,

4. Leases.

Underlease for the whole term of underlessor is in effect an assignment.

or at will, but always for a less time than the lessor has in the premises: for if it be for the whole interest, it is more properly an assignment than a lease (l). Though no formal words are requisite to a lease at common law (m), the usual words of operation in it are, "demise, grant, and to farm let; *dimisi, concessi, et ad firmam tradidi*."

Farm, or *feorme*, is an old Saxon word, signifying provisions (n): and it came to be used instead of rent or render, because anciently, the greater part of rents were reserved in provisions; in corn, in poultry, and the like: till the use of money became more frequent. So that a farmer, *firmarius*, was one who held his lands upon payment of a rent or *feorme*: though at present, by a gradual departure from the original sense, the word farm is brought to signify the very estate or land so held upon farm or rent. By this conveyance an estate for life, for years, or at will, may be created, either in corporeal or incorporeal hereditaments; though livery of seisin is indeed incident and was necessary to one species of leases, viz. leases for life of corporeal hereditaments; but to no other. Before the Statute of Frauds a lease for any number of years might have been made by parol without writing, entry

[* 507] merely being requisite to complete the * estate. That statute (o) rendered a lease for any period greater than three years (and even less if the rent reserved did not amount to two-thirds of the full value) void as a lease, and only operative as creating an estate at will, unless put into writing and signed. Leases continued however not to be necessarily made by deed until the recent act, already often referred to; which has rendered it necessary that all leases previously required to be in writing shall be made by deed (p). Much litigation has taken place to determine whether a particular instrument was a lease or merely an agreement for a lease, and it is said that formerly the judges endeavoured to construe them as leases and not agreements (q). Since the latter act the tendency is the other way; and a document void as a lease, from not being under seal, may be, and often is, construed as an agreement for a lease and enforceable as such (r).

Whatever restriction, by the severity of the feudal law, might in times of very high antiquity be observed with regard to leases, yet by the common law, as it has stood for many centuries, all persons seised of any estate might let leases to endure so long as their own interest lasted, but no longer. Therefore tenant in fee-simple might let leases of any duration;

Who may make leases.

(i) 8 & 9 Vict. c. 18, ss. 75, 77.

(k) 13 & 14 Vict. c. 60, s. 20.

(l) *Ante*, p. 341; *Beardman v. Wilson*, L.

R. 4 C. P. 57.

(m) Co. Litt. 47 a; Mr. Hargrave's note, and *Atloe v. Hemmings*, Bulstr. 281; Bac. Ab. Leases, 281.

(n) Spelm. Gloss. 229.

(o) 29 Car. 2, c. 3, s. 1.

(p) 8 & 9 Vict. c. 106, s. 3.

(q) *Tidey v. Mollett*, 33 L. J. C. P. 235. For numerous instances where the discussion has arisen, see 4 Jarm. Bythe. Conv. 265, *et seq.*

(r) See the recent cases, *Bond v. Rosling*, 1 B. & S. 371; *Rollason v. Leon*, 7 H. & N. 73; *Tidey v. Mollett*, 16 C. B., N. S., 298; *Taswell v. Parker*, 2 De G. & J. 559.

for he has the whole interest: but tenant in tail, or tenant for life, could make no leases which should bind the issue in tail or reversioner, a lease enduring beyond the tenant's own life being voidable by the issue (*s*); nor could a husband, seised *jure uxoris*, make a firm or valid lease for any longer term than the joint lives of himself and his wife, for then his interest

* expired. Yet some tenants for life, where the fee-
 Tenants for life. simple was in abeyance, might (with the concurrence of [** 508*]

such as have the guardianship of the fee) make leases of equal duration with those granted by tenants in fee-simple, such as parsons and vicars with consent of the patron and ordinary (*t*), the bishop or archbishop, with the consent of the dean and chapter, or the dean with the consent of the bishop and chapter (*u*).

Ecclesiastical So also bishops, and deans, and such other sole ecclesiastical persons. corporations as were seised of the fee-simple of lands in their corporate right, might, with the concurrence and confirmation of such persons as the law requires, have made leases for years, or for life, estates in tail, or in fee, without any limitation or control. And corporations aggregate

Corporations. might have made what estates they pleased, without the confirmation of any other person whatsoever. Whereas now, by several statutes, this power where it was unreasonable, and might be made an ill use of, is restrained; and, where in the other cases the restraint by the common law seemed too hard, it is in some measure removed. The former statutes are called the restraining, the latter the enabling statutes. We will take a view of them all.

The earliest of them is an enabling statute (32 Hen. 8, c. 28), which empowers three manner of persons to make leases, to endure for three lives or

Enabling statute. one and twenty years; which could not do so before. As, first,
 32 Hen. 8, c. 28. tenant in tail may by such leases bind his issue in tail, but not

Leases by tenants those in remainder or reversion. Secondly, a husband seised in in tail, husbands, right of his wife, in fee-simple or fee-tail, provided the wife joins and ecclesiastical persons. in such lease, may bind her and her heirs thereby. Lastly, all

persons seised of an estate of fee-simple in right of their churches, which extends not to parsons and vicars, may (without the concurrence of any other person) bind their successors. But then many requisites which

* the statute specifies, must be observed, otherwise such leases are not [** 509*]
 binding (*v*). 1. The lease must be by indenture; and not by deed-

poll, or by parol. 2. It must begin from the making, or day of the making, and not at any greater distance of time (*x*). 3. If there be any old lease in being, it must be first absolutely surrendered, or be within a year of expiring.

4. It must be either for twenty-one years, or three lives; and not for both.

5. It must not exceed the term of three lives, or twenty-one years, but may be for a shorter term. 6. It must be of corporeal hereditaments, and not of

such things as lie merely in grant; for no rent can be reserved thereout by the common law, as the lessor cannot resort to them to distrain (*y*). 7. It must be

(*s*) *I. e.*, not absolutely void; Co. Litt. 46 a, b; Bac. Ab. Leases, D.; *Machell v. Clarke*, 2 Ld. Raym. 778; s. c. 7 Mod. 18; *In Re French*, 7 Ir. C. L. 888.

(*t*) Co. Litt. 44.

(*u*) By 33 Hen. 8, c. 27, the vote of the majority of a hospital chapter or other corporation is valid for these purposes.

(*v*) Co. Litt. 44.

(*x*) See *Pugh v. Duke of Leeds*, Cowp. 714;

Freeman v. West, 2 Wils. 165; *Ante*, p. 276, n. r.

(*y*) But now by the stat. 5 Geo. 3, c. 17, a lease of tithes or other incorporeal hereditaments, alone, may be granted by any bishop or any such ecclesiastical or eleemosynary corporation, and the successor shall be entitled to recover the rent by an action of debt, which (in case of a freehold lease) he could not have brought at the common law.

of lands and tenements most commonly let for twenty years past: so that if they had been let for above half the time (or eleven years out of the twenty) either for life, for years, at will, or by copy of court roll, it is sufficient. 8. The most usual and customary rent, for twenty years past, must be reserved yearly on such lease. 9. Such leases must not be made without impeachment of waste. These were the guards, imposed by the statute (which was avowedly made for the security of farmers and the consequent improvement of tillage) to prevent unreasonable abuses, in prejudice of the issue, the wife, or the successor, of the reasonable indulgence here given. We may see that the provisions of this statute have been modified and enlarged by the legislation of recent times (z).

But we must next consider the disabling or restraining statutes. First of which comes 1 Eliz. c. 19 (made *entirely for the benefit of the successor), which enacts, that all grants by archbishops and bishops (including even those confirmed by the dean and chapter; the which, however long or unreasonable, were good at common law) other than for the term of one and twenty years, or three lives, from the making, or without reserving the usual rent, shall be void. Concurrent leases for years, if confirmed by the dean and chapter, are held to be within the exception of this statute, and therefore valid; provided they do not exceed (together with the lease in being) the term permitted by the act (a). But, by a saving expressly made, this statute of 1 Eliz. did not extend to grants made by any bishop to the crown; by which means Queen Elizabeth procured many fair possessions to be made over to her by the prelates, either for her own use, or with intent to be granted out again to her favourites, whom she thus gratified without any expense to herself. To prevent which (b) for the future, the statute 1 Jac. 1, c. 3, extends the prohibition to grants and leases made to the king, as well as to any of his subjects.

Next came the statute 13 Eliz. c. 10, explained, enforced, and somewhat modified by the statutes 14 Eliz. cc. 11 and 14, 18 Eliz. c. 11, 43 Eliz. c. 29, 39 & 40 Geo. 3, c. 41, and 41 Geo. 3, c. 109, which extend the restrictions laid by the last-mentioned statute on bishops, to certain other inferior corporations, both sole and aggregate. From laying all which together we collect, that all colleges, cathedrals, and other ecclesiastical or eleemosynary corporations, and all parsons and vicars, were restrained from making any leases of their lands, unless under the following regulations: 1. They must not exceed twenty-one years, or three lives, from the making. 2. The accustomed rent, or more, must be yearly reserved thereon, or where a part of land usually let for a certain rent was leased, the ancient rent must be reserved *pro rata*. And *waste lands not previously demised, on which there could be no accustomed rent, must be let at best rent without any fine. 3. Houses in corporations or market towns might be let for forty years; provided they were not the mansion-houses of the lessors, nor have above ten acres of ground belonging to them; and provided the lessee be bound to keep them in repair: and they might also be aliened in fee-simple, for lands of equal value in recompense. 4. Where there was an old lease in being, no concurrent lease should be made, unless where the old one would

(z) *Ante*, pp. 228, 242.

(b) 11 Rep. 71.

(a) Co. Litt. 45; Degge, 119; *Marles v. Wright*, Cro. Eliz. 141.

expire within three years. 5. No lease, by the equity of the early statutes, and express provision of the later ones, could be made without impeachment of waste (*c*). 6. All bonds and covenants tending to frustrate the provisions of the statutes of 13 and 18 Eliz. were to be void.

Concerning these restrictive statutes there are two observations to be made. First, that they did not, by any construction, enable any persons to make such leases as they were by common law disabled to make. Therefore *Effect of the disabling statute.* a parson or vicar, though he was restrained from making longer leases than for twenty-one years or three lives, even with the consent of patron and ordinary, yet was not enabled to make any lease at all, so as to bind his successor, without obtaining such consent (*d*). Secondly, that though leases contrary to these acts were declared void, yet they were good against the lessor during his life, if he were a sole corporation; and also good against an aggregate corporation so long as the head of it lived, he being presumed to be the most concerned in interest. For the act was intended for the benefit of the successor only; and no man shall make an advantage of his own wrong (*e*).

* There was yet another restriction with regard to college leases, by statute 18 Eliz. c. 6, which directs, that one-third of the old rent, then [* 512]

College leases. paid, should for the future be reserved in wheat or malt, reserving a quarter of wheat for each 6*s.* 8*d.*, or a quarter of malt for every 5*s.*; or that the lessees should pay for the same according to the price that wheat and malt should be sold for, in the market next adjoining to the respective colleges, on the market day before the rent becomes due. This is said (*f*) to have been an invention of lord treasurer Burleigh and sir Thomas Smith, then principal secretary of state; who, observing how greatly the value of money had sunk, and the price of all provisions risen, by the quantity of bullion imported from the new-found Indies, (which effects were likely to increase to a greater degree) devised this method for upholding the revenues of colleges. Their foresight and penetration has in this respect been very apparent: for, though the rent so reserved in corn was at first but one-third of the old rent, or half of what was still reserved in money, yet now the proportion is nearly inverted; and the money arising from corn rents is, *communibus annis*, almost double of the rents reserved in money. But as the two rents together have never amounted to the value of the land, fines for renewal continued to be demanded and paid.

The leases of beneficed clergymen were farther restrained in case of their non-residence by statute 13 Eliz. c. 20, extended by the acts already noticed, 14 Eliz. c. 11, 18 Eliz. c. 11, and 43 Eliz. c. 9. But these provisions having been repealed (*g*), we need not further notice them.

We come now to the more modern acts, and it is necessary to point out that in these the legislature has * separately dealt with those corporations, [* 513] which have an ecclesiastical, those which have a collegiate, and those

(*c*) Co. Litt. 45.

(*d*) Co. Litt. 44. If the lease has not been confirmed by the ordinary, the acceptance of rent by the successor will not ratify the lease for the rest of the term which may be unexpired at the time of the death or cession of the lessor. Bro. Abr. Acceptance, pl. 26; and see *Doe d. Brammall v. Collinge*, 18 L. J. C. P. 305.

(*e*) *Ib.* 45.

(*f*) Strype's Annals of Eliz.

(*g*) By 43 Geo. 3, c. 84, which contained enactments, having somewhat similar objects; and further amendments were made by 54 Geo. 3, cc. 54 and 175; and a general act was afterwards passed, 57 Geo. 3, c. 99. This again was repealed by 1 & 2 Vict. c. 106, but the older acts were not revived.

which have a purely eleemosynary character. We have already had occasion to notice the power given to tenants in tail and tenants for life, and need not here further enlarge upon the modern acts in regard to them (*h*).

First, then, as to ecclesiastical corporations. By an act passed in the year 1836 (*i*) it was enacted that thenceforward, no archbishop, bishop, ecclesiastical corporation, sole or aggregate, canon or prebendary, or other spiritual person, nor any master or guardian of any hospital, should renew a lease which should have been previously granted for life, until one or more of the lives named in the previous lease should have expired; and then only so that the surviving life or lives with the new lives or life should make up the number not exceeding three in the whole, for which the previous lease had been granted. And where the previous lease had been for forty years, then no renewal should be granted till fourteen years had expired; with similar restrictions in other cases. Another and the last restraining act which we may notice is a very recent one (*k*), prohibiting prebendaries of prebends (not being prebends of a cathedral or college church), rectors, vicars and incumbents from granting by copy of court roll or lease in consideration of a fine, all vested rights at the date of the act (*l*) being preserved. The act declares, however, that the same lands may be leased, sold, exchanged, or enfranchised under the provisions of two acts passed in the year 1842, to which we now come, and which are important enabling acts.

The first of these (*m*) concerns incumbents of benefices * only. [** 514*] Under this act, incumbents of benefices, with the consent of the patron and the bishop (and, in the case of copyholds, of the lord of the manor) may grant agricultural leases of their glebe lands for fourteen years; the act provides in detail the term of the leases, which are such as a prudent owner, having full regard to the future as well as the present, would insert; but the parsonage house, and offices, and ten acres of glebe most conveniently situated for occupation, are excepted from the authority given by the act.

By the other act of the same year (*n*), power is given to ecclesiastical corporations, aggregate or sole, (except colleges and some other corporations there mentioned, and except ecclesiastical hospitals,) to grant building and mining leases, the terms of which are prescribed by the act. Other suitable provisions in connection with building leases, such as power to lay out streets, are also conferred. The improved values of the property which arise from the operation of the act after the next vacancy, are reserved to be dealt with by the ecclesiastical commissioners (*o*). The authority given by the act does not extend to lease the palace of an archbishop or bishop, or the house of residence of any other corporation, or the gardens, or outbuildings adjoining (*p*). The act is expressly declared to be an enabling and not a restraining act, and there-

(*h*) *Ante*, pp. 228, 242. The Settled Estates Act, 19 & 20 Vict. c. 12, amended by 21 & 22 Vict. c. 77, is the act now principally dealing with these.

(*i*) 6 & 7 Will. 4, c. 20, passed on the 21st June, amended or explained by 6 & 7 Will. 3, c. 64.

(*k*) 24 & 25 Vict. c. 105, amended by 25 & 26 Vict. c. 52, *ante*, p. 191.

(*l*) 6th August, 1861.

(*m*) 5 & 6 Vict. c. 27. It has been held that

glebe lands which have usually been let on lease by incumbents are not within the act, *Jenkins v. Green*, 28 Beav. 87.

(*n*) 5 & 6 Vict. c. 108, called the Ecclesiastical Leasing Act, 1842 (amended by 21 & 22 Vict. c. 57, and 28 & 29 Vict. c. 57).

(*o*) See ss. 10, 11, 12 & 13, referring to the acts, 8 & 4 Vict. c. 113, and 4 & 5 Vict. c. 39, under which the commissioners exercise their powers.

(*p*) Sect. 9.

fore does not abridge any powers which might in any manner be in existence previously (*q*).

Next, as to collegiate institutions. By acts passed in the years 1858 (*r*) and 1860 regulations have been made * as to the granting leases and otherwise in respect of the management of their lands, by the universities [** 515*] of Oxford and Cambridge and Durham, and the colleges therein, and the colleges at Winchester and Eton; also for providing compensation for the loss of the fines. The details of these acts are in accordance with all other modern enabling acts, and do not require particular mention here.

Lastly, as to charitable corporations generally. The provisions of sir Samuel Romilly's act (*s*), although framed apparently for very different purposes, have been made use of for the purpose of obtaining the sanction of the court of chancery to leases and other dealings by charitable corporations (*t*). But the recent acts (*u*), under which the charity commissioners exercise their jurisdiction, contain provisions for the sanction by them of every proper dealing with the charitable property; and, further, for carrying the same into effect under the direction of the commissioners. The jurisdiction of the commissioners under these acts applies to endowed charities only, and it has been held that charities whose funds consist merely of the savings of voluntary contributions are not endowed (*v*). Other charities, however, may voluntarily put themselves under the control of the commissioners, and by so doing obtain the advantage of the powers given by the acts.

The general result of these modern acts relating to ecclesiastical, collegiate, and eleemosynary corporations, is, that the restrictions imposed by the older acts have not been repealed, yet provision has been made for meeting all difficulties in the prudent management of property arising from such restrictions, whilst the restrictions still apply to prevent any improvident dealing with the * property, such as to deprive successors of receiving their proper [** 516*] share of the annual profit. The restrictions have, however, been entirely removed in favour of special public objects, such as workhouses and the like (*x*).

2. An exchange is a mutual grant of equal interests, the one in consideration of the other. The word "exchange" is so individually requisite and appropriated by law to this case, that it cannot be supplied by any other word or expressed by any circumlocution (*y*). The estates exchanged must be equal in quantity (*z*); not of value, for that is immaterial, but of interest; as fee-simple for fee-simple, a lease for years for a lease for years, but it matters not whether the terms be equal in duration or not (*a*), and the like. And the exchange may be of things that lie either in grant or in livery (*b*). But no livery of seisin, even in exchanges of freehold, is necessary to perfect the conveyance (*c*): for each party stands in the place

- (*q*) Sect. 8.
- (*r*) The Universities and College Estates Act, 1858; 21 & 22 Vict. c. 44, and the Amendment Act, 23 & 24 Vict. c. 59.
- (*s*) 52 Geo. 3, c. 101.
- (*t*) See *Re Ashton Charity*, 22 Beav. 288.
- (*u*) See 16 & 17 Vict. c. 137; 18 & 19 Vict. c. 124; 23 & 24 Vict. c. 163, and 32 & 33 Vict. c. 110, which are to be read together as one act.
- (*v*) *Governors for Relief of Poor Widows, &c., of Olergymen v. Sutton*, 27 Beav. 651.
- (*x*) 5 & 6 Will. 4, c. 69; 20 & 21 Vict. c. 13.
- (*y*) Co. Litt. 50, 51; 3 Wils. 468.
- (*z*) Litt. s. 64, 65; Shepp. Touch. 296; 2 Wils. 498.
- (*a*) Co. Litt. 50; Perk. ss. 280, 289.
- (*b*) Co. Litt. 50.
- (*c*) Litt. s. 62.

of the other and occupies his right, and each of them has already had corporal possession of his own land. But entry must be made on both sides: for, if

Entry. either party die before entry, the exchange is void, for want of

sufficient notoriety (*d*); also, by the Statute of Frauds, writing is made essential to an exchange, and if one or both things lie in grant a deed is necessary (*e*). If two parsons, by consent of patron and ordinary, exchange their preferments; and the one is presented, instituted, and inducted, and the other is presented, and instituted, but dies before induction; the former shall not keep his new benefice because the exchange was not completed, and there-

Implied mutual warranty. fore he shall return back to his own (*f*). Formerly, as we have seen, an exchange of any hereditaments implied a warranty, so

[* 517] that if either party were evicted of those * which were taken by him in exchange, through defect of the other's title, he could return back to the possession of his own. This effect of an exchange and that of a similar doctrine in cases of partition were abolished (*g*) by the legislature declaring that an exchange or partition shall not imply any condition at law.

6. A partition, is when two or more joint-tenants, coparceners, or tenants in common, agree to divide the lands so held among them in severalty, each taking a distinct part (*h*). Here, as in some instances there is a unity

6. Partition. of interest, and in all a unity of possession, it is necessary that they all mutually convey and assure to each other the several estates, which they are to take and enjoy separately. By the common law coparceners and tenants in common might have made it by parol with livery of seisin (*i*); joint-tenants, being already seised of the whole, could only testify a partition by deed (*k*). The Statute of Frauds made writing necessary, and a deed is now under the recent act essential in every case (*l*). The partition between joint-tenants is technically effected by release, in other cases by conveyance carrying livery of seisin (*m*). But exchanges are now invariably effected, not by any technical common law assurances but by simple conveyances by grant, as if made upon mutual sales: and partitions are usually effected by a conveyance to a grantee, to such uses as will vest the several parts in the grantors respectively in severalty.

We may remember that the legislature has made provision for the inclosure and partition of commons and other waste lands, and when effected in this manner no conveyances are necessary. By an act passed in the year 1834 (*n*),

Inclosure of com- [* 518] for the purpose of facilitating mutual exchanges * between mon fields. owners of lands intermixed in common fields, meadows, or pastures, provision has been made for carrying out the mutual conveyance where by reason of the disabilities or limited interest of some or one of the parties, without such authority, the conveyance could not be made. And a subsequent act (*o*) contains corresponding provisions for separate inclosure of such common fields; and under the Commons Inclosure Act (*p*) an order of the com-

(*d*) Co. Litt. 50.

(*e*) Co. Litt. 51 b.

(*f*) Perk. s. 288.

(*g*) 8 & 9 Vict. c. 106, *ante*, p. 483.

(*h*) *Ante*, p. 352.

(*i*) Co. Litt. 169.

(*k*) *Ib.* Though a parol partition by joint-tenant for years seems to have been good. Dyer. 3506.

(*l*) 8 & 9 Vict. c. 106, s. 3.

(*m*) *Chester v. Willan*, 2 Saund. 97; *ante*, p. 358.

(*n*) 4 & 5 Will. 4, c. 80. The schedule contains a form of the deed to be executed.

(*o*) 6 & 7 Will. 4, c. 115; extended by 3 & 4 Vict. c. 31.

(*p*) 8 & 9 Vict. c. 118, s. 147.

missioners for the exchange of lands not subject to be inclosed under the act may be obtained, the effect of which is to confer a good title to each person interested. A copy of the order then becomes the title deed, and the land received under it remains to the same uses and trusts as those to which the land given in exchange stood limited previously.

These are the several species of primary or original conveyances. Those which remain are of the secondary or derivative sort; which presuppose some other conveyance precedent, and only serve to enlarge, confirm, alter, restrain, restore, or transfer the interest granted by such original conveyance. As,

7. Releases; which are a discharge or conveyance of a man's right in lands or tenements, to another that has some former vested estate. The words generally used therein are "remise, release, and for ever quit-claim" (*q*), or more usually "release" simply. And these releases

may enure either, 1. By way of enlarging an estate, or *enlarger l'estate*: as, if there be tenant for life or years, remainder to another in fee, and he in remainder releases all his right to the particular tenant and his heirs, this gives him the estate in fee (*r*). The remainder must for obvious reasons be an immediate remainder, or in other words, the estate of the releassee must be capable of *merging in that of the releasor: [* 519] and in order that this may take place, the releassee must have an estate for the release to work upon. An *interesse termini* in the releassee is insufficient, and a release of a reversion to one who has only such an interest is void (*s*).

2. By way of passing an estate, or *mitten l'estate*: this is where one of two coparceners or joint-tenants releases all right to the other, this passes the fee-simple of the whole, and is the proper assurance between such parties (*t*). And in these cases there must be a privity of estate between the releasor and releassee (*u*); that is, one of their estates must be so related to the other, as to make but one and the same estate in law. Moreover, words of inheritance are not essential, since the estate of the coparcener or joint-tenant is limited already. 3. By way of passing a right, or *mitten le droit*, as if a man be disseised, and releases to his disseisor all his right: hereby the disseisor acquires a new right, which changes the quality of his estate, and renders that lawful which before was tortious or wrongful (*x*). No privity is necessary in this case, and indeed often *ex necessitate rei* cannot

exist. 4. By way of extinguishment, as where a lord of a freehold tenant releases his seignorial right. This extinguished for ever the rights, for the tenant cannot have services to receive of himself (*y*). It will be remembered that the effect of a release from a rentcharge of part of the property charged is now effectual without releasing the residue, which formerly was not the case (*z*). 5. By way of entry and feoffment:

as if there be two joint disseisors of a tenant in fee-simple and the disseisee releases to one of them, he shall be sole seised, and shall keep out his former companion; which is the same in effect as if the disseisee had

(*q*) Litt. s. 445.

(*r*) *Ib.* s. 465.

(*s*) Co. Litt. 270, a, b; *Barker v. Keat*, 2 Mod. 250; Shep. Touch. 324.

(*t*) Co. Litt. 273.

(*u*) *Ib.* 273, 273.

(*x*) Litt. s. 466.

(*y*) Litt. ss. 479, 480. See Com. Dig. Tit. Rel. c. 2.

(*z*) *Ante*, p. 61.

[* 520] entered, and thereby put an *end to the disseisin, and afterwards had enfeoffed one of the disseisors in fee (a).

8. A confirmation is of a nature nearly allied to a release. Sir Edward Coke defines it (b) to be a conveyance of an estate or right *in esse*, whereby a voidable estate is made sure and unavoidable, or whereby a particular estate is increased: and the words of making it are these, "give, grant, ratify, approve, and confirm;" but no special words are requisite, and indeed no words at all, for conduct, such as receipt of rent by the reversioner under a voidable lease, is sometimes sufficient (c). An instance of the first branch of the definition is, if tenant for life or in tail lease for forty years, and die during that term; here the lease for years is voidable by him in reversion: yet, if he hath confirmed the estate of the lessee for years, before the death of tenant for life, it is no longer voidable but sure (d). The latter branch, or that which tends to the increase of a particular estate is the same in all respects, with that species of release, which operates by way of enlargement.

9. A surrender, *sursumrestitutio*, or rendering up, is of a nature directly opposite to a release; for, as that operates by the greater estate's descending upon the less, a surrender is the falling of a less estate into a greater. It is defined (e), a yielding up of an estate for life or years to him that has the immediate reversion or remainder, wherein the particular estate may merge or drown, by mutual agreement between them. It is usually done by these words, "surrender, grant, and yield up," though no special form of words is essential (f). It must by the Statute of Frauds be in writing, and under the recent act, if it be not a surrender of a copyhold or of an interest which might by law be created without writing, *it [* 521] must be by deed (g). The surrenderor must have a vested estate, not a mere *interesse termini* (h), and the surrenderee must also have a vested estate, which must be at least of equal degree (i). It seems that the surrender must be of the whole estate of the surrenderor (k), and must take effect immediately, or, at least, immediately upon a condition precedent being complied with (l).

In a surrender there can be no occasion for livery of seisin (m); for there is a privity of estate between the surrenderor, and the surrenderee; the one's particular estate, and the other's remainder are one and the same estate; and livery having been once made at the creation of it, no necessity can exist for having it afterwards. And, for the same reason, no livery ever was required on a release or confirmation in fee to tenant for years or at will, though a freehold thereby passes: since the reversion of the lessor, or confirmor, and the particular estate of the lessee, or confirmee, are one and the same estate; and where there is already a possession, derived from such a privity of estate, any farther delivery of possession would be vain and nugatory (n). We may here

(a) Co. Litt. 275, 278. See s. 472.

(b) Co. Litt. 295.

(c) Litt. s. 515, 531. See 13 & 14 Vict. c. 17.

(d) Litt. s. 516; Co. Litt. 295 b; 3 M. & P. 59.

(e) Co. Litt. 337; 5 M. & P. 785.

(f) See Wills. 127; Cro. Jac. 169; 2 Wills. 26; 5 Moo. & P. 800.

(g) 2 Roll. Ab. 498; 8 & 9 Vict. c. 106, s. 8.

(h) *Heming v. Brabason*, 1 Bridg. 6; Co. Litt. 338 a; Shep. Touch. 334; *Colbourne v. Mixstone*, 1 Leon. 129; which seems to show

that an *interesse termini* may be surrendered, is incorrectly reported. See *Doe v. Walker*, 5 B. & C. 111.

(i) Co. Litt. 338; Perk. s. 589; Cro. Eliz. 303; *Doe v. Walker*, 5 B. & Cr. 111.

(k) Touch. 308; Hard. 417.

(l) Perk. s. 624; *Weddall v. Capes*, 1 M. & W. 50; *Doe d. Murrell v. Milward*, 3 Id. 328; *Coupland v. Maynard*, 12 East, 134.

(m) Co. Litt. 50.

(n) Litt. s. 460.

Implied surrender. notice that surrenders are sometimes implied by law, though no actual deed of surrender has been made. Thus, a lessee accepting a new lease, the existence of which is incompatible with the continuance of his former lease, operates by implication as a surrender of the former lease (o), (377) and when the purpose for which a term of years has been created is satisfied the term itself ceases to exist (p).

* 10. An assignment is properly a transfer, or making over to another, of the right one has in any estate; but it is usually applied [* 522]

10. Assignment. to an estate for life or years. And it differs from a lease only in this: that by a lease one grants an interest less than his own, reserving to himself a reversion; in assignments he parts with the whole property, and the assignee stands in the place of the assignor. The assignee, however, does not take upon him all the responsibilities of the assignor; he is only bound by such covenants as concern the land and run with it, and his liability as to these extends only to acts or defaults during the period that he himself is in possession of the term (q). Whereas the original lessee, whose covenants extend over the whole period of the demise, is liable to the lessor or covenantor for the acts and defaults, not only of himself, but his assign also, though entitled to an indemnity from the latter (r).

Formerly the law did not permit a man to convey directly to himself in any manner, even to himself jointly with others (s). This rule has, by the aid of the Statute of Uses (of which more presently), long been evaded as regards freehold interests. But since that statute did not apply to personal interests, such as estates for years, it was necessary when such a conveyance was desired (which often happens on a change of trustees) to execute two deeds. To obviate this, a provision has been made by a recent act, and now any person may assign personal property, including chattels real, directly to himself and another person or persons, or corporations (t).

* In our discussion of copyhold tenure, and the peculiarities attending it, we had occasion to notice the special mode by which copyholds [* 523]

Alienation of copyholds. are alienated, so far at least as regards the legal estate. Any deed, however, such as an assignment, is sufficient to pass the

Assignment. beneficial interest in the property, so as to entitle the assignee to call upon the tenant to surrender in his favour. A common

Covenant to surrender. mode of assurance for this purpose is a covenant or simple agreement by deed to surrender, which has, in fact, all the virtue of a conveyance except that of giving the alienee the legal title as evidenced by the Court Rolls.

(o) 5 Co. 11; 2 Prest. Conv. 188; 1 Per. & Dav. 440; 2 Mee. & W. 882.

(p) 8 & 9 Vict. c. 112.

(q) *Taylor v. Shum*, 1 B. & P. 21; *Le Keuz v. Nash*, Str. 1222; *Onslow v. Corrie*, 2 Mad. 380.

(r) Com. Dig. Covenant; *Barnard v. Godscall*, Cro. Jac. 309; *Thursby v. Plant*, 1 Wms. Saund. 240, *et notis*. As to what covenants run with the land, see *Spencer's Case*, 5 Rep.

16, the leading case upon the subject; followed by a vast variety of others, of which the following may be selected as examples, *Cookson v. Cock*, Cro. Jac. 125 (to cultivate in a particular manner); *Minshull v. Oakes*, 2 H. & N. 793 (to repair); *Avery v. Langford*, Kay, 663; *Clements v. Welles*, L. R. 1 Eq. 200 (not to carry on trade).

(s) 1 Saund. Uses, 129.

(t) 23 & 23 Vict. c. 85, s. 21.

(377) *Shepard v. Spaulding*, 4 Metc. 416. See *Elliott v. Aiken*, 45 N. H. 80; *Hesselstun v. Seavey*, 16 Me. 212; *Randall v. Rich*, 11 Mass. 494; *Matthews v. Taberner*, 39 Mo. 115; *Patchin v. Dickerman*, 31 Vt. 668.

11. A defeazance is a collateral deed, made at the same time with a feoffment or other conveyance, containing certain conditions, upon the performance of which the estate then created may be defeated (*u*) or totally undone. And in this manner mortgages were, in former times, sometimes made; the mortgagor enfeoffing the mortgagee, and he, at the same time, executing a deed of defeazance, whereby the feoffment was rendered void on repayment of the money borrowed, at a certain day. And this, when executed at the same time with the original feoffment, was considered as part of it by the ancient law (*v*); and, therefore, only indulged; no subsequent secret revocation of a solemn conveyance, executed by livery of seisin, being allowed; though, when uses were afterwards introduced, a revocation of such uses was permitted by the courts of equity. But things that were merely executory, or to be completed by matter subsequent (as rents, of which no seisin could be had till the time of payment; and so also annuities, conditions, warranties, and the like), were always liable to be recalled by defeazances made subsequent to the time of their creation (*w*). A defeazance must be by matter as high as the instrument to be defeated, so that [* 524] a bond or covenant * cannot be defeated at law by writing unsealed (*x*), although such an agreement might be enforced in equity (*y*), and if executed might even operate at law as an accord and satisfaction, satisfying, not defeating, the obligation (*z*).

Before explaining the operation of the conveyances, which remain to be noticed, and completing our account of those already mentioned, we must here digress somewhat to mention the doctrine of uses, to which we have many times alluded (*a*), how it became engrafted upon the common law, and how it was transferred by the legislature.

Uses and trusts, which are names meaning the same thing, though now used on somewhat different occasions, are in their nature not unlike the *fidei commissum* of Roman law (*b*).

The notion of one man having the legal tenancy, or being the terre tenant, yet bound in conscience to dispose of the land according to the wishes of another, was unquestionably adopted in England from the civil law. The mode in which this conscientious obligation was enforced by the aid of the ecclesiastical chancellors will be dealt with hereafter, and need not here be enlarged upon. It is common to ascribe the introduction of the system to the ingenious selfishness of ecclesiastics, as a means of evading a mortmain law, and also of facilitating the devise of land to themselves by dying penitents. Certainly, among the earliest doctrines established, is the rule that though lands, of which a testator was seised, were not in those early times devisable; yet, if he had conveyed them to a trustee, and retained only the use of them, the beneficial interest so retained might be devised * by will, and the [* 525] trustee would be compelled to hold the land in trust, not for the heir of the testator, but the devisee. Whatever may have been the leading motive of those who originally introduced the system of uses and trusts, it was adopted

(*u*) From the French verb *defaire*, *infecutum reddere*.

(*v*) Co. Litt. 236.

(*w*) Co. Litt. 237.

(*x*) Cr. El. 697; 5 B. & Al. 187.

(*y*) 1 Russ. & M. 178.

(*z*) 8 T. R. 599; 1 East, 619.

(*a*) *Ante*, pp. 267, 347, 522.

(*b*) Dig. 7. l. 1.; Inst. 2, 23.

with considerable readiness by all. For, besides the power of disposing of the land by will, which it afforded, other technical doctrines of tenure were disregarded, an important instance of which was, that a trust should not be forfeited for treason or felony (*c*), a doctrine which might be expected to find great favour in the times of the Wars of the Roses, when alterations of the fortunes of the ruling powers, and consequent accusations of treason against the unsuccessful, were frequent.

This doctrine, however, was interfered with by the legislature (*d*); but whether, even now, a trust is forfeitable for treason (though the better opinion is that by virtue of 33 Hen. 8, c. 20, it is so), yet is not beyond the possibility of doubt.

For these and other reasons of a like character, about the reign of Edw. IV., (before whose time, lord Bacon remarks (*e*) there are not six cases to be found relating to the doctrine of uses), the courts of equity began to reduce them to something of a regular system.

Originally it was held that the chancery could give no relief, but against the very person himself intrusted for *cestuy que use*, and not against his heir or alienee. (378) This was altered in the reign of Henry VI., with respect to the heir (*f*); and afterwards the same rule, by a parity of reason, was extended to such alienees as had purchased either without a valuable consideration, or with an express notice of the use (*g*). But a purchaser for a valuable * consideration, without notice, might hold the land discharged of any trust or confidence. And also it was held, [* 526] that neither the king or queen, on account of their dignity royal (*h*), nor any corporation aggregate, on account of its limited capacity (*i*), could be seised to any use but their own; that is, they might hold the lands, but were not compellable to execute the trust. And, if the feoffee to uses died without heir, or committed a forfeiture or married, neither the lord who entered for his escheat or forfeiture, nor the husband who retained the possession as tenant by the curtesy, nor the wife to whom dower was assigned, were liable to perform the use (*j*): because they were not parties to the trust, but came in by act of law; though doubtless their title in reason was no better than that of the heir.

On the other hand the use itself, or interest of *cestuy que use*, was learnedly refined upon with many elaborate distinctions. And, 1. It was held that nothing could be granted to a use, whereof the use is inseparable from the possession: as annuities, commons, and easements, *quæ ipso usu consumuntur* (*k*): or whereof the seisin could not be instantly given (*l*). 2. A use could not be raised without a sufficient consideration. For where a man makes a feoffment to another, without any consideration, equity presumes that he meant it to the use of himself (*m*), unless he expressly declares it to be to the use of another.

(*c*) 1 Hale, P. C. 247; Jenk. 190; *A.-G. v. Sands*, Hard. 495.

(*d*) 26 Hen. 8, c. 13 (passed before the Statute of Uses); 33 Hen. 8, c. 20 (passed after that statute). See *King v. Dacombe*, Cro. Jac. 512; *A.-G. v. Sands*, Hard. 495. *Lewin on Trusts*, c. 24, s. 9.

(*e*) On Uses, 318.

(*f*) Kellw. 42; Year-book, 22 Edw. 4, 6.

(*g*) Kellw. 46; Bacon of Uses, 312.

(*h*) Bro. Abr. tit. *Feoffm. al uses*, 81; Bacon of Uses, 346, 347.

(*i*) Bro. Abr. tit. *Feoffm. al uses*, 40; Bacon, 347.

(*j*) 1 Rep. 122.

(*k*) 1 Jon. 127.

(*l*) Cro. Ells. 401.

(*m*) *Ante*, p. 479.

and then nothing shall be presumed contrary to his own expressions (*n*). But, if either a good or a valuable consideration appears, equity will immediately

raise a use correspondent to such consideration (*o*). 3. Uses

Descendible. were descendible according to the rules of the common law, in the case of inheritances in possession (*p*); for in this and *many [**527*] other respects *aquitas sequitur legem*, and cannot establish a different rule of property from that which the law has established. 4. Uses might be assigned by secret deed between the parties (*q*), or be devised by last will and testament (*r*); for, as the legal estate in the soil was not transferred by these transactions, no livery of seisin was necessary; and, as the intention of the parties was the leading principle in this species of property, any instrument declaring that intention was allowed to be binding in equity. But *cestuy que use* could not at common law aliene the legal interest of the lands, without the concurrence of his feoffee (*s*); to whom he was accounted by law to be only tenant at sufferance (*t*). 5. Uses were not liable to any of the

Uses not subject to feudal burthens.

feudal burthens; and particularly did not escheat for felony or other defect of blood; for escheats, &c., are the consequence of tenure, and uses are held of nobody (*u*); but the land itself was liable to escheat, whenever the blood of the feoffee to uses was extinguished by crime or by defect; and the lord (as was before observed) might hold it discharged of the use (*x*). 6. No wife could be endowed, or husband have his curtesy, of a use (*y*): for no trust was declared for their benefit, at the original grant of the estate. Though this was in early times modified by the court of chancery allowing a husband curtesy out of a use or trust (*z*). And therefore it became customary, when most estates were put in use, to settle before marriage some joint estate to the use of the husband and wife for their lives; which was the origin of modern jointures (*a*). 7. A use could not be extended by writ of elegit, or other legal process, for the debts of *cestuy que use* (*b*). For, being merely a creature of equity, *the common law, which looked no [**528*] farther than to the person actually seised of the land, could award no process against it.

It is impracticable, upon our present plan, to pursue the doctrine of uses through all the refinements and niceties which the ingenuity of the times (abounding in subtle disquisitions) deduced from this child of the imagination, when once a departure was permitted from the rules of property established by the ancient law. These principal outlines will be fully sufficient to show the ground of lord Bacon's complaint (*c*), that this course of proceeding "was turned to deceive many of their just and reasonable rights. A man that had cause to sue for land, knew not against whom to bring his action, or who was the owner of it. The wife was defrauded of her thirds; the husband of his curtesy; the lord of his wardship, relief, heriot, and escheat; the creditor of his extent for debt; and the poor tenant of his lease." To remedy these inconveniences abundance of statutes were provided, which made the lands liable to

(*n*) 1 And. 37.

(*o*) Moor. 684.

(*p*) 2 Roll. Abr. 780.

(*q*) Bacon of Uses, 312.

(*r*) *Ib.* 308.

(*s*) Stat. 1 Ric. 3, c. 1.

(*t*) Bro. Abr. *ib.* 23.

(*u*) See *A.-G. v. Sands*, Hard. 438.

(*x*) Jenk. 190. *Ante*, p. 596, 406.

(*y*) 4 Rep. 1; 2 And. 75.

(*z*) *Ante*, p. 247.

(*a*) See p. 263.

(*b*) Bro. Abr. tit. Executions, 90.

(*c*) Use of the Law, 153.

be extended by the creditors of *cestuy que use* (*d*); allowed actions for the freehold to be brought against him, if in the actual pernancy or enjoyment of the profits (*e*); made him liable to actions of waste (*f*); established his conveyances and leases made without the concurrence of his feoffees (*g*); and gave the lord the wardship of his heir, with certain other feudal perquisites (*h*).

These provisions all tended to consider *cestuy que use* as the real owner of the estate; and at length that idea was carried into full effect by the statute

27 Hen. VIII. c. 10, which is usually called the statute of uses, or, in conveyances and pleadings, the statute for transferring uses into *possession. The hint seems to have been

Statute 27 Hen. 8. c. 10, for transferring uses into possession.

derived from what was done at the accession of king [*529]

Richard III.; who, having, when duke of Gloucester, been frequently made a feoffee to uses, would upon the assumption of the crown (as the law was then understood) have been entitled to hold the lands discharged of the use. But, to obviate so notorious an injustice, an act of parliament was immediately passed (*i*), which ordained, that where he had been so enfeoffed jointly with other persons, the land should vest in the other feoffees, as if he had never been named; and that, where he stood solely enfeoffed, the estate itself should vest in *cestuy que use* in like manner as he had the use. And so the statute of Hen. VIII., after reciting the various inconveniences before-mentioned, and many others, enacts, that "when any person shall be seised of lands, &c., to the use, confidence, or trust, of any other person or body politic, the person or corporation entitled to the use in fee-simple, fee-tail, for life, or years, or otherwise, shall from thenceforth stand and be seised or possessed of the land, &c., of and in the like estates as they have in the use, trust, or confidence; and that the estate of the person so seised to uses shall be deemed to be in him or them that have the use, in such quality, manner, form, and condition as they had before in the use." The statute thus executes the use, as our lawyers term it; that is, it conveys the possession to the use, and transfers the use into possession; thereby making *cestuy que use* complete owner of the lands and tenements, as well at law as in equity. It will be remarked that the word "seised" being the single word used in the statute (and not possessed), excludes from its operation copyholds and leaseholds. Though if a person be seised of a freehold to the use of another for a term of years, the statute will operate so as to give the legal term to that other (*k*).

* The statute having thus not abolished the conveyance to uses, but only annihilated the intervening estate of the feoffee, and turned the

interest of *cestuy que use* into a legal instead of an equitable ownership; the courts of common law began to take cognizance of uses, instead of sending the party to seek his relief in chancery.

And, considering them now as merely a mode of conveyance, very many of the rules before established in equity were adopted with improvements by the judges of the common law. The same persons, however, as before were alone held capable of being seised to a use. The same considerations were necessary for raising it, and it could only be raised of the same

(d) Stat. 50 Edw. 3, c. 6; 2 Ric. 2, ss. 2, 3; 19 Hen. 7, c. 15.

(e) Stat. 1 Ric. 2, c. 9; 4 Hen. 4, c. 7, s. 15; 11 Hen. 6, c. 8; 1 Hen. 7, c. 1.

(f) Stat. 11 Hen. 6, c. 5.

(g) Stat. 1 Ric. 3, c. 1.

(h) Stat. 4 Hen. 7, c. 17; 19 Hen. 7, c. 15.

(i) 1 Ric. 3, c. 5.

(k) Bacon Uses, 355; Jenk. 244, and see Dyer, 869; Poph. 76; 2 T. R. 448; 5 T. R. 124.

Decisions of the courts of common law upon the Statute of Uses.

hereditaments as formerly. But as the statute, the instant it was raised, converted it into an actual possession of the land, a great number of the incidents, that formerly attended it in its fiduciary state, were now at an end. The land could not escheat or be forfeited by the act or defect of the feoffee, nor be aliened to any purchaser discharged of the use, nor be liable to dower or curtesy, on account of the seisin of such feoffee; because the legal estate usually does not rest in him for a moment, but is instantaneously transferred to *cestuy que use* as soon as the use is declared. And, as the use and the land were now convertible terms, they became liable to dower, curtesy, and escheat, in consequence of the seisin of *cestuy que use*, who was now become the *tertenant* also; and they likewise were no longer devisable by will.

The various necessities of mankind induced also the judges very soon to depart from the rigour and simplicity of the rules of the common law, and to

allow a more minute and complex construction upon conveyances to uses, than upon others. Hence it was adjudged, that the use need not always be executed the instant the conveyance is made: but, if it cannot take effect at that time, the operation of the

statute may wait till the use shall arise upon some future contingency, to happen within a reasonable period of time; and in the meanwhile the

[* 531] * ancient use shall remain in the original grantor: as, when lands are conveyed to the use of A. and B., after a marriage shall be had between them (*l*), or to the use of A. and his heirs, till B. shall pay him a sum of money, and then to the use of B. and his heirs (*m*). Which doctrine, when

devises by will were again introduced, and considered as equivalent, in point of construction, to declarations of uses, was also adopted in favour of executory devises (*n*). But much learning and ingenious

argument has been devoted to a point concerning these, which are called contingent or springing uses, as to whether there must be a person seised to such uses at the time when the contingency happens (*o*). This question has been set at rest by the legislature declaring that the future contingent or executory use (*p*) shall take effect without any continued existence of a seisin to uses. Thus, in both a conveyance to uses and in a will a fee may be limited to take effect after a fee (*q*); because, though that was forbidden by the common law in favour of the lord's escheat, yet when the legal estate was not extended beyond one fee-simple, such subsequent uses (after a use in fee) were, before the statute, permitted to be limited in equity; and then the statute executed the legal estate in the same manner as the use before subsisted. It was also held that a use, though executed, may change from one to another by circumstances *ex post facto* (*r*); as, if A. makes a feoffment to the use of his intended wife and her eldest son, for their lives, upon the marriage the wife takes the

whole use in severalty; and, upon the birth of a son, the use is executed jointly in them both (*s*). This is sometimes called a

[* 532] secondary, sometimes a shifting use. And, * whenever the use limited by the deed expires, or cannot vest, it returns back, after such

(*l*) 2 Roll. Abr. 791; Cro. Eliz. 439.

(*m*) Bro. Abr. tit. *Feoffm. al uses*, 30.

(*n*) *Ante*, p. 334.

(*o*) See Sug. Powers, c. 1.

(*p*) 23 & 24 Vict. c. 38, s. 7.

(*q*) Pollexf. 78; 10 Mod. 423.

(*r*) Bro. Abr. tit. *Feoffm. al uses*, 30.

(*s*) Bacon of Uses, 351.

expiration, or during such impossibility, to him who raised it, and is styled a resulting use. As, if a man makes a feoffment to the use of his intended wife for life, with remainder to the use of her first-born son in tail; here, till he marries, the use results back to himself; after marriage it is executed in the wife for life: and, if she dies without issue, the whole results back to him in fee (*t*). A resulting use of this kind is not, however, considered to confer an estate by purchase upon the grantor, but is his former estate, and is so treated for purposes of descent. It was likewise held, that the uses originally declared may be revoked at any future time, and new uses be declared of the land, provided the grantor reserved to himself such a power at the creation of the estate; whereas the utmost that the common law would allow was a deed of defeazance coeval with the grant itself, (and, therefore, esteemed a part of it,) upon events specifically mentioned (*u*). And, in case of such a revocation, the old uses were held instantly to cease, and the new ones to become executed in their stead (*x*). And this was permitted, partly to indulge the convenience, and partly the caprice, of mankind; who (as Lord Bacon observes (*y*)) have always affected to have the disposition of their property, revocable in their own time, and irrevocable ever afterwards.

By this equitable train of decisions in the courts of law, the power of the court of chancery over landed property was greatly curtailed and diminished. But one or two technical scruples, which the judges found it hard to get over,

Instances in which the statute does not execute the use; so that the legal estate remains in the trustee.

restored it with tenfold increase. They held, in the first place, that "no use could be limited on a use," (*z*) and that when a man bargains and sells his land for money, which raises a use by implication to the bargainee, the *limitation of a farther use to another person is repugnant, and, therefore, void (*a*). [* 533]

And, therefore, on a feoffment to A. and his heirs, to the use of B. and his heirs, in trust for C. and his heirs, they held that the statute executed only the first use, and that the second was a mere nullity: not adverting that the instant the first use was executed in B., he became seised to the use of C., which second use the statute might as well be permitted to execute as it did the first; and so the legal estate might be instantaneously transmitted down through a hundred uses upon uses, till finally executed in the last *cestuy que use*. And this has been still further extended, by declaring that a feoffment to A. and his heirs, to the use of A. and his heirs, to the use of B. and his heirs, has the effect of vesting the legal estate in A., and not in B. Even without the words "to the

Use implied from the nature of the use declared.

use of A. and his heirs," it was held, that where lands were given to one and his heirs, in trust to receive and pay over the profits to another, this use was not executed by the statute; for the land must remain in the trustee to enable him to perform the trust (*b*). Upon these distinctions courts of equity determined, that, though these were not uses which the statute could execute,

yet still they were trusts in equity, which in conscience ought to be performed (*c*). To this the reason of mankind assented, and the doctrine of uses was revived,

(*t*) Bacon of Uses, 350; 1 Rep. 120.

(*u*) *Post*, p. 539.

(*x*) Co. Litt. 237.

(*y*) On Uses, 316.

(*z*) Dyer, 155.

(*a*) 1 And. 37, 136.

(*b*) 1 Eq. Cas. Ab. 383, 384; 2 Taunt. 109; see 12 East, 455; 1 Nev. & P. 401; 1 Ves. & B. 485; 1 Scott, 542; 4 M. & W. 421.

(*c*) 1 Hal. P. C. 248.

under the denomination of trusts; and thus, by this strict construction of the courts of law, a statute made upon great deliberation, and introduced in the most solemn manner, has had little other effect than to make a slight alteration

in the formal words of a conveyance (*d*). However, the courts of equity, in the exercise of this new jurisdiction, have wisely avoided in a great degree those mischiefs which made uses intolerable. And the statute * of frauds, 29 Car. 2, c. 3, has required every

[* 534] declaration, assignment or grant of any trust in lands or hereditaments, (except such as arise from implication or construction of law,) to be made in writing signed by the party, or by his written will. The result of this is that the courts consider a trust-estate (either when expressly declared, or resulting by implication) as equivalent to the legal ownership, governed by the same rules of property, and liable to every charge in equity, to which the other is subject in law. By a long series of uniform determinations, and with some assistance from the legislature, they have raised a new system of rational jurisprudence, by which trusts are made to answer in general all the beneficial

ends of uses, without their inconvenience or frauds. The trustee is considered as merely the instrument of conveyance, and can in no shape affect the estate, unless by alienation for a valuable consideration to a purchaser without notice of the trust (*e*): which, as the deeds commonly disclose the trust, and besides *cestuy que use* is generally in possession of the land, is a thing that can rarely happen. The trust will descend, may be aliened, is liable to debts, to executions on judgments (by the express provision of the legislature (*f*)), to forfeiture, to leases and other incumbrances, nay, even to the curtesy of the husband, and the dower of the wife (*g*), as if it were an estate at law. But it has been held, like ancient uses, not to escheat to the lord for want of heirs (*h*): because the trust could never be intended for his benefit. In such a case, the trustee retains the land for his own benefit discharged of the trust (*i*). But let us now return to the statute of uses.

[* 535] * The only service, as was before observed, to which this statute is now consigned, is in giving efficacy to certain new and special kinds of conveyances, and in enlarging the powers of the older sorts. We may take the latter first, as being according to the present practice the most important.

It will be remembered, that the limitation of estates by common law assurances was bounded within very narrow limits, and more particularly the creation of remainders; the rules of which are laid down at some length. By the aid of the Statute of Uses we may override every one of these rules to such extent as may be desired, subject only to the paramount rule against perpetuities. Thus, the rule that an estate may not be limited in defeasance of, or in remainder for, a fee-simple, is at once annihilated by a limitation under the statute, such as the following: A. enfeoffs, or makes a grant to, B. and his heirs, to the use of A. and his heirs, until the marriage of A., and afterwards

(*d*) Vaugh. 50; Atk. 591.

(*e*) 2 Freem. 43.

(*f*) See the stat. 1 & 2 Vict. c. 110; and *ante*, c. xix.

(*g*) *Ante*, c. viii.

(*h*) *A.-G. v. Sands*, Hard. 488; *Burgess v. Wheat*, 1 Eden. 176; s. c. 1 W. Bl. 123.

(*i*) *Taylor v. Haygarth*, 14 Sim. 16; *Davall v. New River Company*, 3 D. G. & S. 394. It must be noticed that this doctrine in favour of the trustee has been held not to apply to leaseholds or estates *pur autre vie*. *Reynolds v. Wright*, 30 L. J. Ch. 381, as to which case; see *ante*, p. 416 n.

to the use of A. for life, remainder to the use of the first son of A. and his heirs male, with other remainder over. Here the fee-simple, first limited to A., is made to cease entirely and a new series of limitations to spring up upon a given event happening—that of A.'s marriage. Limitations of this sort, effected in this way, are of daily occurrence, with great varieties of detail, which cannot, and need not, here be dwelt upon. They would be wholly inadmissible at common law. Two points deserve special notice: first, that by these means a man may, as in the instance just given, convey to himself; and, secondly, a power of dealing with the estate by a future instrument may be reserved. Thus, there may be inserted at any point in the series

Powers.

of limitations a limitation such as the following:—To the use of such person or persons, for such estates, as A. should by deed appoint; and in default of appointment, then the remaining limitations. When A., then, at some future time executes the power so reserved to him, he thereby puts an *end to the subsequent limitations; and the original deed must afterwards be construed as if the limitations contained in A.'s deed of [* 536] appointment were substituted in place of all the subsequent limitations. This method of giving powers of appointment is found most convenient in practice, and may be made subject to a great variety of restrictions, modelled according to the pleasure of the donor of the power (*k*).

They may be made perfectly general, in which case the donee of the power may execute it in his own favour, and so make the property his own, or they may be made specially confined to be exercised in favour of all, or some or one of a particular class. A general power of appointment is well exercised by a general devise by the donee of his property, if the description be sufficient to include the property, although no reference to the power be made in the will (*l*).

Powers of the nature we are referring to, when given to one who has an interest in the land, may be released by the donee, and may be suspended or extinguished by his acts: if he does anything which he lawfully may do, but which is inconsistent with the exercise of the power, he shall not defeat his prior act by a subsequent exercise (*m*). Where, however, a power is simply collateral to any interest in the land, as where it is given to a stranger to be exercised in favour of another, such a power cannot be released (*n*).

The paramount rule governing the creation of estates under the method we have described is the rule against *perpetuities, already (*o*) referred to, as governing devises. The limitations must be such that they [* 537] must of necessity take effect within the duration of a life, or lives, in being at the date of the deed, or within twenty-one years afterwards, together with a further period for gestation, in case it exists, and when the infant to be born is the person taking a benefit under the deed. If the limitations are such that it is possible that they may transgress this rule, they are absolutely void, as if they did not exist, and all subsequent limitations fall with them (*p*), whatever

(*k*) The reader is referred to Lord St. Leonard's well known treatise on Powers for a full discussion of the nature, the creation, the execution, and the extinction of powers, a subject which bristles with sharp points

(*l*) 7 Will. 4 & 1 Vict. c. 26. s. 27.

(*m*) *Goodright v. Cator*, Doug. 477; *Bringloe v. Goodson*, 4 Bing. N. C. 726, 734; *Edwards*

v. Slater, Hard. 410; Sugd. 51; *Hurst v. Hurst*, 16 Beav. 372.

(*n*) *West v. Berney*, 1 R. & M. 484. See, as to the duty of such strangers, *Weller v. Ker*, L. R. 1 H. L. Sc. App. 11.

(*o*) *Ante*, pp. 835, 836, where the authorities are cited.

(*p*) *Curtis v. Lukin*, 5 Beav. 147.

may prove to be the actual event. We have only to add, that the limitations which may be contained in the appointment under a power must also be kept within the same confines as to time; they must be such as, if they had been actually inserted in the deed creating the power, would have been within the period assigned by the rule. The only exception to this rule seems to be, where the bad limitation immediately succeeds an estate tail, or is in defeazance of an estate tail; since the estate tail may be converted into a fee-simple, and as by so doing the subsequent limitations may be destroyed, their remoteness will not be considered as invalidating them (*q*).

The conveyances which remain to be noticed will not detain us long. They were invented principally to obviate the necessity of a public feoffment and livery of seisin upon the land. This necessity no longer exists, since a grant is rendered sufficient, even for hereditaments which lie in livery; the assurances, therefore, which we refer to are now no longer wanted, and being somewhat artificial in their character, have fallen into disuse.

First of these comes a *covenant to stand seised to uses*; (379) by which a man, seised of lands, covenants in consideration of blood or marriage that he will stand seised of the same to the use of his child, wife, or kinsman; for life, in * tail, or in fee (*r*). Here, the statute executes at once the estate; for the party intended to be benefited, having thus acquired the use, is thereby put at once into corporal possession of the land (*s*), without ever seeing it, by a kind of parliamentary magic. But this conveyance can only operate, when made upon such weighty and interesting considerations as those of blood or marriage. Yet a deed may operate as a covenant to stand seised, although not one in form or language (*t*). This mode of conveyance, as well as that to be next noticed, will apply to a remainder or reversion, as well as to an estate in possession (*u*), though inasmuch as "grant" applied to these, it was never in common use for such estates.

Another species of conveyance, introduced by this statute, is that of a *bargain and sale* of lands; which is a kind of real contract, whereby the bargainor

Bargain and sale.

for some pecuniary consideration bargains and sells, that is, contracts to convey, the land to the bargainee; and becomes by such

a bargain trustee for, or seised to the use of, the bargainee; and then the statute of uses completes the purchase (*x*); or, as it has been well expressed (*y*), the bargain first vests the use, and then the statute vests the possession. (380) But, as it was foreseen that conveyances, thus made, would want all those benefits of notoriety, which the old common law assurances were calculated to give: to prevent clandestine conveyances of freeholds, it was enacted in the

same session of parliament, by statute 27 Hen. 8, c. 16, that such bargains and sales should not endure to pass a freehold, unless the same be made by indenture, and enrolled within six months in one of the courts of Westminster-hall, or with the

(*q*) Lewis Perp. 251; *Sonday's Case*, 9 Rep. 128; *Mary Portington's Case*, 10 Rep. 35.

(*r*) Hard. 494; Burgess & Wheate, 1 ed., 176; 1 W. Bl. 123.

(*s*) Bacon, Use of the Law, 151.

(*t*) *Doe d. Daniel v. Woodroffe*, 2 H. L. 811. See, also, 1 Rep. 175; 2 Str. 934.

(*u*) 5 T. R. 129.

(*x*) Bacon, Use of the Law, 150.

(*y*) Cro. Jac. 696.

(379) See 4 Kent's Com. 492-494; 2 Washb. Real Prop. 892, 893.

(380) See 4 Kent's Com. 495, 496; 2 Washb. Real Prop. (3d ed.) 420.

custus rotulorum of the county. That is to say, it is voidable and becomes void if *not enrolled; otherwise it is in all respects good. But if it become void it will be considered to have been void *ab initio* (z). [* 539] Olandestine bargains and sales of chattel interests, or leases for years, were thought not worth regarding, as such interests were very precarious, till about six years before;—which also occasioned them to be overlooked in framing the statute of uses;—and therefore such bargains and sales are not directed to be enrolled.

A bargain and sale is also the appropriate assurance in another case not operating under the statute of uses, but which resembles an appointment under a power. It is where a conveyance is made under a common law authority, as where a direction is given in a will to sell an estate without a devise of any estate to the person who is to make the sale; or a similar case, where copyholds are devised to such uses as the testator's trustees should appoint in order to complete a sale. In such cases the purchaser takes by force of the will or other instrument creating the power, and not of the deed exercising it. Executors have, under a recent act (a), power to sell the testator's land, even though not devised to them, if he have charged it with his debts. Their conveyance would in such cases operate like a bargain and sale, vesting the legal estate in the freeholds, and, in the case of the copyholds, conferring the right of admittance.

The last conveyance which we have to mention, was founded originally upon the statute of uses, but now depends upon another statute; it is a release made in pursuance of the act of parliament intituled, "An act for rendering a release as effectual for the conveyance of freehold estates as a lease and release by the same parties" (b), and till recently was the most common of any assurances. Formerly it consisted of a lease and release, and was first invented by Sergeant Moore, soon after * the statute of uses. It was thus contrived: A lease, or rather bargain [* 540] and sale, upon some pecuniary consideration, for one year, is made by the tenant of the freehold to the lessee or bargainee. Now, this, without any enrolment, made the bargainor stand seised to the use of the bargainee, and vested in the bargainee the use of the term for a year; and then the statute of uses immediately annexes the possession. No enrolment was required, because the enrolment act does not apply to leasehold interests. The lessee, therefore, being thus in possession, was capable of receiving a release of the freehold and reversion; which, we have seen before (c), must be made to a tenant in possession: and, accordingly, the next day, a release was granted to him (d). This was held to supply the place of livery of seisin: and so a conveyance by lease and release was said to amount to a feoffment (e). This continued to be the common mode of conveyance till the year 1841, when the act above named was passed, with the intention of making one deed do instead of two. Since, however, the act which was passed in the year 1845, this method of assurance, being obviously a very artificial one, possessing no advantage over a grant, has ceased to be used.

Such are the conveyances now in use, or capable of being used; but we have

(z) See stat. 8 & 4 Will. 4, c. 74, s. 41; Cro. Jac. 53, 109; 4 Rep. 71; Hob. 165.

(a) 22 & 23 Vict. c. 85, s. 16; and see 21 Hen. 8, c. 4.

(b) 4 & 5 Vict. c. 21.

(c) *Ante*, p. 519.

(d) See 2 Prest. Conv. 231.

(e) Co. Litt. 270; Cro. Jac. 604.

yet to explain a class of deeds which depend in great measure for the effectuation of their object upon the provisions of the legislature. We refer to disentailing assurances by tenants in tail, and assurances by married women. We have traced the history of the growth of the power over their estates of tenants in tail, and already adverted to the fact, that until recently the only mode of alienation was by the aid of the court of common pleas (*f*). This method has been abolished, and a deed substituted. In order, however, properly to [* 541] understand its effect, we must very shortly describe the former proceedings, the nature of which has been already alluded to (*g*).

The most ancient of these, though not till afterwards applied to bar an estate tail, was called a fine, of which there were three sorts, called in the law French respectively, a fine "*sur cognizance de droit come ceo que il ad de son done*;" a fine "*sur cognizance de droit tantum*;" a fine "*sur consessit*;" and a fine "*sur done grant et render*." They differed principally in the nature of the right which the deforciant (*i. e.*, the person against whom the mock legal proceeding was instituted) admitted. It is needless here to enter into their technical distinctions: they were all of the same character, viz., a real action brought to a sudden termination by an admission of title by the deforciant, and a compromise made by leave of the court. Their effect was successively regulated by the statutes 34 Edw. 3, c. 13; 1 Rich. 3, c. 7; 4 Hen. 7, c. 24; and 32 Hen. 8, c. 36; under which, proclamations of the fine were rendered necessary; and if no persons claimed in consequence, the validity of the fine was established. These proclamations being in fact useless, were afterwards declared by statute to be deemed unnecessary (*h*).

A tenant in tail or person who was to convey the land by the fine was the defendant; the plaintiff being he to whom the title was to be made. A deed was usually executed declaring the uses upon which the person who so required title was to hold the land.

The other species of assurance of a similar character was the common recovery, which was a suit not compromised, but carried through all the processes. The common process as finally used was this. A., the tenant in tail (supposing the recovery to be suffered by a tenant in tail), conveyed a freehold interest to P., a mere nominee, called the tenant to the præcipe, against whom Q. brought an [* 542] action by issuing a writ or *præcipe quod reddat*. P. then declared that he had the land from A., and vouches him to warranty. A. thereupon declared that he had the lands from R. (usually the cryer of the court), and he vouches R. R. then makes default in defending the title, and P. thus recovers the land: Q. is supposed to get a recompense from A. the tenant, and A. is supposed to get a recompense (merely nominal, of course) from R., and so justice is supposed to be done. Meanwhile, however, A. gets a declaration of title by the record, which, under the circumstances, is an absolute title against all the world. The reason for making a tenant to the præcipe, as the defendant in the action, and not the tenant in tail himself, was that in the former case the recovery was held to bar every latent interest which he might have in the land, whereas, if it had been against the tenant in tail as defendant, it barred only that estate in the premises of which he was then actually seised (*i*). Such is a rough outline of these assurances, absurd enough in

(*f*) Which court seems to have had exclusive jurisdiction in real actions.

(*g*) *Ante*, p. 227.

(*h*) 11 & 12 Vict. c. 70.

(*i*) Bro. Ab. tit. Tail; 32 Plowd. 8.

themselves, yet eminently useful in their effects. A fine was considered as only barring the issue of a tenant in tail, and not the remainderman, whilst a recovery barred every estate in remainder or reversion. The latter, therefore, was generally used, though the former (being less expensive) was resorted to when possible: it was the invariable mode used for a conveyance by a married woman. It will be seen that, as the action must be against the tenant of the freehold in possession (subject only to terms of years (*k*)), a tenant in tail could not suffer a recovery whilst there was a preceding life estate, not, in fact, until his estate was in possession.

All this method of dealing with these interests has been abolished by the legislature (*l*). We can here only shortly notice the provisions of this most useful act which accomplished this. The substance of them may be stated as follows:

* Every actual tenant in tail (including every person who has only a right to be such) may now (*m*) dispose of the lands (*n*) entailed, for [** 543*] an estate in fee-simple, or any less estate, or for any limited purpose (*o*), or against all persons claiming the lands by virtue of the entail, and also as against all persons (including the crown) whose estates are to take effect after the determination, or in defeasance of the estate tail (*p*). The deed by which the disposition is made must be inrolled in chancery within six calendar months after its execution (*q*). The power is not to be exercised by any woman tenant in tail of lands within the provisions of 11 Hen. 7, c. 20 (*i. e.*, tenants in tail *ex provisione viri*), except with such assent as would under that statute have been necessary to a fine or recovery (*r*); but as no settlement was to be made in future under the Act of Hen. 7, this exception has now scarcely any meaning except in reference to a few old settlements.

Another restriction extends to tenants in tail who, under the "act to embarfeigned recovering of land wherein the king has the reversion (*s*)," are restrained from barring their estates tail; that is, persons on whom lands have been conferred by the crown in tail, as a reward for public services (*t*), also tenants in tail after possibility of issue extinct are restrained from converting their estate into a fee-simple (*u*). The act specially provides (*x*) that issue in tail, having therefrom merely an expectant interest, are to have no power to dispose of the lands in respect of that interest.

* We may remember that a tenant in tail in remainder could not, at least without the concurrence of the tenant of the freehold in pos- [** 544*] session, suffer a recovery, though he could levy a fine. An incapacity of a similar character has been created by the act, which constitutes, with this view, a protector of the settlement, as he is termed. The owner of the first estate for years, determinable on lives, or any greater estate prior to the estate tail, is made the protector (*y*); or the person (if any) who

(*k*) See *ante*, pp. 278, 319.

(*l*) 8 & 4 Will. 4, c. 74.

(*m*) *I. e.* since 31 Dec. 1833.

(*n*) Including all hereditaments of any tenure except by copy of Court Roll, s. 1.

(*o*) See s. 21.

(*p*) S. 15.

(*q*) S. 41.

(*r*) A woman tenant in tail of lands originally belonging to her husband, or any of his family, was, by the act mentioned in the

text, restrained from alienating the land without the consent of the issue in tail, or the person next entitled after her death to an estate of inheritance.

(*s*) 34 & 35 Hen. 8, c. 20.

(*t*) 8 & 4 Will. 4, c. 74, s. 18.

(*u*) *Ib. ante*, p. 229.

(*x*) S. 20.

(*y*) Ss. 23—31 provide for the various persons who are to be deemed the protectors in different cases.

is appointed by the settlor for the purpose. The protector must, in order that the disposition by the tenant in tail may be valid to bar remainders and reversions, give his consent to the disposition, either by the deed itself, or by a distinct deed to be executed on or before the day on which the assurance is made. And the protector's consent must also be enrolled either at or before the time when the assurance is enrolled.

The protector is to be absolutely free to determine whether he gives his consent or not, and is not to be looked upon in any manner as a trustee in respect of his power of consenting (z).

If no consent by the protector be given, then the tenant in tail can only create a base fee, but he may enlarge this after the estate has fallen into possession, or sooner, if he can at any time obtain the protector's consent (a). The disposition by a tenant in tail must be by deed, and not will, and must be a conveyance and not a mere contract; and no contract by a tenant in tail is to have any effect either at law or in equity, even if by deed; and if the tenant in tail be a married woman, her husband must concur (b).

The act provides for the disposition of the property of a bankrupt tenant in tail for the benefit of his creditors (c). * It also enacts that the previous provisions shall apply to copyhold lands, except that if the estates be legal the assurance shall be by surrender instead of deed, and the deed of consent of the protector is to be entered upon the court rolls, or evidence of the consent, if given by joining in the surrender, is to be preserved on the court rolls (d). The deed, if any, by which an equitable tenant in tail disposes of his lands is to be entered on the court rolls within six months after its execution (e), but enrolment in chancery is not necessary (f).

The provisions of the act remaining to be noticed are those by which a married woman may dispose of her lands or any interest in them. For fines, which were previously the method adopted for this purpose being abolished, it became necessary to substitute another process. The act, therefore, declares that a married woman (in every case except that of a tenant in tail, for which provision had already been made), may, with her husband's concurrence, dispose of lands of any tenure, and money, subject to be invested in the purchase of lands, or arising from the sale of land (g), and also dispose of, release, or extinguish any estate which she may possess in lands of such money as aforesaid, as fully as if she were a feme sole, but every deed by which she so deals with her property shall upon her executing the same, or afterwards, be produced and acknowledged by her to be her deed before a judge, or before any two of the commissioners appointed for the purpose, of whom there are a large number in various parts of the country (h). This part of the act is not, however, to extend to copyholds in any case in which the husband and wife might previously have dealt with them by surrender; and any powers which a married

(z) Ss. 36, 37.
 (a) Ss. 34, 35, 38. See as to the last section, *Crocker v. Waine*, 5 B. & S. 697.
 (b) Ss. 40, 47.
 (c) Ss. 56, 57, 58, adopted by 32 & 33 Vict. c. 71, s. 25.
 (d) Ss. 50, 51, 52.

(e) S. 53. *Honywood v. Forster*, 30 Beav. 1; *Gibbons v. Snape*, 1 De G. J. & S. 621.
 (f) S. 54.
 (g) *Franks v. Bollans*, L. R. 3 Ch. 717. See *Crofts v. Middleton*, 3 De G. M. & G. 192.
 (h) Ss. 57, 58, 59. See as to these, the act 17 & 18 Vict. c. 75.

woman *might otherwise exercise are not interfered with by the [* 546] act (i).

We have given but a bare outline of this statute, but sufficient for our present purpose; we may add that the act having been drawn in a masterly manner, has given rise to fewer difficulties in its application than usually occur when revolutions are effected by parliament. The enrolment in chancery seems to have been adopted as giving an additional solemnity to the deed disentailing the estate, but inasmuch as its only effect is to create an additional expense, it is not very clear why even this might not be dispensed with.

Before we conclude this chapter, we may with propriety add a few remarks on certain deeds which do not, it is true, affect land directly, yet which formerly had much, and still have some effect upon the title of lands when in the hands of devisees or heirs, or in other words, which create, or may create, what the law calls a specialty debt. Their importance, however, is very shortly to cease. These are bonds and covenants, the nature of which is the same, though the form is usually different. An obligation or bond is a deed whereby the obligor declares himself, and usually his heirs, executors, and administrators, bound to pay a certain sum of money. The language in which this is expressed is immaterial, so that the meaning be clear (k).

If this be all, the bond is called a single one, *simplex obligatio*: and the bond is scarcely distinguishable from a covenant; but there is generally a condition added, that, if the obligor does some particular act, the obligation shall be void, or else shall remain in full force: as payment of rent; performance of covenants in a deed; or repayment of a principal sum of money borrowed of the obligee, with interest, which principal sum is usually one-half of the penal sum specified in the bond. In case this condition is * not performed, [* 547] the bond becomes forfeited, or absolute, at law, and formerly the whole amount of the penalty could be recovered though equity interposed to prevent the creditor getting more than the amount of principal, interest, and costs, and this now is all that a court of law will give (l) where the bond is given to secure a sum of money and interest; and if it be given for other purposes, then only the amount of damages which a jury will assess can be recovered (m), and this is limited to the amount of the penalty.

The condition or defeazance is usually contained in the deed or bond itself; it may, however, be a separate and subsequent deed (n).

If the condition of a bond be impossible at the time of making it, or be to do a thing contrary to some rule of law that is merely positive, or be uncertain, or insensible, the condition alone is void, and the bond shall stand single, and unconditional: for it is the folly of the obligor to enter into such an obligation, from which he can never be released. If it be to do a thing that is *malum in se*, the obligation itself is void: for the whole is an unlawful contract, and the obligee shall take no advantage from such a transaction. And if the condition be possible at the time of making it, and afterwards becomes impossible, by the act of God, the act of law, or the act of the obligee himself, there the penalty of the obligation

(i) S. 78. (l) 4 & 5 Anne, c. 16, s. 12. See vol. III. p. 54.
(k) Vin. Ab. Obligation, L.; Debt, D.; Cro. El. 268. (m) 8 & 9 Will. 8, c. 11.
(n) Co. Litt. 287; 2 Sand. 47.

is saved: for no prudence or foresight of the obligor could guard against such a contingency (o).

We say usually the bond expressly binds the heir as well as the executor and administrator. This was of importance in regard to the remedies which we may remember the law gave to creditors of a deceased debtor against his real property, which he had not by his will charged with, or devised subject to, payment of his debts (p). *For we may remember that the law [* 548] which first rendered such property liable to the payment of all debts preserved the preferential rights of creditors by specialty, in which the heirs are bound (q) over other specialty creditors and simple contract creditors.

This priority still exists as regards creditors of persons who shall have died before the 1st January, 1870. Creditors by contract of persons who shall die on or after that day are, by an act of the present year (32 & 33 Vict. c. 46), to be treated as of equal degree, except so far as they may hold any security. It is therefore sufficient to say here, that a bond creditor whose debtor shall have died before the beginning of the year 1870 ranks as a specialty creditor, and if the heirs are named in the bond, reaps the consequent additional advantage as regards his debtor's real estate, always supposing that the debtor have not provided by his will for payment of his debts.

We may remark that in bankruptcy no such distinction is allowed or ever was thought of. There the maxim, equality is equity, has always been adopted.

A covenant is a direct agreement by a man on behalf of himself, his heirs, executors, and administrators, under seal, to do such a thing or to pay such a sum of money, with or without interest, on such a day. It is, in fact, a direct mode of obliging the covenantor by specialty to perform the same duty as a bond in an indirect way enforces. Upon action on a covenant, exactly the same damages are obtained as on a bond, unless indeed the limit of the penalty be reached in the latter case. All observations which we have made as to bonds apply to covenants, which were considered to rank as specialty debts.

Covenants in practice invariably (though not necessarily) bind the heir expressly. We have already referred to certain covenants often contained in conveyances of real property, which in many cases bind not only the heir or [* 549] devisee of the covenantor, but also every alienee of the property, by whatever title he possesses it (r).

It only remains to add to our disquisition upon deeds that the legislature has specially provided for the counties of Middlesex and Yorkshire a registry of deeds and other instruments.

By these acts (s), which in most respects are similar, though not identical, deeds and conveyances are void as against subsequent purchasers or mortgagees, unless they be registered before the conveyances under which such purchasers or mortgagees claim. Wills are to be registered within six months after the death (t).

Some persons have thought that the notoriety of the title which a registry

(o) Co. Litt. 206.

(p) *Ante*, p. 462.

(q) 8 & 4 Will. 4, c. 104.

(r) *Ante*, p. 487. See 8 & 9 Vict. c. 119.

(s) Middlesex, 7 Anne, c. 20; West Riding, 2 & 3 Anne, c. 4; 5 Anne, c. 18; East Riding

and town of Hull, 6 Anne, c. 35; and North Riding, 8 Geo. 2, c. 6.

(t) See *Chadwick v. Turner*, L. R. 1 Ch. 810. As to the inroad which courts of equity have made upon these acts, see vol. iii. p. 57.

gives is a matter of great moment and value, and therefore a scheme of general registration should be adopted. Other very competent judges have had occasion to doubt whether more disputes have not arisen in these counties by the inattention and omissions of parties than have been prevented by the use of registers. Moreover, the expense of searching the register, which is necessary on every dealing with the land, is no slight disadvantage. The generally prevalent opinion seems to have been against a system of compulsory registration. But the matter is under consideration at the present moment (u). (381)

(u) A commission is now sitting to inquire into the question generally. See *post*, p. 569.

(381) In this country it is the uniform practice to record deeds and conveyances of lands, except certain chattel interests. In every State in the Union there are statutory provisions in relation to such recording, and as to the attestation, proofs and acknowledgments which are necessary to authorize the instrument to be recorded, and as to the effect of such recording either as evidence, or as notice to other or third parties.

The object in view in recording deeds or other conveyances is principally to give notice to all persons who may desire to ascertain whether there has been any prior conveyance or incumbrance of the real estate described in such deed or conveyance. When the deed has been duly recorded it operates as a constructive notice, and it is as effectual in law as though each subsequent purchaser or incumbrancer had received personal notice of its existence. As a general rule an omission to record a deed will not affect its validity as between the grantor and the grantee, or their heirs or devisees, or those claiming under them.

When a deed of lands has been given, and a third party takes a subsequent deed of the same lands, from the same grantor, with actual notice, at the time, of the existence of the prior deed, he will not get any title, even though such prior deed has not been recorded. *Rogers v. Jones*, 8 N. H. 264; *Ellison v. Wilson*, 36 Vt. 67; *Jamaica Pond v. Chandler*, 9 Allen, 169; *Murphy v. Nathans*, 46 Penn. St. 512; *Blanchard v. Tyler*, 12 Mich. 339; *Irwin v. Smith*, 17 Ohio, 226; *Dixon v. Doe*, 1 Sm. & Marsh. 70, 107; *Wilkins v. May*, 8 Head, 176; *Lillard v. Rucker*, 9 Yerg. 63; *Morrison v. Kelly*, 22 Ill. 610; *Stanley v. Green*, 12 Cal. 148.

The authorities all agree that, in legal effect, there is no difference between actual and constructive notice. *Ib.*

Such registration or recording of a deed does not operate as a notice to any one but a party who claims to have received a subsequent title or lien through, from, or under the grantor in the prior recorded deed. *Bates v. Norcross*, 14 Pick. 231; *George v. Wood*, 9 Allen, 80; *Loosey v. Simpson*, 11 N. J. Eq. (3 Stockt.) 246, 249; *Raynor v. Wilson*, 6 Hill, 469, 473; *Tilton v. Hunter*, 24 Me. 29; *Lightner v. Mooney*, 10 Watts, 412; *Ely v. Wilcox*, 20 Wis. 530; *Crockett v. Maguire*, 10 Mo. 34; *Lieby v. Wolf*, 10 Ohio, 83; *Holley v. Hawley*, 39 Vt. 525, 532.

A subsequent purchaser is not bound to take notice of the record of a deed executed by a prior grantee whose own deed has not been recorded. *Ely v. Wilcox*, 20 Wis. 530; *Loosey v. Simpson*, 11 N. J. Eq. (3 Stockt.) 246, 249.

Notice to one of several subsequent grantees is notice to all of them. *Stanley v. Green*, 12 Cal. 148.

So notice to an agent or trustee is notice to the principal. *Myers v. Ross*, 3 Head, 59.

A deed which is not properly and legally put upon record is not such a notice as to bind or affect any one. *Stevens v. Hampton*, 46 Mo. 404; *Brown v. Lunt*, 37 Me. 423; *Chuteau v. Jones*, 11 Ill. 300, 321; *Short v. Curlee*, 28 id. 219; *Bishop v. Schneider*, 46 Mo. 472, 480; *Suter v. Turner*, 10 Iowa, 517; *Jacoby v. Gault*, 20 Ark. 190; *Johnston v. Sater*, 11 Gratt. 321, 325; *Racouillat v. Sansevain*, 32 Cal. 376, 389; *Stewart v. McSweeney*, 14 Wis. 468; *Harper v. Topley*, 35 Miss. 506; *Isham v. Bennington*, 19 Vt. 425; *Galpin v. Abbot*, 6 Mich. 17; *Parret v. Shaubhut*, 5 Minn. 323.

All deeds or instruments duly recorded are so far a binding notice to a subsequent purchaser, as to impute to him a knowledge of all facts relating to the same lands, so far as such facts appeared in the prior deeds or instruments so recorded before his purchase. *Jackson v. Livingston*, 10 Johns. 374; *Fitzhugh v. Barnard*, 12 Mich. 110; *Reeder v. Barr*, 4 Ohio, 446; *Daughaday v. Paine*, 6 Minn. 452, 453; *Baltimore, etc. v. White*, 2 Gill. 444, 457; *Brush v. Ware*, 15 Peters, 93, 113.

[* 550]

*CHAPTER XXII.

ALIENATION BY MATTER OF RECORD.

ASSURANCES by *matter of record* are such as do not entirely depend on the act or consent of the parties themselves: but the sanction of a court of record is called in to substantiate, preserve, and be a perpetual testimony of the transfer of property from one man to another; or of its establishment, when already transferred. Of this nature are, 1. Private acts of parliament. 2. The king's grants. 3. Orders made by the Court of Chancery under certain acts.

Private acts of parliament are a not uncommon mode of assurance. For it may sometimes happen, that, by the ingenuity of some, and the blunders of other practitioners, an estate is most grievously entangled by a multitude of contingent remainders, resulting trusts, springing uses, executory devises, and the like artificial contrivances; so that it is out of the power of either the courts of law or equity to relieve the owner. Or it may sometimes happen, that, by the strictness or omission of family settlements, the tenant of the estate is abridged of some reasonable power (as, letting leases, making a jointure for a wife, or the like), which power cannot be given him by the ordinary judges either in common law or equity. Or, it may be necessary, in settling an estate, to secure it against the claims of infants or other persons under legal disabilities, who are not bound by any judgments or decrees of the ordinary courts of justice.

This practice was carried to a great length in the year succeeding the restoration; by setting aside many conveyances alleged to have been made [* 551] by constraint, or in order to screen the estates from being forfeited during the usurpation. And at last it proceeded so far, that, as the noble historian expresses it (*a*), every man had raised an equity in his own imagination, that he thought was entitled to prevail against any descent, testament, or act of law, and to find relief in parliament: which occasioned the king, at the close of the session, to remark (*b*), that the good old rules of law are the best security; and to wish, that men might not have too much cause to fear, that the settlements which they make of their estates shall be too easily unsettled when they are dead, by the power of parliament.

Acts of this kind are, however, at present carried on, in both houses, with great deliberation and caution. Nothing, also, is done without the consent, expressly given, of all parties in being, and capable of consent, that have the remotest interest in the matter: unless such consent shall appear to be perversely and without any reason withheld. And an equivalent in money or other estate is usually settled upon infants, or persons not *in esse*, or not of capacity to act for themselves, who are to be concluded by this act. And a general saving is constantly added, at the close of the bill, of the right and interest of all persons whatsoever, except those whose consent is so given or purchased, and who are therein particularly named: though it has been held, that, even if such saving be omitted, the act shall bind none but the parties (*c*).

(*a*) Lord Clar. Contin. 162.(*c*) Co. 138; Godb. 171.(*b*) *Ib.* 163.

A law, thus made, though it binds all parties to the bill, is yet looked upon rather as a private conveyance, than as the solemn act of the legislature. It is not, therefore, allowed to be a *public*, but a mere *private* statute: it is not printed or published among the other laws of the session; it has been relieved against, when obtained upon *fraudulent suggestions (*d*); it has been held to be void, if contrary to law and reason (*e*); and no judge or [* 552] jury is bound to take notice of it, unless the same be specially set forth and pleaded to them. It remains, however, enrolled among the public records of the nation, to be for ever preserved as a perpetual testimony of the conveyance or assurance so made or established. (382)

The acts which we have alluded to in our disquisition upon leases, and particularly the Leases and Sales of Settled Estates Act (*f*), have gone far to meet the requirements which experience has pointed out as commonly occurring in the way we have mentioned; and private acts of parliament are therefore now less frequent than previously to that act. Nevertheless, it is still sometimes necessary to resort to the transcendent power of parliament to cut some Gordian knot in the title or in the management of an estate.

The *king's grants* are also matter of public record. For, as St. Germyn says (*g*), the king's excellency is so high in the law, that no freehold may be given to the king, nor derived from him, but by matter of record. (383) And to this end a variety of offices have been from time to time erected, communicating in a regular subordination one with another, through which all the king's grants must pass, and be transcribed, and inrolled; that the same might be narrowly inspected by his officers; so as to inform him if any thing contained therein was improper or unlawful to be granted (*h*). These grants, whether of lands, honours, liberties, franchises, or ought besides, were always contained in charters, or letters *patent*, that is, open letters, *literae patentes*: so called because they were not sealed up, but exposed to open view, with the great seal pendant at * the bottom; and usually directed or addressed by the king to all his subjects at large. And therein they differ from certain other [* 553] letters of the king, sealed also with his great seal, but directed to particular persons, and for particular purposes; which, therefore, not being proper for public inspection, are closed up and sealed on the outside, and are thereupon called writs *close*, *literae clausae*, and are recorded in the *close-rolls*, in the same manner as the others are in the *patent-rolls*.

Grants by letters patent such as we describe are, as regards lands and other hereditaments of the nature of property, now antiquated. For alienations of lands and other hereditaments enjoyed by the sovereign in right of the crown,

(*d*) *Richardson v. Hamilton*, Canc. 8 Jan. 1783; *McKenzie v. Stuart*, Dom. Proc. 18 Mar. 1754.

(*e*) 4 Rep. 12.

(*f*) 19 & 20 Vict. c. 120.

(*g*) Dr. & Stud. b. 1, d. 8.

(*h*) See *stats.* 18 Hen. 6, c. 1; 27 Hen. 8, c. 11; 57 Geo. 3, c. 63; 2 Will. 4, c. 49.

(382) In this country the power to transfer the title to private estates is controlled and limited by constitutional provisions. There are instances in which the legislature may prescribe the mode in which the property of infants, lunatics, or other persons under a legal disability, may be transferred, or disposed of for their advantage. For a full and accurate discussion of this subject, see *Cool. on Const. Lim.* 97-108; 8 Washb. Real Prop. (3d ed.) 193-200.

(383) See 8 Washb. Real Prop. (3d ed.) 163-189.

or of the principality of Wales, duchy of Lancaster, or duchy of Cornwall, have been from time to time regulated by divers acts of parliament, restricting them within certain limits, and making them subject to various conditions (*i*). And we may also remember that the income of crown lands was, by the first act passed in the reign of George III. (*k*), made to constitute part of the General Aggregate Fund then established.

The disposal of crown lands has been, therefore, of late vested in divers public officers, entitled successively surveyor-general of land revenues of the crown, and surveyor-general of woods, forests, parks, and chases, and afterwards commissioners of woods, forests, and land revenues (*l*).

* The private estates of the queen and her predecessors have, however, been preserved from the operation of the acts we have alluded to, and may be disposed of with as ample a power as if they were the estates of subjects (*m*); and they are also subject to the like taxes and assessments, whether parliamentary or parochial, as those of private persons.

Royal grants, therefore, by letters patent apply only now to a few incorporeal hereditaments, such as dignities, offices, and the like. The manner of making the grant has been prescribed by act of parliament (*n*). A warrant, addressed to the lord chancellor, is first prepared by the attorney or solicitor-general, setting forth the tenor of the intended letters patent; it is then signed with the queen's own sign manual, and countersigned by a principal secretary of state: it is afterwards sealed with her Majesty's privy seal: the patent then immediately passes under the great seal; so that the sign manual, thus countersigned, is the warrant to the privy seal, and the privy seal is the warrant to the great seal (*o*). But there are some grants which only pass through certain offices, as the admiralty or treasury, in consequence of a sign manual, without the confirmation of either the great, or the privy seal.

The remaining instance of alienation by matter of record need not detain us long; it is the result of a device of the legislature in order to overcome certain obstacles which the ordinary chances of human life present in the management of trust property. When any lunatic or person of unsound mind, or any idiot, is seised or possessed of any property, or entitled to any contingent interest in property, upon trust or by way of mortgage, the Lord Chancellor or Lords Justices of Appeal in Chancery may make an order vesting * the property in such person as he or they may direct (*p*), and such an order has the same effect as if the trustee or mortgagee had been sane, and had executed a conveyance of the property.

(*i*) 1 Hen. 4, c. 6; 36 Ed. 3, st. 1, c. 18; 8 Hen. 6, c. 16; 1 Hen. 8, c. 10; 1 Anne, c. 7, s. 5; 34 Geo. 3, c. 75 (repealed by 24 & 25 Vict. c. 101); 38 Geo. 3, c. 60; 42 Geo. 3, c. 116; 47 Geo. 3, stat. 2, c. 24; 48 Geo. 3, c. 73; 50 Geo. 3, c. 65; 52 Geo. 3, c. 161; 55 Geo. 3, c. 190; 10 Geo. 4, c. 50 (repealing several of the older acts); 8 & 9 Vict. c. 99; 11 & 12 Vict. c. 102; 14 & 15 Vict. c. 42; 14 & 15 Vict. c. 46; 15 & 16 Vict. c. 28; and many special acts directed to the management of particular estates.

(*k*) 1 Geo. 3, c. 1.

(*l*) 50 Geo. 3, c. 65; 2 & 3 Will. 4, c. 1; 14 & 15 Vict. c. 42, which separated the direction of her Majesty's works and public buildings from the management of the crown

lands; 15 & 16 Vict. c. 62; see 15 & 16 Vict. c. 28, which incorporated the commissioners of her Majesty's works and public buildings.

(*m*) See 39 & 40 Geo. 3, c. 88; 4 Geo. 4, c. 18; 25 & 26 Vict. c. 37.

(*n*) 14 & 15 Vict. c. 82, repealing 27 Hen. 8, c. 11.

(*o*) As to the old practice, see 2 Rep. 176; 9 Rep. 18; 2 Inst. 553. See vol. iii. c. 4, as to the court of the petty bag in chancery.

(*p*) 13 & 14 Vict. c. 60, ss. 3, 4, 7, 8. The act is an enlargement and consolidation of previous acts having somewhat similar objects. 11 Geo. 4; 1 Will. 4, c. 60; 4 & 5 Will. 4, c. 23; and 1 & 2 Vict. c. 69.

Again, where a trustee is an infant or is out of the jurisdiction, or cannot be found, or when it is uncertain which of several trustees was the survivor, or whether the last trustee is alive or dead, or when a trustee has died intestate without an heir, or the heir or devisee cannot be found—in any of these cases the Court of Chancery may make an order vesting the property, subject to the trust, in such person as the court may direct; and the order has the same effect as if the trustee or the heir or devisee had executed a conveyance (*g*).

Where lands have been directed by a court of equity to be sold for any purpose whatever (*r*), or where the court has made a decree for specific performance of a contract concerning lands, the person in whom they may happen to be vested is declared to be a trustee within the meaning of the act, and the court can deal with the lands accordingly, and it may discharge the contingent right, under the will of any deceased debtor, or of any unborn person (*s*). This provision has greatly facilitated the working out of the statute which gives the court power to apply real estate in payment of the debts of a deceased debtor. The like order may be made in cases where a mortgagee has died without having entered into possession, and there is a similar difficulty in obtaining a conveyance of the legal estate (*t*); and so also when a trustee refuses to convey the trust property when duly required to do so (*u*).

Where the property in question is situate within the * duchy of Lancaster, in the counties palatine of Lancaster or Durham, the court of [*556] the duchy or the courts of chancery of the counties palatine are the courts in which the order is to be made (*x*).

The rights of the lord of the manor are duly preserved under these acts in the case of copyhold lands (*y*).

* CHAPTER XXIII.

[*557]

ALIENATION BY DEVISE.

THE last method of conveying real property is by devise, or disposition contained in a man's last will and testament. And, in considering this subject, we will shortly inquire first into the origin and antiquity of devising real estates by will, and then set forth the present law, which wholly depends upon a recent statute. (384) We may here remark that, now, the same rules govern the validity of a will in dealing with real property, as when it comprises personal property; though the history of the power of devising land materially differs from that of bequeathing personal chattels, and leasehold interests in land.

(*g*) *Ib.* ss. 9, 16.

(*r*) 15 & 16 Vict. c. 55, s. 1.

(*s*) 13 & 14 Vict. c. 60, ss. 29, 30.

(*t*) *Ib.* s. 19.

(*u*) 15 & 16 Vict. c. 55, s. 2.

(*x*) 13 & 14 Vict. c. 60, s. 21.

(*y*) *Ib.* s. 28.

(384) A general discussion of this subject will be found in 3 Washb. Real Prop. (3d ed.) 496-461; 1 Redf. on Wills (3d ed.), 1-163; 1 Kent's Com. 504.

It seems sufficiently clear, that, before the conquest, lands were devisable by will (a). But, upon the introduction of the military tenures, the restraint of devising lands naturally took place, as a branch of the feudal doctrine of non-alienation without the consent of the lord (b); though the feudists were not the inventors of this restriction, as we may trace it even from the ancient Germans (c). And the ancient law of the Athenians directed that the estate of the deceased should always descend to his children; or, on failure of lineal descendants, should go to the collateral relations: which had an admirable effect in keeping up equality, and preventing the accumulation of estates. But it is said that when Solon (d) made a slight alteration, by permitting them (though only on failure of issue) to dispose of their lands *by testament, and devise away estates from the collateral heir, the result was to produce an excess of wealth in some and corresponding poverty in others, and thence divers political evils involving an overthrow of liberty. An argument, founded on the political effect of limiting a power of devise, as also the like effect of primogeniture, has been used on both sides in the various controversies that have arisen upon what ought to be the law on these points, and modern nations differ very materially in the views adopted by their respective systems of jurisprudence. We need here only remark, that whatever may be the political consequences of a restriction upon a man's power of dealing with his property, it is now too late, in England, to say that a very considerable amount of freedom in disposition by will shall not be enjoyed. Certainly whilst the law of primogeniture continues to hold sway over the devolution of land, it would be to the highest degree inexpedient to interfere with the present extensive liberty enjoyed by every possessor of property in respect to its distribution after his death. And experience does not show that testators by their wills often commit an injustice to members of their family greater than that which, according to the opinion of many at least, is involved in this rule of primogeniture. Moreover, the power of dealing, within reasonable limits, with his property by will, is generally esteemed to be, and doubtless is, a great incentive to a man to be energetic, and at the time prudent, during the active period of his life. In the feudal times, many influences operated upon men wholly different from those which in the present peaceful and commercial state of society are of primary importance; and, accordingly, we find that, by the common law of England since the conquest, no estate, greater than for a term of years, could be disposed of by testament (e); except only in Kent, and in some ancient burghs, and a few *particular manors, where their Saxon immunities by special indulgence subsisted (f). And though the feudal restraint on alienations by deed vanished very early, yet this on wills continued for some centuries after: from an apprehension of infirmity and imposition on the testator *in extremis*, which made such devises suspicious (g). Besides, in devises there was wanting that general notoriety, and public designation of the successor, which in descents is apparent to the neighbourhood, and which the simplicity of the common law always required in every transfer and new acquisition of property.

(a) Wright of Tenures, 172.

(b) *Ante*, c. 4.

(c) Tacit. de Mor. Germ. c. 21.

(d) Plutarch. in vita Solon.

(e) 2 Inst. 7.

(f) Litt. § 167; 1 Inst. 111; Cro. Car. 561; 1 Lev. 79; 1 Sid. 77, 185; Robins. on Gavelk. b. 2, c. 5.

(g) Glanv. l. 7, c. 1.

But when ecclesiastical ingenuity had invented the doctrine of uses as a thing distinct from the land, uses began to be devised very frequently (*h*), and

the devisee of the use could in chancery compel its execution.

For it is observed by Gilbert (*i*), that, as the popish clergy then generally sate in the court of chancery, they considered that men are most liberal when they can enjoy their possessions no longer: and therefore at their death would choose to dispose of them to those, who, according to the superstition of the times, could intercede for their happiness in another world. After the statute of uses (*j*) had annexed the possession to the use, these uses, being the very land itself, became no longer devisable, at least without some special conveyancing machinery fitted to the purpose, such as a conveyance to such uses as the owner might by will appoint, a thing which would obviously be rare in practice. This might have occasioned a great revolution in the law of devises, had not the statute of wills been made about five years after, viz.,

Statute of wills,
32 Hen. 8, c. 1,
and 34 Hen. 8, c.
5, allowed devisees of all lands except copy-holds.

32 Hen. 8, c. 1, explained by 34 Hen. 8, c. 5, which enacted, that all persons being seized in fee-simple (except female * covert, infants, idiots, and persons of nonsane memory) (385) might by will and testament in writing [* 560] devise to any other person, except to bodies corporate, two-thirds

(*h*) Plowd. 414.

(*i*) On devises, 7.

(*j*) 27 Hen. 8, c. 10. See Dyer, 148.

(385) For the purpose of making contracts, or for the disposition of property, the law requires that the person entering into a contract, or disposing of his property, shall possess, at the time, sufficient intelligence, reason or legal capacity for that purpose. Where the act is not voluntary, or where it is not in any proper sense understood by the party performing it, there cannot be that assent which the law requires for the transfer of property or rights. It is on this ground that idiots, persons of unsound mind, infants, persons under duress, and the like, are not legally bound by their contracts or disposition of property. In some cases the mental powers or capacity may be unquestioned and yet the party may not be competent to transfer an absolute title to some kinds of property. An alien is a person of this character. He may take the title to real estate, but it is subject to the power of the State to claim it. See *ante*, 296, note 115. And although an alien may be otherwise capable of transferring real estate, it will always be subject to the claims made by the State, although the title will be valid until office found. *Ib*.

The common law permitted infants to make valid wills, where the female was twelve and the male fourteen years of age. But an early English statute required that testators who devised real estate must be of full age or twenty-one years of age. By the statutes of England, as well as those of most of the States of the Union, it is required that devises of real estate shall be made by persons of full age, whether male or female, or whether the property be real or personal. As in the case of other statutes, there is not entire uniformity in the laws of the several States, and the only method of determining the law of each State is, that its statutes and decisions be examined. A reference to some of the text-books may be of service to the student. In this country, as well as in England, a will is not valid when made by an idiot, an insane person, or one of nonsane memory, or an infant. See 1 Redf. on Wills (3d ed.), 15-158; 3 Washb. Real Prop. (3d ed.) 433-435. The same rule applies when a will is made by a testator who is so intoxicated at the time as not to know the nature of the act he is doing. 1 Redf. on Wills (3d ed.), 160-163; see 1 Pars. on Cont. 384.

The powers of the mind may be impaired by disease, or by extreme old age, to such an extent as to render a person legally incompetent to make a valid will. 1 Redf. on Wills (3d ed.), 98-107; *Leeper v. Taylor*, 47 Ala. 221.

Duress, fraud, or undue influence may be a sufficient ground for setting aside a will executed by a testator who is under such restraint or influences. 1 Redf. on Wills (3d ed.), 506-538; *Leeper v. Taylor*, 47 Ala. 221.

of their lands, tenements, and hereditaments, held in chivalry, and the whole of those held in socage; which now, through the alteration of tenures by the statute of Charles II., amounts to the whole of their landed property, except their copyhold tenements.

Corporations were excepted in these statutes, to prevent the Corporations excepted in statute extension of gifts in mortmain, of which enough has already of wills, but may take devises for charitable uses. been said.

We may remark, that though a married woman was expressly excepted from those who were enabled by the act to devise lands, yet this exception was held not to extend to prevent her dealing with lands which were settled to such uses as she might appoint. It has been long established that she may exercise power of appointment (*k*). Her present capacity to make a will stands upon a similar footing, for no addition to it was made by the recent act (*l*). (386) The principal enlargement of her powers which she has gained is due to the establishment upon settled principles of the equitable doctrine of a married woman's separate estate. The recent cases (*m*) seem to show that she may now alienate by will, without the special machinery of a power of appointment, even a fee-simple of lands, if settled to her separate use. A protecting order, which a wife when deserted by her husband can under a recent statute (*n*) obtain, which gives protection from her husband for all property acquired by her subsequently, would probably be considered to enable her to devise the property so acquired (*o*), if the order should continue in force till her death.

[* 561] * Whether, however, the incapacity which still affects married women in regard to property will continue much longer seems doubtful (*p*).

To return to the acts of Hen. VIII. it will be seen that they did not apply to copyholds. These, therefore, continued to be in the same position as personal property; and the next statute which dealt with the subject of devises made the same omission. That statute was the famous act passed with a view, amongst other things, of disposing of the countless difficulties which arose in determining whether wills had been really executed as they were alleged to have been; difficulties like those which attended disputes upon verbal contracts, which were also dealt with by the act. The Statute of Frauds (*q*) directed that all devises of lands and tenements should not only be in writing, but should be signed by the testator or some person in his presence and by his direction, and be subscribed by three witnesses at least. The statute did not, however, require any such solemnity for

(*k*) Sugd. Powers, 153.

(*l*) 7 Will. 4; 1 Vict. c. 26, s. 8.

(*m*) Particularly *Taylor v. Meads*, 34 L. J. Ch. 203; and see Sugd. V. & P. 174. *Hall v. Waterhouse*, 6 New Rep. 20.

(*n*) 20 & 21 Vict. c. 85, s. 21.

(*o*) See *Re Kingsley's Trusts*, 26 Beav. 84; *Cooks v. Fuller*, *ib.* 99; *Bathe v. Bank of Eng-*

land, 4 K. & J. 564, which cases illustrate the extent of her rights.

(*p*) A bill giving married women legal rights of property has passed the House of Commons, and was read a second time by the House of Lords on the 31st July, 1869.

(*q*) 29 Car. 2, c. 3; an intermediate statute, 10 Car. 1, sess. 2, c. 2, does not require note.

(386) In several of the States of the Union there are statutory enactments which enable married women to dispose of their separate estate by will, in the same manner as though they were unmarried females. 3 Washb. Real Prop. (3d ed.) 433, 434; 1 Redf. on Wills (3d ed.), 21-30.

the validity of a will of personal estates, which continued to be perfectly good, even though made without the presence of a single witness.

This statute, notwithstanding the anxiety of the legislature, by no means put an end to the questions which arose. One of these, relating to the competency of the witnesses, was met by another attempt at legislation (*r*). Another, of a different kind, involving the frequent disappointment of the intention of testators, arose by reason of the rule, which was held, that all devises under the statute must be considered to be specific, however * general the terms of the will might be; or, which is much the same thing, that a will could only operate upon such land as the testator [* 562] possessed at the date of making his will. If, therefore, he acquired lands subsequently, these could not pass by the will (*s*); nay, more, if he altered his estate in those which he possessed at the date of the will, it was considered to be a revocation of the will as far as concerned such lands (*t*). Unless, indeed, subsequently to the acquisition of, or change of ownership of the lands, he republished the will (*u*).

For many reasons, then, the legislature was again led to interfere. And now the validity, and in many respects the construction, of all wills made, executed, or republished on or after the 1st January, 1838, depend upon a recent act (*x*), which repealed all former acts (*y*). To this we will now turn our attention. In the first place the act greatly enlarges the subject matter over which a testamentary power exists. For previously there were some things which could not be devised at all, such as a right of entry upon condition, and most contingent estates and possibilities, also estates *pur autre vie* in copyholds where there was no special occupant. All these, and indeed every species of property and estate in its nature capable of being dealt with by will, are made devisable, with the single exception, indeed, of estate tail, the barring of which being, as we have already fully shown, only permitted in a particular way, cannot be effected by will, and therefore, a will does not operate upon it. Moreover, it was formerly necessary in most manors, in order that the tenant of copyhold tenements might dispose of them by * will, that he should surrender them into the hands of the lord, to such uses as he should appoint by will. The [* 563] necessity of this surrender had been to some extent done away with by a previous act (*z*), the provisions of which are re-enacted in an improved form, and now no surrender to the uses of a will is necessary. Again, the act declares that every will shall take effect as if it had been made immediately before the testator's death, except where the language in any part plainly requires another construction (*a*). A will, therefore, may now deal with after-acquired property, and the unlooked for consequence of a revocation of his will, which formerly ensued from a testator's dealings with his property, no longer exists (*b*).

(*r*) 25 Geo. 2, c. 6, which rendered the attestation of a beneficiary under a will good as to the validity of the will, but declared void the gift which the witness would otherwise have taken. See *Hatfield v. Thorpe*, 5 B. & Al. 589.

(*s*) Moor. 255; 11 Mod. 128.

(*t*) 1 Jarm. Wills, 136.

(*u*) 1 Ch. Cas. 39; 2 Ch. Cas. 144; Salk. 238.

(*x*) 7 Will. 4 & 1 Vict. c. 26.

(*y*) S. 2. S. 12 contains a partial saving of

the old law under 11 Geo. 4 & 1 Will. 4, c. 20, as regards petty officers, seamen, and marines, and soldiers who, when in actual service, and mariners at sea, may, under s. 11, dispose of personal property, except wages and prize-money (28 & 29 Vict. c. 72) as they might have done before the act, *i. e.* by writing unattested.

(*z*) 55 Geo. 4, c. 192.

(*a*) 7 Will. 4 & 1 Vict. c. 26, s. 24.

(*b*) S. 23.

Next, as to the formalities necessary to a will. (387) These are now made the same for all wills, whatever be the nature of the property with which they deal (c). The act requires every will to be in writing, and signed at the foot or end of it by the testator, or by some other person in his presence, and by his direction, and the signature is to be made or acknowledged by the testator in the presence of two or more witnesses,

Formalities required for a valid will.

(c) Though it has been held that where a will is signed and witnessed. *West v. Ray, Kay*, 385; *Collard v. Sampson*, 4 De G. M. & G. 224. power is to be executed by a sealed instrument, the will should be sealed as well as

(387) Most of the English rules relating to the execution of wills have been adopted in this country. And in most of the States there are statutes which prescribe the mode in which a will must be executed to be valid. The principal points are, that the will be in writing, signed at the foot or end of it by the testator, and properly attested by witnesses. These general rules require illustration, and some of the numerous authorities will be noticed. The language of the statute frequently, and usually, is, that the will shall be in writing. But it is held that this does not require that the writing shall be in ink, and wills written in pencil mark have been held valid. *In re Dyer*, 1 Hagg. Eccl. 219; *Philbrick v. Spangler*, 15 La. An. 46; and, see, *Geary v. Physic*, 5 Barn. & Cress. 234; *Brown v. Butchers & Drovers' Bank*, 6 Hill, 443; *Draper v. Pattina*, 2 Speers (S. C.), 292; *McDowel v. Chambers*, 1 Strobb. Eq. 347. Such a mode of executing a will, however, ought not to be adopted except in a case of necessity.

Although the language of a statute may require that the will shall be in writing, yet it is a well-settled rule that a statute which declares that a writing is required in the execution of particular agreements, or instruments, may nevertheless be printed instead of written, *Temple v. Mead*, 4 Vt. 535; *Henshaw v. Foster*, 9 Pick. 312; *Brainerd v. Hendricks*, 32 How. 97; 49 Barb. 62; 2 Abb. N. S. 47.

A will must not only be written, but it must also be signed by the testator in such manner as the law requires. And one of the questions which have arisen is, whether any thing less than a written signature will be sufficient. An interesting English case furnishes an answer on this point. A, the testator, who was a paralytic, procured a stamp or seal to be made, with his name engraved thereon, which was in use for his ordinary signature. A wished to execute a testamentary paper as a codicil to his will, and B, in the presence and by the direction of A, affixed and impressed at the foot of such paper the name of A, by using such stamp for that purpose. A afterward acknowledged the signature and the codicil, and asked the witnesses to attest the paper, and this was held to be equivalent to making a mark, at the direction of the testator, and that the making a mark was a signature in accordance with the provisions of the statute. *Jenkyns v. Gaisford*, 3 S. & T. 93; 9 Jur. N. S. 630; 11 W. R. 854; 8 L. T. N. S. 517.

A signing by a testator who makes his mark for that purpose is a valid signature. *Ray v. Hill*, 3 Strobb. 297; *Upchurch v. Upchurch*, 16 B. Monr. 102; *St. Louis Hospital v. Williams' Admr.*, 19 Mo. 609; *Guthrie v. Price*, 23 Ark. 396; *Van Hanswyck v. Wiess*, 44 Barb. 494; *Nickerson v. Buck*, 12 Cush. 332; *Watson v. Pipes*, 33 Miss. (3 George) 451, 466; *Stevens v. Vancleve*, 4 Wash. C. C. 262.

In some of the States the statutes authorize the signature to a will to be made by affixing the testator's mark. *Pool v. Buffum*, 3 Oregon, 438; *Smith v. Dolby*, 4 Harring. 350; *Rash v. Purnell*, 2 id. 448.

If the testator, by reason of illness or other cause, is unable to sign his name to his will, he may be assisted by another person by guiding his hand in writing his name, or making his mark. *Wilson v. Beddard*, 12 Simons, 23; *Van Hanswick v. Wiess*, 44 Barb. 494; *Vandruuff v. Rinehart*, 29 Penn. St. (5 Casey) 232; *Cozzens' Will*, 61 Penn. St. (11 Smith) 196; *Vines v. Clingfost*, 21 Ark. 309.

The general rule is, that the subscription or signing of a will is valid when it is done by a third person, at the request, or by the express direction of the testator, if done in his presence. *Riley v. Riley*, 36 Ala. 496; *Robins v. Coryell*, 27 Barb. 556; *Smith v. Harris*, 1 Rob. Eccl. 262; *Re Bailey*, 1 Curteis' Eccl. 914.

present at the same time, and such witnesses are to attest and subscribe the will in the presence of the testator, though no special form of attestation is necessary (*d*).

This seems to be reasonably distinct in specifying the formalities requisite to the validity of a will, yet, questions arose which have been thought worthy of a legislative solution, and accordingly the Wills Act Amendment Act, 1852 (*e*), declares that the signature of a testator shall be valid if it be placed at or after, or following, or under, or * beside, or opposite, to the end of the [* 564] will, so that it shall be apparent on the face of the will that the testator intended to give effect by such his signature to the writing signed as his will; and no such will is to be affected by any of a variety of circumstances which the statute expressly mentions, and which indicate the questions which had arisen.

A will is not void on account of the incompetency of a witness to prove the execution (*f*), and if any person shall attest the execution of the will to whom or to whose wife or husband any beneficial devise, legacy, or other gift or appointment affecting real or personal estate be made (except charges for payment of debts), the devise, legacy, gift, or appointment,

Competency of witnesses.

(*d*) 7 Will. 4 & 1 Vict. c. 26, s. 9.
 (*e*) 15 & 16 Vict. c. 24, applying to all wills made before, but proved after, as well as those made after the passing of the act.
 (*f*) 7 Will. 4 & 1 Vict. c. 26, s. 14, except the cases mentioned in 28 & 29 Vict. c. 72.

It has been held, in some of the cases, that a will need not be signed at the end or foot of it; and that it was sufficient if the name of the testator was written in the body of the will, if the testator acknowledges the instrument as his will. *Sarah Miles' Will*, 4 Dana (Ky.), 1; *Upchurch v. Upchurch*, 16 B. Monr. 102; *Armstrong's Heirs. v. Armstrong's Heirs*, 29 Ala. 538.

But in other cases it is held that the statute requires the signature of the testator to be affixed or signed at the foot or end of the will. *Waller v. Waller*, 1 Gratt. (Va.) 465; *Hays v. Harden*, 6 Penn. St. 409; *Glancy v. Glancy*, 17 Ohio St. 184; *Soward v. Soward*, 1 Duvall (Ky.), 126.

In England no formal publication of a will is now required, and it is a sufficient publication of a will if a person declares that a certain paper is his act, and that he desires it to be witnessed as such. And in several of the States a similar rule has been adopted; and any act of the testator, by which he indicates his wish to have the witnesses subscribe the paper as witnesses to his execution of it, is a sufficient publication of it as a will. *Dean v. Heirs of Dean*, 27 Vt. 746; *Dewey v. Dewey*, 1 Metc. (Mass.) 849; *Watson v. Pipes*, 32 Miss. (3 George) 451; *Osborn v. Cook*, 11 Cush. (Mass.) 532; *Verdier v. Verdier*, 8 Rich. L. (S. C.) 185; *Cilley v. Cilley*, 34 Me. 162; *Turner v. Cook*, 36 Ind. 129; *Dickie v. Carter*, 42 Ill. 376.

In some of the States the statutes require that the testator shall declare and publish the paper to be his last will and testament; and there must be a substantial compliance with such statutes, or the will will be invalid. *Gilbert v. Knox*, 52 N. Y. (7 Sick.) 125; *Lewis v. Lewis*, 11 N. Y. (1 Kern.) 220; *Den ex dem. Compton v. Milton*, 7 Halst. Law (N. J.), 70.

It is a very general principle of both English and American law that a will, to be valid, must be duly attested by competent witnesses. It is not necessary that the subscribing witness should write his name in full; for a signature by his initials has been held sufficient. *Christian, In re*, 2 Rob. Eccl. 110; *Amies, In re*, 2 Rob. 116. So of a signing by making his mark. *Harrison v. Harrison*, 8 Ves. 185; *Ford v. Ford*, 7 Humph. (Tenn.) 92; *Adams v. Chaplin*, 1 Hill's Ch. (S. C.) 266; *Meehan v. Rourke*, 2 Bradf. Surr. 385; *Morris v. Kniffin*, 37 Barb. 336; *Horton v. Johnson*, 18 Ga. 396; *Jesse v. Parker*, 6 Gratt. (Va.) 57; *Pridgen v. Pridgen*, 13 Ired. 259.

If the attesting witness cannot write, his hand may be guided by the hand of another attesting witness. *Harrison v. Elvin*, 3 Q. B. 117; *Campbell v. Logan*, 2 Bradf. Surr. 90.

is to be void, but the witness may be admitted to prove the will (*g*). (388) A creditor, however, may attest the will without losing his rights, even though the will contain a charge of his debt upon the testator's property (*h*), and executors are competent witnesses to a will (*i*). (389)

The act also made some changes in the law as to revocation of wills. Previously a will was considered to be revoked upon the presumption arising from change of circumstances, if after making it the testator married and had a child. (390) The present rule is, that marriage alone

Revocation of wills.

(*g*) S. 15.
(*h*) S. 16.

(*i*) S. 17.

(388) It is a matter of great importance, and of deep interest to society, that the witnesses who attest the execution of wills should be credible and competent. And, for this reason, public policy would dictate that several classes of persons ought not to be considered as competent; and among these causes of incompetency may be mentioned infancy, insanity, or mental imbecility, crime, interest, or any other sufficient ground of exclusion. In relation to infancy it has been held that a person who is competent to be sworn, and to testify in a court of justice, is a credible attesting witness of a will. *Carlton v. Carlton*, 40 N.H. 14; *Jones v. Tebbette*, 57 Me. 572. If the attesting witness be under the age of fourteen years he is presumed to be incompetent, but this presumption may be rebutted. *Carlton v. Carlton*, *supra*.

In New York, if a subscribing witness to a will takes a beneficial interest under such will, and it cannot be proved without his evidence, the witness will be competent, and the devise will be void so far only as it relates to his interest under the will. 2 R. S. 65, § 50.

But a beneficial provision in a will, in favor of a subscribing witness, is not void under this statute, even though he was examined on the probate of the will, if his examination was unnecessary, and the will was sufficiently established by the evidence of the other subscribing witnesses. *Cornwell v. Wooley*, 1 Abb. Ct. App. 441; 4 Abb. N. S. 40; 2 Trans. App. 380; 8 Keyes, 378; *Caw v. Robertson*, 5 N. Y. (1 Seld.) 125.

In England the rule formerly was, that, if the wife took an interest under a will, her husband would be disqualified as a witness to the extent of the interest she took under such will. *Hatfield v. Thorp*, 5 Barn. & Ald. 589; *Austey v. Downing*, 3 Strange, 1258. But see the statute cited in the text.

In New York, if a husband is a witness to a will which contains a devise to his wife, the devise is void, and the husband is a competent witness. *Jackson v. Durland*, 2 Johns. Cas. 314. So if there is a devise to the husband, and his wife is a subscribing witness to the will, the devise to the husband will be void, and the wife a competent witness. *Jackson v. Cooder*, 1 Johns. Cas. 163.

In Maine, where there is a devise to a husband, and the wife is a subscribing witness to the will, the devise is void, and the wife is a competent witness. *Winslow v. Kimball*, 25 Me. 493. See, also, *Fortune v. Buck*, 23 Conn. 1.

In Massachusetts, a wife is not a competent witness to a will which contains a devise to her husband. *Sullivan v. Sullivan*, 106 Mass. 474; 8 Am. Rep. 356; see, also, *Rucker v. Lambdin*, 12 Sm. & Marsh. 231, 257.

(389) It appears to be settled in this country that an executor is a competent witness to the will in which he is named as executor. *Jones v. Larrabee*, 47 Me. 474; *Comstock v. Hadlyme*, 8 Conn. 254; *McDonough v. Laughlin*, 20 Barb. 238; *Den v. Allen*, Penning. 35; *Orndoff v. Hummer*, 12 B. Monr. 619; *Murphy v. Murphy*, 24 Mo. 526; *Rucker v. Lambdin*, 12 Sm. & Marsh. 230; *Coalter v. Bryan*, 1 Gratt. 18; *Henderson v. Kermer*, 1 Rich. 474; *Meyer v. Fogg*, 7 Fla. 292; *Kelly v. Miller*, 39 Miss. 17.

A contrary rule has been laid down in some cases. *Taylor v. Taylor*, 1 Rich. 531; *Allison's Exrs. v. Allison*, 4 Hawks. 141; *Burritt v. Silliman*, 16 Barb. 198.

(390) In this country it is held that a will is revoked by the subsequent marriage of the testator, and the birth of a child by such marriage. *Brush v. Wilkins*, 4 Johns. Ch. 506; *Havens v. Van Den Burgh*, 1 Denio, 27, 30; *Wilcox v. Roates*, 1 Wash. (Va.) 140.

in all cases revokes a will (*k*), except where it is made in exercise of a power over property which would not, if unappointed, pass to the testator's own representatives. But no presumption arising from circumstances can revoke a will (*l*) — as a will can only be revoked, otherwise than by marriage, by another will or codicil executed as the law requires, or by a writing executed in like manner as wills declaring the intention of the testator to revoke the will, (391) or by the burning or otherwise destroying the same, done with the intention of revoking it (*m*). (392) And a will once revoked * cannot be revived without re-execution, or execution of a codicil with the intention of [* 565] reviving it (*n*).

(*k*) S. 8. See 1 Wms. Ex. 175 n.
(*l*) S. 19.

(*m*) S. 20.
(*n*) S. 22.

In many, if not in most, of the States there are statutory provisions relating to this subject; and, in many of the States, the birth of a child subsequent to the execution of a will will operate to revoke it, unless some provision has been made for such child by will or otherwise. *McCullum v. McKensie*, 26 Iowa, 510; *Hughes v. Hughes*, 37 Ind. 183; *Evans v. Anderson*, 15 Ohio St. 324; *Tyler v. Tyler*, 19 Ill. 151; *Dupree v. Dupree*, 45 Ga. 415, 439; *Edwards' Appeal*, 47 Penn. St. 144; *Young's Appeal*, 18 id. 115; *Bloomer v. Bloomer*, 2 Bradf. Surr. 369.

(391) A codicil is considered as an addition or supplement to a will, and it must be executed with the same formalities as the will itself. *Heise v. Heise*, 31 Penn. St. 246; *Hollingshead v. Sturgis*, 21 La. Ann. 450; *DeLafield v. Parish*, 1 Redf. Surr. 1; 25 N. Y. (11 Smith) 9; *Reid v. Borland*, 14 Mass. 208; *Laughton v. Atkins*, 1 Pick. 535.

(392) The modes of revocation of wills, by defacing the paper, may be by burning, tearing, canceling, obliterating, or otherwise destroying the instrument. But such acts do not constitute a valid revocation unless they are done with the intent to revoke the will. *Smock v. Smock*, 8 Stockt. (N. J.) 156.

A will which is burned, torn, or otherwise destroyed by accident, mistake, or the fraudulent acts of a third person, is not revoked by such act. *Dawson v. Smith*, 3 Houst. 335, 341; *Collagan v. Burns*, 57 Me. 449; *Patterson v. Hickey*, 32 Ga. 156; *Kearns v. Kearns*, 4 Harring. 350.

It has been held that the mere intention to destroy a will shall operate as a revocation of it in a case where the testator has been deceived into the belief that he had destroyed his will; as where a testator, who was ill in bed, called for his will, and one of the executors and legatees in the will deceived him by handing him an old letter which he destroyed, in the belief that it was his will. *Pryor v. Coggin*, 17 Ga. 444.

If the testator burns a paper which he thinks is his will, but by mistake, or by the fraud of others, he burns a different paper, with the intention of revoking such will by such destruction, and he honestly believes that he has done it, and continues in that belief, without any subsequent recognition or knowledge of its existence, this will amount to a revocation of such will. *Smiley v. Gambill*, 2 Head (Tenn.), 164.

So where a testator throws his will into the fire with the intention of destroying and revoking it, and it is burned through in several places, but the writing is not interfered with, and it is then rescued and preserved against the testator's will, and without his knowledge, this amounts to a revocation of the will. *White v. Casten*, 1 Jones' Law (N. C.), 197.

A mere unexecuted wish or intent to revoke a will, when no sufficient act is done toward effecting such purpose, will not operate as a revocation of a will. *Blanchard v. Blanchard*, 33 Vt. 62. A testator who requests his wife to bring his will to him from its place of deposit, with the declared intention of burning it up, and the reply of the wife that she had burned it up, when her statement was untrue, is not sufficient to revoke such will. *Mundy v. Mundy*, 15 N. J. Eq. (2 Mc Cart.) 290. So where the testator demands his will of his son for the purpose of destroying it, and the son declares that he has burned the will, that it no longer exists, to which the testator replies that he is glad that it is destroyed, this does not amount to a revocation. *Runkle v. Gates*, 11 Ind. 95. So where a will is taken

Such is the law regulating devises as determined by the legislature. It would be wholly impossible here to lead the student through the labyrinth of cases which have arisen so as to require judicial decision, either as regards the peculiar circumstances attending the formalities or rather informalities of their execution, or difficulties in determining what is the true import of the will when it is held to be duly executed.

The inaccuracies and misconceptions as to fact and law and diction, which abound in testamentary documents do, it is true, repeat themselves to a degree which many would not anticipate, and consequently may be, and have been classified and arranged, and interpretations have been put upon them for future guidance. But to discuss them even in the briefest manner would lead us far beyond our limits. Excellent though voluminous treatises may be found to which the student may refer as occasion may lead him (o).

We must content ourselves here with noticing those rules of construction which the legislature has thought fit to declare, and which therefore every testator must be supposed to have specially in his mind whilst framing his will. (393)

(o) Mr. Jarman's great work contains a very full discussion of the principles of construction which are to guide the interpreter of wills, and the cases which illustrate them. The much smaller work on the Rules of Construction, by Mr. Hawkins, is also a valuable assistant in the work of explaining the obscurities of testators.

from a testator without his consent, and is withheld from him, although he applies to the person who has possession of the will, for the purpose of obtaining and revoking it. So where the testator sent for persons to be present as witnesses to the revocation of his will, but before their arrival the will was taken from him, without his consent, and withheld from him, after his demand for its return to him for revocation, this is no revocation, even though the testator erroneously supposed that it was necessary to have a magistrate and witnesses present to enable him to make a valid revocation of his will. *Blanchard v. Blanchard*, 82 Vt. 62. Where the testator is blind, and he orders his will to be destroyed by A, a third person, who fraudulently professes to burn it in the presence and hearing of the testator, when in truth and in fact A does not burn the will, but fraudulently substitutes and burns another paper which he falsely represents to be the will, this will not revoke the will. *Kent v. Mahaffey*, 10 Ohio St. 204; *Boyd v. Cook*, 3 Leigh (Va.), 32. So where a testator had left his will in the possession of his wife, who was requested by the testator to get the will so that he might destroy it, and the wife brought forward another paper which she alleged was the will, and burnt it in his presence, which he declared was right, this was held to be no revocation of the will. *Clingan v. Mitcheltree*, 81 Penn. St. 25.

The destruction of a will by a testator is no revocation of it, if at the time he is insane or has not legal capacity to revoke a will. *Smith v. Wait*, 4 Barb. 28; *Forman's Will*, 54 id. 274; *Allison's Devises v. Allison's Heirs*, 7 Dana (Ky.), 90; *Rhodes v. Vinson*, 9 Gill. (Md.) 169; *Ford v. Ford*, 7 Humph. 92.

(393) In the construction of wills the intention of the testator has a controlling influence; and, when that intention is legally ascertained, it is generally carried into effect by the courts, unless it is in contravention of some of the rules of the law. This principle is recognized in all the cases.

But the intention must be expressed in the will itself, and it is to be judged of exclusively by words contained in the instrument, as applied to the subject-matter and the surrounding circumstances. *Jackson v. Luquere*, 5 Cow. 221, 228; *Arcularius v. Geisenhainer*, 8 Bradf. Surr. 64; affirmed, 25 Barb. 408.

The general or primary intention is preferred and effectuated, even by the sacrifice of some particular intention, if necessary. And where the general intent is clear, but it is not practicable to give effect to all the language of the will, in relation to some special intent, the latter must yield, and the general intent prevail. *Oxley v. Lane*, 35 N. Y. (8 Tiff.) 840; *Parks v. Parks*, 9 Paige, 107; *Hitchcock v. Hitchcock*, 35 Penn. St. 393; *Purnell v. Dudley*,

The legislature has then declared:— 1. That real estates, where devised by a general description, shall be considered to include any real estate (capable of coming within the meaning of the general description,) over which the testator has a power of appointment in any manner, and the will shall operate as an appointment, unless a contrary

General devise or bequest is an exercise of a power.

4 Jones' Eq. (N. C.) 203; *Workman v. Cannon*, 5 Harr. (Del.) 91; *Thrasher v. Ingram*, 32 Ala. 646.

It is not important whether the general or the particular intent is first stated in the will, for the construction will be the same in either case. *Chase v. Lockerman*, 11 Gill & Johns. (Md.) 185; *Cook v. Holmes*, 11 Mass. 528; *Land v. Otley*, 4 Rand. (Va.) 213.

The testator's clear general intention will prevail over mere technical or grammatical rules of construction. *Parks v. Parks*, 9 Paige, 107, 117; *Jackson v. Housel*, 17 Johns. 281; *Fox v. Phelps*, 17 Wend. 393; 20 id. 437; *Sarsby v. Vance*, 36 Miss. 584; *Rose v. McHose's Exrs.*, 26 Mo. (5 Jones) 590; *Redd v. Hargroves*, 40 Ga. 18; *Edwards v. Bibb*, 43 Ala. 666; *Feltman v. Butts*, 8 Bush (Ky.), 115, 120.

A testator is not presumed to have intended a violation of the law by his will; and it is rather to be presumed that he intended to make a legal disposition of his estate, instead of a void or an illegal one. *Edwards v. Bibb*, 43 Ala. 666; *Du Bois v. Ray*, 35 N. Y. (8 Tiff.) 162; *Manice v. Manice*, 43 N. Y. (4 Hand) 303, 363, 368; *Butler v. Butler*, 3 Barb. Ch. 805.

Where the intention of the testator cannot be fully carried out, because some of the provisions of the will are illegal, the courts will disregard these and give effect to the valid portions of the will if they are separable from the invalid parts. *Knox v. Jones*, 47 N. Y. (2 Sick.) 389; *Manice v. Manice*, 43 N. Y. (4 Hand) 303; *Ozley v. Lane*, 35 N. Y. (8 Tiff.) 340, 349.

In a will, plain, unambiguous words will be allowed their full natural force, and they will be preferred, and will prevail over conjectural or doubtful constructions, arising from the situation, circumstances and condition of the testator, his property, or his family. *Feltman v. Butts*, 8 Bush (Ky.), 115, 119, 120; *Bunner v. Storm*, 1 Sandf. Ch. 357; *Mann v. Mann*, 14 Johns. 1; *Chamberlain v. Chamberlain*, 43 N. Y. (4 Hand) 424, 443; *Baker v. Baker*, 8 Gray (Mass.), 101; *Underhill v. Vandervoort*, 56 N. Y. (11 Sick.) 243.

Every part of a will must have its just and proper operation, unless some part of it is entirely unintelligible, or is clearly and directly repugnant to other portions of it. *Terry v. Wiggins*, 47 N. Y. (2 Sick.) 512, 518; *Hall v. Chaffee*, 14 N. H. 215; *Cate v. Cranor*, 30 Ind. 292; *Moran v. Dillehay*, 8 Bush (Ky.), 434.

The language of a will ought to receive its ordinary construction as it is used and understood in common conversation, unless some other meaning is clearly or necessarily indicated; and, where words are equivocal, that meaning should be adopted which will tend to preserve consistency to one which will create inconsistency; and, if possible, some effect ought to be given to each distinct provision of the will. *Thrasher v. Ingram*, 32 Ala. 646, 660; *Chrystie v. Phylfe*, 19 N. Y. (5 Smith) 344, 348; *Du Bois v. Ray*, 35 N. Y. (8 Tiff.) 163, 171, 173.

Where the meaning of the testator is apparent from the language used in his will, the plain import of the language cannot be departed from, even though it results in rendering the will invalid. *Van Nostrand*, 52 N. Y. (7 Sick.) 12.

It will be assumed that the testator knew the law. *Du Bois v. Ray*, 35 N. Y. (8 Tiff.) 171; *Edwards v. Bibb*, 43 Ala. 666.

Where two clauses of a will are so inconsistent and irreconcilable that they cannot possibly stand together, that one which is posterior in position will be regarded as indicating a subsequent intention, and will prevail unless the general scope of the will leads to a contrary conclusion. *Van Nostrand v. Moore*, 52 N. Y. (7 Sick.) 12; *Pratt v. Rice*, 7 Cush. (Mass.) 209; *Evans v. Hudson*, 6 Ind. 298; *Davis v. Boggs*, 20 Ohio St. 550; *Fulton v. Hill*, 41 Ga. 554, 568; *Thrasher v. Ingram*, 32 Ala. 646, 660; *Mutter's Estate*, 38 Penn. St. 314, 321; *Stickie's Appeal*, 29 id. 234; *Iglehart v. Kirwan*, 10 Md. 559.

A construction which will disinherit an heir at law is not favored, and will not be adopted unless by the express terms of the will, or by necessary implication, such was the intention of the testator. *Lynes v. Townsend*, 33 N. Y. (6 Tiff.) 558, 561, 562; *Quinn v. Hardenbrook*, 54 N. Y. (9 Sick.) 88; *Downing v. Bain*, 24 Ga. 373; *Howard v. American Peace Society*, 49 Me. 288; *Bender v. Dietrich*, 7 Watts & Serg. 284; *Hitchcock v. Hitchcock*, 35 Penn. St. 198.

A will speaks from the death of the testator, and not from its date, unless its language.

[* 566] intention appear by the will. And the like as to personal * estate (*p*). The rule has already been referred to (*q*), as also the following. 2. That a devise of real estate to any person, without any words of limitation, is to be construed as passing the fee simple, or other the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a contrary intention appear by the will (*r*). 3. Where, as often happens in any devise or bequest of real or personal estate, there occur the words, "die without issue," or "die without leaving issue," or "leave no issue," or any other words which may import either a want or failure of issue of any person in his lifetime, or at the time of his death, or an indefinite failure of his issue, they shall be construed as meaning a want or failure of issue in the lifetime or at the death of such person, and not an indefinite failure of issue, unless a contrary intention appear by the will, by reason of such person having a prior estate tail, or of a preceding gift being a limitation of an estate tail to such person. But the rule is not to extend to cases where the words refer to issue of a particular description already mentioned (*s*). This rule was laid down in consequence of the words dealt with in it, having acquired a technical meaning different from that in which they are often popularly used (*t*). 4. Questions as to the estates taken by trustees are set at rest by the declaration that, with a few exceptions depending upon the express words of the testator, they take the fee-simple or whole interest of the testator (*u*). This rule seems to be absolute, and is to hold, whatever be the intention appearing by the will. 5. Where any real estate is devised to any person for an estate tail or *quasi* tail, and the person dies in the lifetime of the testator, leaving issue who would inherit under the entail, and such issue are alive at the death * of the testator, the devise is not to lapse, but to take effect as if the person had died immediately after the testator, unless a contrary intention appear by the will (*x*). 6. The following rule is also intended to prevent a lapse in cases where the bounty of the testator may well

No words of Limitation necessary.

Rule as to "die without issue."

Estates of trustees.

Lapse of estates tail.

Lapse of gift to children.

(*p*) S. 27.

(*q*) *Ante*, p. 536.

(*r*) *Ante*, p. 214.

(*s*) S. 29.

(*t*) See *Greenway v. Greenway*, 1 Giff. 131.

(*u*) Ss. 80, 81. An exception in s. 80 is made as to the presentation to a church.

(*x*) S. 32.

by fair construction, indicates a contrary intention. *Canfield v. Bostwick*, 21 Conn. 550, 553; *Gold v. Judson*, 21 id. 616; *Wetmore v. Parker*, 52 N. Y. (7 Sick.) 451, 463; *Hitchcock v. Hitchcock*, 35 Penn. St. 393.

In relation to the law which determines the validity of wills it may be stated, generally, that the mode of execution, the construction, and the validity of a will disposing of real estate, is governed, exclusively, by the law of the State where the property is situated. *Knox v. Jones*, 47 N. Y. (2 Sick.) 389, 395; *Jennings v. Jennings*, 21 Ohio St. 56, 76; *Varner v. Bevil*, 17 Ala. 286; *McCormick v. Sullivan*, 10 Wheat. 192, 202; *White v. Howard*, 46 N. Y. (1 Sick.) 144; *Richards v. Miller*, 62 Ill. 417.

The law of the testator's domicile controls, as to the formal requisites essential to the validity of the will as a means of transmitting property, the capacity of the testator, and the construction of the instrument. *Chamberlain v. Chamberlain*, 43 N. Y. (4 Hand) 424, 432, 433; *Varner v. Bevil*, 19 Ala. 286; *Armstrong v. Lear*, 12 Wheat. 169; *Holmes v. Remsen*, 4 Johns. Ch. 460, 469; *De Sobry v. De Laistre*, 2 Harr. & Johns. 193, 224; *Dannell v. Dannell*, 4 Bush (Ky.), 61; *White v. Howard*, 46 N. Y. (1 Sick.) 144, 159; *Richards v. Miller*, 62 Ill. 417. Whether a deceased person died intestate or not is to be determined by the law of the place where he was domiciled at the time of his death. *Moultrie v. Hunt*, 23 N. Y. (9 Smith) 394; *Irwin's Appeal*, 33 Conn. 128; *Nat v. Coons*, 10 Mo. 543.

be extended; it is that where any devise or bequest is made to a child or other issue of the testator, and such child or other issue dies during the testator's lifetime, and any issue of such child or other issue shall be living at the testator's death, then the devise or bequest is not to lapse, but to take effect exactly as if the child or other issue had died immediately after the testator's death, unless a contrary intention appear by the will (*y*). 7. Where there is a lapse

of any devise or bequest of any real or personal property by reason of the devisee or legatee dying in the testator's lifetime, and the case does not come within either of the preceding rules, or where a gift is contrary to law (as real estate or impure personal estate (*z*) given to charities), then the property comprised in the devise or bequest so failing shall fall into the residuary devise or residuary bequest (if any), according to the nature of the property (*a*).

To complete our account of descents and devises, we ought here to notice that a recent act has imposed upon every succession of real property whereby property accrues, upon the death of any person, to another, duties similar in character to those which have been imposed upon legacies. The act which imposes them (*b*) is so framed as to include every case where a person acquires a beneficial interest, or additional beneficial interest, in property upon the death of another, or upon any period determined by the death of another person who died after the commencement of the act (*c*), except where the deceased is the husband or * wife of the successor. It lays down rules for the determination of the question who, in each particular case, is to be deemed the predecessor (*d*), from whom the succession is derived. It imposes the following duties:—Where the successor is of the lineal issue, or lineal ancestor of the predecessor, a duty of one *per cent.* upon the value of the succession. For a brother or sister, or descendant of a brother or sister of the predecessor, a duty of three *per cent.* upon such value. For a brother or sister of the father or mother of the predecessor, or any of their descendants, a duty of five *per cent.* upon such value. For a brother or sister of the grandfather or grandmother of the predecessor, or any of their descendants, six *per cent.* upon such value. For all other relationships, and for strangers in blood, ten *per cent.* upon such value.

Rules are laid down for the valuation of every species of interest, which valuations are made upon the supposition that the succession consists of an annuity equal to the annual value of the property (after making certain allowances), and payable during the residue of his life, or any less period that he may be entitled to it. The act contains tables for the calculation of the value of such interest, and the duty is to be paid by eight equal half-yearly installments, determinable (if the interest of the successor be determinable) upon the death of the successor, the first being payable one year after the death of the person upon whose death the succession took place.

The duty is made a first charge upon the property, and therefore it is

(*y*) S. 83.

(*z*) *I. e.* money charged upon land or derived from the sale of lands.

(*a*) S. 25 lays down the rule as to real estate. The rule was previously adopted as to lapsed legacies and bequests.

(*b*) 16 & 17 Vict. c. 51.

(*c*) 19 May, 1853.

(*d*) Upon which rules a vast number of cases have already arisen from judicial consideration, which cannot, however, be here noticed.

incumbent upon all persons dealing with successors to see that the duty has been paid.

Before concluding our remarks upon the subject of title, we may here mention that recently an act has been passed (e) for the purpose of facilitating the Registry for titles. [* 569] proof of title * to, and the conveyance of, real estates. Under this a public registry has been established, where any owner may register his title, and so obtain an absolute indefeasible title. The conditions and provisions subject to which, and the details of the way in which this is to be done, cannot find a place here. They are intended to abolish the laborious and expensive investigations which are usually undertaken upon every dealing with lands. Whether the result will realise the hopes of those who originated the scheme, remains to be shown. Up to the present time, the powers conferred by the act have not been extensively used (f).

The view which we have taken of the various assurances by which things real may be alienated, completes, so far as our limits will allow, the account which we have to give of the mode by which title to them may be reciprocally lost and acquired. We have before considered the estates which may be had in them, with regard to their duration or quantity of interest, the time of their enjoyment, and the number and connections of the persons entitled to hold them; we have examined the tenures, both ancient and modern, whereby those estates have been, and are now, holden: and have distinguished the object of all these inquiries, namely, things real, into the corporeal or substantial, and incorporeal or ideal kind; and have thus considered the rights of real property in every light wherein they are contemplated by the laws of England. A system of laws that differs much from every other system, except those of the same feudal origin, in its notions and regulations of landed estates; and which therefore could in this particular be very seldom compared with any other.

The subject which has thus employed our attention is of very extensive use, and of as extensive variety. And yet, possibly, it has afforded the student less [* 570] amusement * and pleasure in the pursuit, than the matters discussed in the preceding volume. To say the truth, the vast alterations which the doctrine of real property has undergone from the conquest to the present time; the infinite determinations upon points that continually arise, and which have been heaped one upon another for a course of seven centuries, without any order or method; and the multiplicity of acts of parliament which have amended, or sometimes only altered, the common law: these causes have made the study of this branch of our national jurisprudence a little perplexed and intricate. Fortunately for us, the tendency of recent legislation has been to place the law upon a footing almost equal in simplicity to that which existed in the most ancient times, and yet to no inconsiderable extent accompanied by means and appliances suitable to our modern wants. (394)

(e) 25 & 26 Vict. c. 53.

(f) See debate in the House of Commons, July, 1869.

(394) Nuncupative wills ought to be mentioned, although not much in use, and not so important as formerly. The right to make such a will has been limited by statute in England, and in many of the States in this country. Some of these statutes limit the right of making such a will to soldiers in actual military service, and to mariners at sea. The right

* CHAPTER XXIV.

[* 571]

THINGS PERSONAL.

UNDER the name of things personal are, according to its primary signification, denoted all sorts of things moveable, which may attend a man's person wherever he goes; and therefore, being only the objects of the law while they remain within the limits of its jurisdiction, and being also of a perishable quality, had not originally so much regard from the law, as things that are in their nature more permanent and immoveable, as

however, is not so restricted in all the States, as will be seen by the cases subsequently noticed. It has been found by experience that, to permit a will to be made by mere oral declarations, and to dispense with writing for that purpose, has opened the way to the grossest frauds; and, hence, the restrictions mentioned.

The general rule may be stated to be that a nuncupative will is not valid unless it is made when the testator is in *extremis*, or is overtaken by sudden and violent sickness, and has not time to make a written will; and by the term "last sickness" is to be understood the last extremity at a time when the testator did not expect to recover. *Prince v. Hasleton*, 20 Johns. 502; *Ellington v. Dillard*, 42 Ga. 361; *O'Neill v. Smith*, 83 Md. 569. But see *Hubbard v. Hubbard*, 8 N. Y. (4 Seld.) 208, and the cases there cited.

This mode of disposing of property is confined to personal property, and does not extend to lands, which cannot be disposed of by a nuncupative will. *Smithdon v. Smith*, 64 N. C. 52; *Smith v. Thurman*, 2 Heisk. (Tenn.) 110; *Palmer v. Palmer*, 2 Dana (Ky.), 390.

A soldier is permitted to make a valid nuncupative will, if made while he is "in actual military service." The construction of this expression has been several times considered by the courts. In a Vermont case it was held that, when a soldier is in the enemy's country, performing military service, whether in camp, in campaign or in battle, such service is *actual military service* within the letter and spirit of the statute. *Van Deuser v. Gordon*, 39 Vt. 111, 119. In such a case, it is not necessary that the soldier should be in *extremis* at the time of making a nuncupative will. *Ib.* A soldier who is in service, and who is taken sick on the march, and falls out and is carried to the hospital, is in such actual military service as to be entitled to make such a will. *Gould v. Safford's Estate*, 39 Vt. 498.

Where a soldier in an army writes to his wife, and the letter sent to her contains this expression: "If I never return home I want all I have to be my wife's;" and he subsequently returns home, where he dies, this will not be a valid will. *Mages v. McNeil*, 41 Miss. 17. So, where an enlisted soldier, who has not entered on actual service, delivers a promissory note with the expression, "I give you this note; if I never return it is yours," and the donor dies while a soldier, of a disease contracted in the service, this is not a valid gift, *donatio mortis causa*. *Irish v. Nutting*, 47 Barb. 370. So of a similar gift of money. *Dezheimer v. Gautier*, 34 How. 472; 5 Rob. 216.

During the late rebellion, if a soldier, who had been duly mustered into the United States service, marched into the enemy's country and encamped among a hostile population, and acted in conjunction with other soldiers who confronted the rebel army, he is in such actual military service as to enable him to make a valid nuncupative will, or to dispose of his personal property by a letter written for that purpose. *Leathers v. Greenacre*, 53 Me. 561, 566; *Botsford v. Krake*, 1 Abb. N. S. 112; and see *Anderson v. Pryor*, 10 Sm. & Marsh. (Miss.) 620.

The term seaman, or mariner, includes the entire naval force or service, and applies to all the officers or sailors, while at sea or temporarily absent on leave, as well as to the merchant service. *Ex parte Thompson*, 4 Bradf. Surr. 154. A cook who is lying sick on board of a steamship, which is lying at her wharf in a foreign port, is a seaman within the meaning of the law as to nuncupative wills. *Ib.*

So a valid nuncupative will may be made by a captain of a coasting vessel while she is on a voyage, and while lying at anchor in an arm of the sea where the tide ebbs and flows. 8 N. Y. (4 Seld.) 196; affirming S. C., 12 Barb. 148.

lands and houses, and the profits issuing thereout. The name now has a much more extensive signification than it anciently had. The amount of property, not connected with land, was comparatively very trifling during the scarcity of money and the ignorance of luxurious refinements which prevailed in the feudal ages. Hence it was, that a tax of the fifteenth, tenth, or sometimes a much larger proportion, of all the moveables of the subject, was frequently laid without scruple, and is mentioned with much unconcern by our ancient historians, though now it would justly alarm our opulent merchants and stockholders. And hence, likewise, may be derived the frequent forfeitures inflicted by the common law of all a man's goods and chattels, for misbehaviours and inadvertencies that at present hardly seem to deserve so severe a punishment. Our ancient law-books, which are founded upon the feudal provisions, do not therefore often condescend to regulate this species of property. There is not [* 572] a chapter in Britton or the Mirror, that *can fairly be referred to this head; and the little that is to be found in Glanvill, Bracton, and Fleta, seems principally borrowed from the civilians. But in modern times, for reasons that are sufficiently apparent to every one, we have learned to conceive different ideas of it. Our courts now regard a man's personalty in a different light, it is true, but with importance nearly, if not quite, equal to his realty: and have adopted a more enlarged and less technical mode of considering the one than the other; frequently drawn from the rules which they found already established by the Roman law, wherever those rules appear to be well-grounded and apposite to the case in question, but principally from reason and convenience, adapted to the circumstances of the times; preserving still a due

But, where the testator was a mariner by profession, and made his will on board of a steamer in the Delaware river, which was towing a vessel in which he was to sail as a passenger to Chagres, there to take command of a lighter, to lighten vessels arriving in that river, he was held not to be a mariner in service. *Warren v. Harding*, 2 R. I. 138.

A captain of a United States gunboat during the late rebellion (in 1863) made a nuncupative will on board of it on the Mississippi river, opposite to the city of Vicksburgh; but it was held that the captain was not a mariner "at sea," and the will was held invalid. *Matter of Gwin*, 1 Tuck. Surr. 44.

Nuncupative wills are not favorites of the law, and the courts usually require a full and strict compliance with the requirements of the law in relation to them. *Taylor's Appeal*, 47 Penn. St. 81, 86; *Biddle v. Biddle*, 86 Md. 630, 643; *Dorsey v. Sheppard*, 12 Gill & Johns. 192, 198; *Yarnall's Will*, 4 Rawle, 45; *Andrews v. Andrews*, 48 Miss. 220.

It must clearly appear that the testator had testamentary capacity at the time of making his will. *Dorsey v. Sheppard*, 12 Gill & Johns. 192; *Biddle v. Biddle*, 86 Md. 630, 643; *Yarnall's Will*, 4 Rawle, 45, 62.

It must be satisfactorily established that the proper number of witnesses were duly requested by the testator to hear his declarations, and that they are called upon for the purpose of attesting his will. *Yarnall's Will*, 4 Rawle, 45, 62, 63; *Taylor's Appeal*, 47 Penn. St. 81, 87; *Biddle v. Biddle*, 86 Md. 630, 643, 644; *Andrews v. Andrews*, 48 Miss. 220; *Hobden's Will*, 20 N. J. Eq. 478; *Dawson's Appeal*, 28 Wis. 69.

It is not necessary that the testator should use the exact words of the statute, for any words that express a clear intention to give his estate to a certain person will be sufficient to pass the property. *Weir v. Chichester*, 68 Ill. 453, 455. He need not call upon the persons present by name to become witnesses to his will, for "any form of expression, however imperfectly uttered, so that it conveys to the minds of those to whom it is addressed the idea that he desires them or some of them to bear witness to the disposition he is making of his property, will be deemed a compliance with the statute in that regard." *Ib.*; *Arnett v. Arnett*, 27 Ill. 247; *Hatcher v. Millard*, 2 Coldw. (Ky.) 81.

regard to ancient usages, and even a certain feudal tincture, which is still to be found in some branches of personal property, though not easily discernible.

We will, pursuing the plan adopted in our former chapters concerning real property, inquire shortly into the nature of the several species of property, then into the interests which may be had in them, and afterwards the title by which they may be acquired and lost. And first, as to their nature. (395)

Various phrases have been at different times used to express personal property, but they have not generally been sufficiently comprehensive to include all that is now intended by that term. Thus, the word chattels has been used, derived by Sir Edward Coke (*a*) from the French, though it is in fact the same as the technical Latin term *catalla*, and primarily signified only beasts of husbandry (hence called at this day cattle). This word is by no means co-extensive with personal property, yet it acquired (by being set in opposition to a feud) a very enlarged meaning; first, it was extended to all moveables * in general (*b*); next, it was made to include not only all moveable things called chattels personal (*c*), but also the inferior [* 573] interests in land, thence called chattels real.

Chattels real, says Sir Edward Coke (*d*), are such as concern, or savour of, the realty; as terms for years of land, wardship in chivalry (while the military tenures subsisted), the next presentation to a church, estates by statute-merchant, statute-staple, elegit, or the like; of all which we have already spoken. And these are called real chattels, as being interests issuing out of, or annexed to, real estates: of which they have one quality, viz., immobility, which denominates them real; but want the other, viz., a sufficient, legal indeterminate duration; and this want it is that constitutes them chattels. The utmost period for which they can last is fixed and determinate, either for such a space of time certain, or till such a particular sum of money be raised out of such a particular income; so that they are not equal in the eye of the law to the lowest estate of freehold, a lease for another's life: their tenants were considered upon feudal principles, as merely bailiffs or farmers; and

(a) Co. Litt. 118.

(b) Dufresne, II. 409. See Le Grand Coutumier, c. 87.

(c) So, too, in the Norman law, *Cateux sont meubles et immeubles; et comme vrais meubles sont qui transporter se peuvent, et ensuivre le*

corps: immeubles sont choses qui ne peuvent ensuivre le corps, ni estre transportees, et tout ce qui n'est point en heritage. LL. Will. Nothi, c. 4, apud Dufresne, II. 409.

(d) Co. Litt. 118.

(395) It is important to recollect that personal things or property may be considered in two very different aspects; one of which signifies the thing or property possessed, and the other the right of possession. When the term personal property is used as descriptive of, or as designating, the things owned, and not in relation to the right of ownership, it includes, at the common law, all those things in which a person may have a right and interest to the exclusion of all others, excepting only such property as is termed real estate.

One of the essential distinguishing features or qualities of personal property is, that it is moveable, while property regarded as real estate is immoveable. There may, however, be such alterations of property as to change real into personal property, or to change personal into real property. A tree while growing is regarded as real estate; but, if it is cut down, it becomes personal property. Minerals in the earth are real property, and yet they may become personal property by digging them out of the ground.

So, personal property may be converted into real estate; as where brick, stone, or timber are carried upon real estate and built into a house upon such lands. And, by tearing down such building, the materials may again become personal property. See Schouler on Pers. Prop. 26, 27.

the tenant of the freehold might at any time have destroyed their interest, till the reign of Henry VIII. (e)

It is unnecessary for us here to dwell upon the nature of these lesser interests in lands which are included in the name of chattels, having already discussed at some length their several natures and properties (f). (396)

The expression chattels personal (or goods and chattels, which was the more common phrase), anciently therefore included every item of property that was *Chattels personal*. [* 574] not an interest in land, and being usually of a moveable nature, or capable of being carried about with the person, received the name personal; though Sir Edward Coke also gives another reason, that they were capable of being recovered by a personal action (g). The two reasons, however, having probably much the same foundation, since the word personal action must have received its name from its being adopted to recover things connected with the person. Whatever was its origin, however, the expression does not sufficiently denote all the present classes of property not connected with land; nor does the phrase "goods, wares and merchandise," used in the Statute of Frauds (h), or that of "goods and commodities," used in several other acts of parliament.

The practices of modern times have given rise to a large variety of other kinds of property, not thought of in ancient times, which are not the objects of any bodily sense, yet are included among personal things, and subject to laws similar to those governing tangible things, such as animals, furniture, and the like (i).

Formerly the only important member of this class which existed was the right to demand a sum of money, either founded upon debt or upon other grounds. From this the name "thing," or "chase in action," *Things in action.* was adopted to describe them. The name indicates that the material value of the property consisted in the right to invoke the aid of the court: and the peculiar notions which our ancestors entertained as to this right, have given rise to many of the most remarkable, and some of the most inconvenient, doctrines which have affected this species of property, and which are only now gradually disappearing, but not yet altogether gone (j).

* But many of the species of property which now exist are not in [* 575] their nature at all connected with actions at law, and therefore, though they frequently are described as choses in action, yet such description is not accurate, and the peculiar notions before alluded to do not apply to them.

Concerning the first class of personal things, or things capable of bodily sense, such as furniture, plate, implements of husbandry or of war, jewels, and the like, which from the visible possession which may be had of them, are called things in possession, thereby distinguishing them from things in action, it is not necessary to say much. The complete ownership of them involves the right to use them in the most absolute way, even though such user may entirely consume them.

(e) *Ante*, p. 277.

(f) *Ante*, c. 9.

(g) *Co. Litt.* 118 b.

(h) *Colt v. Netttervill*, 2 P. W. 804, where it was stated the twelve judges were equally

divided, six against six, whether a contract for stock was a contract within the Statute of Frauds.

(i) See *In re Cleland*, L. R. 2 Ch. 466.

(j) See vol. iii. p. 44.

(396) See Schouler on Personal Property, 45-75, where the subject is fully discussed.

The law concerning some few particular varieties, such as heirlooms, heriots (usually now consisting only of a money payment, though formerly a chattel),* and mortuaries (like heriots, now consisting of a money payment, though formerly not so), is regulated by custom. As to others, such as fixtures, emblements, &c., we have seen (*k*) that whilst affixed to or ground in the soil they are subject to special conditions as to ownership and enjoyment. Of others, of which ships are the most important, the law depends entirely upon legislative enactment.

Ships, from the circumstances attending their user, their constant absence from this country and, often, from the visible possession of their owner, have, by the policy of the law, been placed upon a peculiar footing, and made subject to peculiar laws. In the year 1854 all previous acts on the subject were repealed (*l*), and a general act consolidating the law relative to merchant shipping was passed (*m*). By this act (*n*) no ship is to be deemed a British ship unless owned by British subjects, and every * British ship is subject to the laws prescribed by the act. The details of the [* 576] act cannot find a place here.

The second class of personal things are of an intangible, incorporeal nature, called by the general name things or choses in action.

Choses in action, strictly so called, depend, in general, upon contract; the peculiarities and varieties of their nature depend, for the most part, upon the mode and extent of the relief which the courts afford to contracting parties. Of this we shall speak at large in the third book of these commentaries. We say, in general, for there are some rights of action which depend upon other grounds. Instances of these are, damages for slander or libel; for injury to one's person, or the loss of the life of a near relation, upon whom one depends for support (*o*), arising from the improper negligence of another. These and the like hardly rest upon contract, unless it be the general contract which is implied in the very essence of society, the contract not to injure any other member of the society; and in many instances it has required the authority of parliament to give them a legal sanction.

The other species of property (often, though not reasonably) included in the name of choses in action, consists of such artificial contrivances as have been developed principally in recent times. The first and most important of these is stock in the public funds of a nation, that is to say, a portion of a national debt, which differs from every other debt in this respect, that the courts can afford no aid to the creditor. As to the English public funds, they are in reality nothing more than the right, sanctioned by parliament, to receive certain annuities from the State. No right exists in the holder of 100*l.* 3 per cent. Consolidated * Annuities (as one of the kind is called) to demand [* 577] payment of the 100*l.*, but only the right to an annual payment of 3*l.* The Government, on the other hand, have the right to redeem the annuity by payment of the nominal amount of the stock—a right, however, which is never exercised, as the market price is hardly ever equal to the nominal amount.

(*k*) *Ante*, pp. 236, 282.

(*l*) By 17 & 18 Vict. c. 120.

(*m*) 17 & 18 Vict. c. 104, amended by 18 & 19 Vict. c. 91; 25 & 26 Vict. c. 63; 30 & 31 Vict. c. 124.

(*n*) 17 & 18 Vict. c. 104, s. 18.

(*o*) Under Lord Campbell's Act, 9 & 10 Vict.

c. 93. Before this act, though, if a man were injured, but not killed he might have redress in damages; yet if his support were altogether lost to his family by death, no redress could be obtained by those who were thus deprived of their subsistence.

When the commissioners for the reduction of the national debt have money applicable to the purpose for which they hold their office, they purchase stock in the market from those who are willing to sell at the market price, and the stock so purchased is cancelled (*p*).

Other Governments, such as those of British India and the autonomous colonies, have invariably adopted a different system in this respect, their public loans being all made repayable at fixed dates, with interest in the meantime. Holders of these securities must rely upon the good faith of the Government which guarantees the payment, a reliance which is readily placed upon the Imperial and British Colonial Governments, and, indeed, upon many foreign powers. But, as is obvious, should there be any disregard of the rights possessed by fundholders, no remedy can be obtained by aid of the courts.

A convenient system of registration of fundholders in the English and Indian funds has been adopted at the expense of the State, by which the names of the legal holder or holders are inscribed in the books of the governor and company of the Bank of England. The stock is considered as legally vested in those whose names are so inscribed, and can be transferred only by the owner or his duly-constituted attorney signing suitable transfers in books kept for that purpose by the same bank. The bank only recognizes the person appearing on their books as the owner, and does not take any notice of trusts, and is not bound to do so even if express notice be given to them. Moreover, the bank [* 578] will only open one account * with the same individual, and in no case will allow more than four persons to have a joint account.

The bank, however, will so far recognize the interest of other persons besides those named in its books, that it accepts service of a writ of distringas, as it is called, which may be issued out of Chancery, in a fictitious suit (*q*), by any person who claims to be beneficially interested in any manner in stock. The effect of this writ is, that the bank is bound to give notice to the person who has served it before registering a transfer, which may have been attempted to be made by the person in whom the stock is legally vested. The bank is not able to refuse to transfer the stock for more than eight days after request has been made, unless in the meantime an order is made by the court in a properly-constituted suit (*r*).

Under the Trustee Acts (*s*) the Court of Chancery may, in proper cases, similar to those already noticed (*t*) as to the legal estates in land vested in trustees, make orders to vest the legal interest in stock in such
Trustee acts. person as the court may direct, and in such cases the order of the court operates as a transfer, which the bank is bound to regard, and is by the act indemnified in so doing (*u*).

By a recent act (*v*) the Bank of England may issue certificates of title of stock in respect of any sum of stock being 50*l*., or a multiple of 50*l*. (not exceeding 1000*l*.), with coupons attached for the dividends accruing due for a
[* 579] period of five years from the date of the certificate (*w*). * They are of two kinds—one entitling the bearer to the stock therein described;

(*p*) 29 Vict. c. 11.

(*q*) It formerly issued out of the Court of Exchequer, but when the jurisdiction in equity of that court was transferred to chancery, the power to issue this writ was also transferred. 5 Vict. c. 5, s. 5.

(*r*) 2 Dan. Ch. Pr. 1530.

(*s*) 13 & 14 Vict. c. 60; 15 & 16 Vict. c. 55.

(*t*) *Ante*, p. 556.

(*u*) 13 & 14 Vict. c. 60, ss. 22-26.

(*v*) 26 & 27 Vict. c. 28.

(*w*) By sect. 2, trustees are expressly forbid-

the other nominal, entitling the person therein named to the stock; and in the latter case the bank will only recognize the person so named, or some person who has become entitled by devolution of law as being the legal personal representative, or assignee in bankruptcy, or husband of the person named in the certificate (*x*).

The ownership of the public funds of British colonies and of foreign governments is usually evidenced by the possession of formal documents or bonds,

the mere possession of which carries with it the right of receiving the annual interest and the principal sum secured, and which pass by simple delivery from hand to hand. To them are usually affixed coupons for interest due at intervals between the date of the loan

and the period fixed for repayment. English exchequer bills or bonds are of this character (*y*).

Shares in public incorporated companies are another most important branch of this kind of property. They are declared to be personal property by act of parliament (*z*), with the single exception of shares in the New River Company, a very old company. It is impossible here to enter into an account of the law regulating these; we may simply remark, that they may be either accompanied with unlimited liability on the part of the owners of the shares to discharge the company's debts, or such liability may be, as it usually now is, limited to the nominal amount of the shares (*a*).

Another important species of rights, which must be included in the present class, are those which *depend upon the art and ingenuity and industry of man, and the estimation given to the products arising from those qualities. It includes several varieties: 1. Copyright of books and writings. 2. Patents for invention. 3. Designs for manufacture. 4. The indicia of commercial reputation, trade-mark, and the good will of a business. The first three of these depend now upon statutory enactment, although they were not wholly unprotected by the common law (*b*); the last still rests upon the doctrines of the courts. We will say a few words upon each subject, though our disquisition must necessarily be short.

1. The copyright of books and other writings is the right which the law affords for protecting the produce of man's intellectual industry from being made use

of by others without adequate recompense to him. When a man, by the exertion of his rational powers, has produced an original work, he seems to have clearly a right to dispose of that identical work as he pleases, and any attempt to vary the disposition he has made of it appears to be an invasion of that right. Now the identity of a literary composition consists entirely in the sentiment and the language (*c*); the

den to avail themselves of this act, unless specially authorized by their trust. Contravention of this section is to be deemed a breach of trust, and punishable accordingly. An act of the present year, 1869, also directs the bank to issue to fundholders interest warrants upon inscribed stock. 82 & 83 Vict. c. 104.

(*z*) Sect. 6. As to the rights of executors, see 8 & 9 Vict. c. 97; and as to unclaimed dividends, see 8 & 9 Vict. c. 62.

(*y*) See 29 Vict. c. 25.

(*a*) As to shares in railway and other companies incorporated by special acts, see 8 & 9

Vict. c. 16, s. 7; as to shares in other companies, 25 & 26 Vict. c. 89, s. 22.

(*a*) As to railway and similar companies, see 8 & 9 Vict. c. 16, ss. 21, 26; as to other companies, 25 & 26 Vict. c. 89, s. 23.

(*b*) *Miller v. Taylor*, 4 Burr. 2303; *Donaldson v. Beckett*, *ib.* 2408.

(*c*) See *Pike v. Nicholas*, 88 L. J. Ch. 529; *Kelley v. Morris*, L. R. 1 Eq. 697; *Morris v. Ashbee*, L. R. 7 Eq. 34; in which last two cases the rights of a compiler of a directory (in which no sentiment can be involved, but merely the result of labour) were discussed and sustained.

same conceptions, clothed in the same words, must necessarily be the same composition: and whatever method be taken of exhibiting that composition to the ear or the eye of another, by recital, by writing, or by printing, in any number of copies, or at any period of time, it is always the identical work of the author which is so exhibited; and no other man (it has been thought) can have a right to exhibit it, especially for profit, without the author's consent (397).

[* 581] Before the era of printing these rights must * necessarily have stood upon a footing different in many respects to that on which they are now placed. The mechanical process of publishing works must then have had an importance greater, relatively to the matter published, than now. Consequently the necessity of protection by law was less, if at all, felt. Accordingly the Roman law is silent upon the subject of an author's rights; all the notice which it took of writings was simply to declare, that if one man wrote on the paper or parchment of another, the ownership of the blank materials remained unaffected (*d*). Not that the law was regardless of the respect due to genius and intellectual or artistic power, for the same law declared (*e*) that a painter, who used another's canvas, by the fact of his artistic creation acquired the property in the picture, being, it is presumed, bound to indemnify the owner of the canvas. So we find but few instances in our ancient law in which the matter has been discussed, though it is certain that the law considered an author entitled to protection (*f*). The law, however, having been settled by statute, the common law on the subject, whatever it was, has been abrogated.

The earliest statute is 8 Anne, c. 19, which, after being several times amended and altered (*g*), has been repealed; and the right now wholly rests upon an act of the present reign (*h*), by which "the sole and exclusive liberty of printing or otherwise multiplying copies" (*i*) of any "book" (which word in the act referred to has a very extensive signification) (*k*) is reserved to the author and his representatives for the term of his natural life and ten years [* 582] afterwards, or for the term of forty-two years, whichever * is the longer period. This right is made subject to certain conditions, the most important of which are the presentation within one month after publication, of a copy to the British Museum, and within twelve months to the Bodleian library at Oxford, the Cambridge University library, the Advocates' library at Edinburgh, and that of Trinity College, Dublin. The proprietorship must also be registered at Stationers' Hall in a book kept for that purpose (*l*). In order to secure the benefit of the copyright the book must be first published in England (*l*).

We may add, that the same act secured to musical composers and dramatic

(*d*) *Si in chartis membranisque tuis carmen vel historiam vel orationem Titius scripserit, hujus corporis non Titius sed tu dominus esse videris.* Inst. 2. 1. 33.

(*e*) *Ib.* s. 34.

(*f*) *Donaldson v. Beckett*, 4 Burr. 2408, in which case the subject of the contest was "Thompson's Seasons."

(*g*) By 15 Geo. 3, c. 53; 41 Geo. 3, c. 107; 54 Geo. 3, c. 156.

(*h*) 5 & 6 Vict. c. 45.

(*i*) Observe, not selling, *Taylor v. Pillow*, L. R. 7 Eq. 418.

(*k*) Sect. 2.

(*l*) *Routledge v. Low*, L. R. 3 H. L. E. & L. 100; where also the rights of an alien are discussed, and some difference of opinion expressed; though it was held that if resident in England at the time of publication he might acquire copyright.

(397) See 2 Kent's Com. 373-384; Curtis on Copyright; Schouler on Personal Property, 654, 671; Act of Congress of July 8, 1870 (16 U. S. Stat. at Large, 212, ch. 230, § 85), etc.

authors the sole right of performing their compositions, or representing their pieces for the same term for which copyright is granted (*m*).

2. Patents for invention stand upon somewhat similar, though far from identical, grounds as copyrights. (398) The progress of inventions in matters relating to manufactures (to which the majority of inventions belong) is such, that many persons are at work at the same time in the same direction; and often the same idea is hit or conceived by several nearly simultaneously: moreover, the refinements and improvements upon each successive device follow each other so rapidly, that it is difficult to determine to whom of several inventors the chief or distinctive merit belongs. Such conflicts as occur daily between rival inventors, can rarely take place between rival authors. Consequently, although a similar desire to give some reward to an inventor as is obtained by authors is naturally entertained, yet it is far less easy to put into practice. Moreover, the highly expensive nature of the litigation, which ensues upon questions of infringement of patents, is such as to preclude those whose means are small, * though their inventive faculties may be large, from successfully claiming the fruits of their labours. [* 583]

These considerations have led many to doubt the expediency of continuing the operation of patent laws. If they fail in their object of securing to a first and true inventor an adequate reward for his industry, the argument founded on the public policy of encouraging invention falls to the ground. Nevertheless, inasmuch as at present the law is in full force, some notice of the right thereby created is required here.

In ancient times the notion of giving a monopoly of a particular manufacture was familiar to many as a royal device of benefiting favourite subjects; but was one by no means looked upon with approbation by any but those whose interest was thus advanced. Their illegality was often insisted upon, both by charters and statutes, and was in the reign of Elizabeth solemnly declared (*n*). An exception was, however, made in the case of an introducer of a new trade, or the inventor of a new machine. The statute of monopolies (21 Jac. 1, c. 3), which was passed not long afterwards, adopted this view, and allowed a royal patent of privilege to be granted for fourteen years, to any inventor of a new manufacture, for the sole working or making of the same. This statute has been in this, as in other instances of tentative legislation, followed by numerous others, the details of which it is needless here to refer to. The whole right of patentees now depends upon an act passed in the year 1852 (*o*); for, though the act creates no right in the crown to grant a patent,—such right being inherent,—yet, unless the patent accords with the provisions of the act, it is declared to be void.

We can here only very shortly notice what these provisions are. The most important of them seem to be these. The subject-matter of the patent must be a new * manufacture, not used by others at the time of making the letters patent: the question whether any particular alleged invention [* 584] is new has been one fruitful, to a remarkable extent, with litigation.

(*m*) Sect. 20, extending the privileges given by 3 & 4 Will. 4, c. 15.

(*n*) *The case of monopolies*, 11 Rep. 846, 44 Eliz.

(*o*) 15 & 16 Vict. c. 88.

(398) See Act of Congress of July 8, 1873 (16 U. S. Stat. at Large, 198, ch. 230); 2 Kent's Com. 366-373; Curtis on Patents; Schouler on Personal Property, 654-671.

Next, the patentee must be the true and first inventor; but for the purpose of this requirement, the first introducer from abroad is considered to be the inventor of the subject of the patent.

Lastly, the patentee must, in a document called the specification, accurately describe the nature of his invention, and how it is to be performed, and state exactly what he claims as his invention. This must be filed in the Court of Chancery, within six months after the letters patent are granted; though it may be, and often is, filed with the petition for the grant (*p*). Should, however, the patentee afterwards find that he has claimed too much, he may disclaim the part which is in excess of his proper invention (*q*). Patents for warlike inventions may be purchased by the state, in which case they are kept secret, and no specification is filed (*r*).

3. Patterns or designs for manufactures, such as for carpets, paperhangings, and the like, are also, when duly registered according to law, protected from being imitated without the permission of the designer. The act by which this right is conferred (*s*) distinguishes several classes of manufactures, the ornamentation of which is protected, and different periods, varying from nine months to three years, are assigned during which the protection applies:

Under the act, a registrar is appointed for the purpose of registering the design, and receiving copies, drawings, &c., of it: these are afterwards open for public inspection. These copies or drawings, which the act requires to be deposited with the registrar, must accurately * describe the design (*t*), [* 585] so that, as soon as the period of protection has expired, the public may be able to make free use of the design.

Sculptures, casts, paintings, &c. Sculptures and casts are also protected from being copied by another series of acts (*u*), as also are paintings, engravings, and photographs (*v*).

Lastly, trade-marks are protected by law. If a manufacturer uses a symbol to denote that certain goods upon which it is affixed are manufactured by him, and the goods are put into the market (*w*), a certain reputation, accompanied by substantial advantages, may be obtained. This the law protects, and the sole right to use the trade-mark will be vindicated (*x*). This right the law now regards as property (*y*). (399)

(*p*) As to the specification, see *Simpson v. Holiday*, L. R. 1 E. & L. 815.

(*q*) See 5 & 6 Will. 4, c. 83, s. 1; 7 & 8 Vict. c. 69, ss. 5, 6.

(*r*) 22 Vict. c. 18.

(*s*) 5 & 6 Vict. c. 100, amended by 21 & 23 Vict. c. 70, and extended by 24 & 25 Vict. c. 73.

(*t*) *Norton v. Nichols*, 4 K. & J. 475; *Holds-worth v. M'Crea*, L. R. 2 H. L. E. & I. 380.

(*u*) 88 Geo. 3, c. 71; 54 Geo. 3, c. 56; 13 & 14 Vict. c. 104.

(*v*) 25 & 26 Vict. c. 63.

(*w*) No trade-mark can be acquired without actual sale; mere expenditure in advertisement does not confer it. *Maxwell v. Hogg*, L. R. 2 Ch. 307.

(*x*) See *post*, vol. iii. p. 69.

(*y*) *Hall v. Barrows*, 32 L. J. Ch. 548; 33 *ib.* 204; *Leather Cloth Co. v. American Leather Cloth Co.*, 11 H. L. 523. Formerly it was thought to rest upon fraud only, *Blanchard v. Hill*, 3 Atk. 484.

(399) In this country trade-marks are protected by courts of law, by courts of equity, as well as by statutes. An act of congress makes ample provision for securing the rights of persons having trade-marks. See Act of July 8, 1870 (16 U. S. Stat. at Large, 198, ch. 230, §§ 77-84). But courts of law and of equity have furnished remedies to owners of trade-marks long before the enactment of statutes for that purpose. To discuss the subject at length in this place is not to be expected, yet a few of the more general principles may be noticed. A trade-mark is a name, letter, mark, symbol, or device, invented or used by a maker or

seller of the goods or things made or sold by him, to indicate that they are made or sold by him, or that he has some exclusive right to sell them, and thus to secure to himself the profits arising from the making or sale of the goods or things so bearing that peculiar character or mark. A trade-mark may be a device, character or symbol which is, in itself, without any definite meaning, or it may be a descriptive word indicating the origin, nature and character of the goods, or it may consist of the name of a person, or place, or thing, together with some device, character or symbol. The essential principle or element of a trade-mark is that it shall indicate the true origin or ownership of the article or goods protected. *Amoskeag Manufacturing Co. v. Spear*, 2 Sandf. Sup. Ct. 599; *Gillott v. Esterbrook*, 48 N. Y. (3 Sick.) 874, 876; 8 Am. Rep. 553; *Falkinburg v. Lucy*, 35 Cal. 52; *Boardman v. Meriden Britannia Co.*, 35 Conn. 402; *Ferguson v. Duval*, 2 Brewst. (Pa.) 314; *Filley v. Fassett*, 44 Mo. 173; *Delaware & Hudson Canal Co. v. Clark*, 13 Wall. 811, 822, 823.

The name of a place may be adopted and used as a trade-mark; and where water-lime was made at Akron, N. Y., from quarries near that place, the plaintiff was protected in his trade-mark, which was "Akron," as against the defendant who made his water-lime from stone quarried at Syracuse, N. Y., a place quite distant from Akron, and who labeled his barrels "Alvord's Onondaga Akron Cement of Water-Lime, manufactured at Syracuse, N. Y." *Newman v. Alvord*, 51 N. Y. (6 Sick.) 189; 10 Am. Rep. 588; see *Wotherpoon v. Currie*, 43 L. J. Ch. 130; L. R., 5 H. L. 508; and stated, 51 N. Y. (6 Sick.) 197; *Seizo v. Provençende*, L. R., 1 Ch. App. 192; *Lee v. Haley*, L. R., 5 Ch. App. 155; *McAndrew v. Bassett*, 4 De Gex, Jones & Smith, 890. The principle upon which these cases were decided was that the defendant should not be permitted, by the adoption of a trade-mark which was untrue and deceptive, to sell his own goods as those of the plaintiff.

But no one can apply the name of a place, or of a district of country, to a well-known article of commerce, and thereby obtain such an exclusive right to the application as to prevent others inhabiting the same place or district, or dealing in similar articles coming from the same place or district, from truthfully using the same designation. *Delaware & Hudson Canal Co. v. Clark*, 13 Wall. 811; *Newman v. Alvord*, 51 N. Y. (6 Sick.) 189; 10 Am. Rep. 588, do not conflict with this rule; see *Lee v. Wolff*, 1 Pars. Sup. Ct. 626; 46 How. 157; 15 Abb. N. S. 1.

A natural product of a peculiar nature, such as a mineral water found in a spring upon a person's land, may be the subject of a trade-mark; and the owner will be protected in the exclusive use of a name given to it and employed as a trade-mark; and, therefore, the word "Congress," in the phrases "Congress Water," and "Congress Spring Water," is a legitimate trade-mark, which will be protected by the courts. *Congress & Empire Spring Co. v. High Rock Congress Spring Co.*, 45 N. Y. (6 Hand) 291; 6 Am. Rep. 82; 10 Abb. N. S. 348.

The surname of an individual may be used as a trade-mark to designate or distinguish a machine manufactured by him; and another person of the same surname will not be permitted to use it in such a way as to deceive the public, and to deprive the other party of the benefit of the notoriety and market which his machines had gained. *Hove v. Hove Machine Co.*, 50 Barb. 236; see also *Curtis v. Bryan*, 2 Daly, 312; 36 How. 33; *Croft v. Day*, 7 Beav. 84; *Sykes v. Sykes*, 3 Barn. & Cress. 541.

One who coins a new word and uses it to designate an article made or sold by him will be entitled to its exclusive use as a trade-mark. *Caswell v. Davis*, 4 Abb. N. S. 6; 35 How. 76; *Wolfe v. Goulard*, 18 id. 64; *Burnett v. Phalon*, 5 Abb. N. S. 212; 1 Abb. Ct. App. 267; 3 Keyes, 594; 3 Trans. App. 167; *Davis v. Kendall*, 2 R. I. 569.

But no manufacturer can acquire a special property in an ordinary term or expression, the use of which as an entirety is essential to the correct and truthful designation of a particular article or compound. *Town v. Stetson*, 3 Daly, 53; *Corwin v. Daly*, 7 Bosw. 222; *Choynski v. Cohen*, 39 Cal. 501.

Figures and numbers may be used as a part of a trade-mark. *Boardman v. Meriden Britannia Co.*, 35 Conn. 402; *Gillott v. Esterbrook*, 48 N. Y. (3 Sick.) 874; 8 Am. Rep. 553; 47 Barb. 455.

As to the persons who may acquire a right to a trade-mark it is well settled that not only citizens of this country, but alien friends will be equally protected. *Taylor v. Carpenter*, 3 Sandf. Ch. 803; 3 Story's C. C. Rep. 450; 2 Wood. & M. 1; *Coats v. Holbrook*, 2 Sandf. Ch. 586; *State v. Gibbs*, 56 Mo. 133.

Any one may invent or adopt and use a trade-mark, and advertise or introduce it to the public as his own. But, under the recent statute of July 8, 1870 (U. S. Stat. at Large, 198,

Good-will. Closely allied to trade-mark, is the good-will of a business, which also is now considered as properly part of the assets of a trader (z). (400)

(s) *Johnson v. Helley*, 2 De G. J. & S. 446.

ch. 230, §§ 77-84), such trade-mark must be duly recorded to render its provisions available. To entitle a person to the protection of a trade-mark it must be clear that it is an honest mark, and that an honest use is made of it; for if it appears that such mark is fraudulent, or that a fraudulent use is made of it, the courts will refuse to interfere for its protection. *Fetridge v. Wells*, 4 Abb. 144; 18 How. 385; *Samuel v. Berger*, 4 Abb. 88; 24 Barb. 163; 18 How. 343; *Hobbs v. Francais*, 19 id. 587; *Partridge v. Menck*, How. App. Cas. 547; *Fovle v. Spear*, 7 Penn. L. J. 176; *Heath v. Wright*, 3 Wall. Jr.; *Phalon v. Wright*, 5 Phila. 484; *Palmer v. Harris*, 60 Penn. St. 156.

To constitute an infringement of a trade-mark it is not necessary that the imitation should be so close as to deceive a person who sees the original and the imitation side by side, for it will be sufficient if the resemblance is such that ordinary purchasers, proceeding with ordinary caution, would be likely to be deceived. *Seizo v. Provezende*, L. R., 1 Ch. App. 192; 1 Jur. (N. S.) 215; 14 W. R. 357; 14 L. T. (N. S.) 814; *Partridge v. Menck*, 3 Barb. Ch. 101; How. App. Cas. 558; 2 Sandf. Ch. 622; *Coffeen v. Brunton*, 4 McLean, 516; *Walton v. Crowley*, 8 Blatchf. C. C. 440; *Bradley v. Norton*, 83 Conn. 157; *Filley v. Fussett*, 44 Mo. 173; *Hostetter v. Vowinkle*, 1 Dillon, 329.

Where the imitation is not close, but is such that ordinary purchasers who were paying ordinary attention to their purchases would not be deceived, there is no infringement. *Ib.*; *Fetridge v. Wells*, 4 Abb. 144; 18 How. 385; *Calladay v. Baird*, 4 Phila. 139; *Swift v. Day*, 4 Rob. 611; *Falkinburg v. Lucy*, 35 Cal. 52; *Rowley v. Houghton*, 2 Brewst. (Pa.) 303.

The remedy given by law to an injured party for an infringement of a trade-mark is by an action for the recovery of damages, or by injunction to restrain the continuance of the injury. As to remedy by action see *Thomson v. Winchester*, 19 Pick. 214; *Marsh v. Billings*, 7 Cush. 322; *Lemoine v. Gaulton*, 2 E. D. Smith, 343; *Derringer v. Plate*, 29 Cal. 292.

As to remedy by injunction see *Hostetter v. Vowinkle*, 1 Dill. 329; *Rowley v. Houghton*, 7 Phila. 39; *Burnett v. Phalon*, 1 Abb. Ct. App. 267; 5 Abb. N. S. 212; 3 Keyes, 594; 8 Trans. App. 167; *Wolfe v. Burke*, 7 Lans. 151; *Wolfe v. Barnett*, 24 La. Ann. 97; *Coats v. Holbrook*, 2 Sandf. Ch. 586; *Taylor v. Carpenter*, 11 Paige, 292; 2 Sandf. Ch. 603; *Morrison v. Case*, 9 Blatchf. 548; *Ellis v. Zeilin*, 42 Ga. 91; *McCartney v. Garnhart*, 45 Mo. 593.

Where it is clear that there has been an infringement by the defendant of the plaintiff's trade-mark, it will not be any defense that the defendant's goods are as good as those made or sold by the plaintiff. *Coats v. Holbrook*, 2 Sandf. Ch. 586; *Taylor v. Carpenter*, 11 Paige, 292; *Thomson v. Winchester*, 19 Pick. 214.

(400) In the sale of property or of any kind of trade, profession, or business, it is quite common for the vendor to sell the "good-will" of such property or business; and sometimes, if not generally, to agree not to establish or carry on a rival business at the same place. Such agreements, when founded upon a sufficient consideration, are valid, and will be enforced unless the restraint is so unlimited as to territory as to be void.

The good-will of a business may be valuable, and it may form, in whole or in part, the subject-matter of a contract of sale, therefore a representation as to its value is material, and a misrepresentation, knowingly made by the vendor, is a fraud upon the purchaser which will entitle him to rescind the contract if it is an entire one. *Crouss v. Fessler*, 39 Cal. 336.

A party who has sold the good-will of a business for a valuable consideration will be restrained from holding himself out as continuing his former business. *Elliott's Appeal*, 60 Penn. St. 453; *Spier v. Lambdin*, 45 Ga. 319.

An action lies to recover the sum agreed to be paid for the "good-will" of a physician's practice. *Hoyt v. Holly*, 39 Conn. 326.

A good-will is held to be the mere probability that the old customers will continue to come to the old place; but the good-will is the good-will as the vendor used it, and is only co-extensive with the business carried on. *Bradford v. Peckham*, 9 R. I. 250.

* CHAPTER XXV.

[* 586]

PROPERTY IN THINGS PERSONAL.

HAVING in our last chapter distinguished the various kinds of personal property, we now come to deal with the nature of the interest which may be had in them. As to chattels real, or interests in land, nothing need be added to what has already appeared.

As to all things in possession of an inanimate nature, as plate, money, jewels, and the like, as also fixtures and plants when severed from all connection with the soil, we need only remark that they cannot be removed out of the owner's possession without his own act or consent, or, at least, without doing him an injury, which it is the business of the law to prevent or remedy.

But with regard to the property in animals, which have in themselves a principle and power of motion, and (unless particularly confined) can convey themselves from one part of the world to another, there is a great difference made with respect to their several classes, not only in our law, but in the law of nature and of all civilized nations. (401)

(401) The common law of England and of this country regards animals as a subject of ownership or property, either qualified or absolute; and they are divided into two principal classes, one of which is wild, and the other tame. Animals of a wild nature, at liberty and unreclaimed, are not subjects of absolute property. Tame animals are subjects of absolute property. An animal, once wild, may become tame, and thus become a subject of ownership like other tame animals. So wild animals may be captured, and thus become the property of the captor; or, they may be killed and thus become property.

The mere pursuit of a wild animal is not alone sufficient to confer ownership upon the pursuer; and he must have wounded the animal, or in some other manner have brought him within his control. *Pierson v. Post*, 8 Caines, 175; *Buster v. Newkirk*, 20 Johns. 75; *Young v. Hichens*, 6 Ad. & El. (N. S.) 606.

If the animal is brought within the pursuer's control, as by mortally wounding it, or by inclosing it in a net, or otherwise securing it so as to deprive it of its natural liberty, he may acquire a property in it. *Ib.*

Bees are of a wild nature, but they may be reclaimed and hived, and thus become the property of the possessor. And if a swarm of reclaimed bees leave the hive of the owner, his property in them will continue as long as he can keep them in sight and identify them; and if they enter the tree of another person, and a stranger cuts the tree and takes the bees, he will be liable to the owner whose hive they left. *Goff v. Kùts*, 15 Wend. 550. Merely finding a tree on the land of another person, in which tree there is a swarm of bees, and marking the tree with the initials of the finder's name, is not reclaiming the bees, nor does it vest in him any title to the bees. *Gillet v. Mason*, 7 Johns. 16. Wild bees in a bee tree belong to the owner of the land upon which such tree stands. *Ferguson v. Miller*, 1 Cow. 243; *Goff v. Kùts*, 15 Wend. 550; *Adams v. Burton*, 43 Vt. 30; *Idol v. Jones*, 2 Dev. L. (N. C.) 163; *Cock v. Weatherby*, 5 Smedes & Marsh. 833.

If a person discovers a swarm of bees in a bee tree upon the lands of another person, who gives him permission to take the bees, and he then marks the trees with his initials, but does nothing more, this will not enable him to recover the value of the bees as against a third person who afterward took them by the permission of the owner of the tree. *Ferguson v. Miller*, 1 Cow. 243. But, if the finder of the bees is engaged in the act of cutting down the tree, by the permission of the owner, and while thus engaged, he is driven away from such work and prevented from cutting down the tree, by a third person, who, subsequently to the first license, obtained a license from the owner of the tree to take the bees, but without revoking the first license, the person first beginning to cut the tree will have

It is no part of the lawyer to enter into a classification by zoological principles. It is, and must be sufficient for him to point out those distinctions which exist according to the established customs of society, and the express

a superior right to the bees, and may maintain an action against such third person for cutting down the tree and taking away the bees and honey. *Adams v. Burton*, 43 Vt. 38.

The owner of bees which have been reclaimed, but have left the hive, and gone into a tree upon another person's land, may maintain an action against a third person who destroys the bees and takes the honey. *Goff v. Kilts*, 15 Wend. 550.

Doves are of a wild nature, and as such are not subjects of larceny, except when in the care and custody of the owner; as when in a dove-cot or pigeon-house, or when in the nest before they are able to fly. *Commonwealth v. Chase*, 9 Pick. 15. If pigeons are so far tame that they come home every night to roost in wooden boxes hung on the outside of the house of their owner, and a person comes in in the night and steals them out of these boxes, it is a larceny. *Rea v. Brooks*, 4 Car. & P. 181. So, partridges, hatched and reared by a common hen, while they remain with her, and from their inability to escape are practically under the dominion and in the power of the owner of the hen, may be the subject of larceny, though the hen is not confined in a coop, or otherwise, but allowed to wander with her brood about the premises of her owner. *Reg. v. Spickle*, L. R., 1 C. C. 158; 11 Cox's C. C. 189.

A turkey is a domestic animal, and the subject of larceny. *State v. Turner*, 66 N. C. 618. So of a peacock. *Commonwealth v. Beaman*, 8 Allen (Mass.), 497.

Oysters planted by an individual in a bed clearly designated and marked out in navigable waters, which are free to all the inhabitants of the State, are the property of the person who planted them, and he may maintain an action against one who unlawfully removes or takes them. *Fleet v. Hegeman*, 14 Wend. 42; *Dicker v. Fisher*, 4 Barb. 592; *Loundes v. Dickerson*, 84 id. 586.

But a person who plants oysters in navigable waters, opposite to the land of another person, does not thereby acquire such a possession of them as will enable him to maintain an action against such adjacent owner for taking them away. *Brinkerhoff v. Starkins*, 11 Barb. 248; see, also, *Arnold v. Mundy*, 1 Halst. (N. J.) 1; *State v. Taylor*, 3 Dutch. (N. J.) 117; see *ante*, p. 486, note 204.

A dog is a species of property, and, for an injury to him, or for killing him, an action at law may be maintained; and, in an action for killing a dog, it is not necessary to show that he had any pecuniary value. *Parker v. Miss*, 27 Ala. 490, 493; *Dodson v. Mock*, 4 Dev. & Bat. 146; *Dunlap v. Snyder*, 17 Barb. 561; *Wheatley v. Harris*, 4 Sneed (Tenn.), 468; see, also, *State v. McDuffie*, 84 N. H. 533; *United States v. Gideon*, 1 Minn. 292.

Every kind of domestic animals, such as horses, cows, sheep, swine, ducks, geese, turkeys, hens, and the like, are of a tame nature, and are the subjects of ownership or property, and an action lies for unlawfully taking, injuring, or destroying them.

There are instances, however, where the acts of domestic animals are such as will justify a person in killing them. Where the owner of an ass which he knows to be dangerous, and to be in the habit of pursuing and injuring stock, and, with a knowledge of such vicious qualities, permits him to run at large, where he is found pursuing a cow which he threw down, and is in the act of stamping her, the owner of such cow will be justified in killing the ass, if he believes that to be necessary for the purpose of saving his cow. *Williams v. Dixon*, 65 N. C. 416.

But, where a hog had killed one chicken and attempted to kill another, and was found about seventy-five yards from where the defendant's chickens usually ran, where the defendant killed him, it was held error to leave it to the jury whether the hog was of a predatory character, and had the reputation of "a chicken-eating hog," with the instruction that, if such was the fact, any one had a right to destroy it as a public nuisance. *Morse v. Nison*, 6 Jones' Law (N. C.), 293. In the last case the court by PEARSON, Ch. J., said: "We do not concur in the opinion of his honor as to the right of killing hogs that are in the habit of eating chickens. The position that such a hog is a public nuisance and may be killed by any one, is not supported on principle or authority, and would tend to monstrous consequences. * * * It may be the killing will be justified by proving that the danger was imminent, making it necessary "then and there" to kill the hog in order to save the life of the chicken, or prevent great bodily harm; but we are inclined to the opinion that, even

declarations of law. These, when broad enough, will lead to sufficiently satisfactory results. In this view, then, animals may be divided into those which are usually tame, such as horses, kine, sheep, fallow deer (a), pigs,

(a) *Ford v. Tynte*, 81 L. J. Ch. 177.

under these circumstances, it is not justifiable to kill the hog." * * * "It is provoking to see an *old sow* trying to catch young chickens and snapping up one every now and then, in spite of the noises and energetic remonstrances of the hen, but it is not reason, and therefore not the law that so valuable an animal may be destroyed to save the life of an unfledged chicken; at all events the danger must be imminent and the necessity fully made out. In our case the "defendant proved a special killing by the hog of a chicken and another attempt to do so," and afterward "the hog, being near the fence of the defendant, where his chickens were in the habit of running, but not in the act of doing any deed that would injure the defendant or his property, was killed by him," the owner having no *sciens* of this quality of the hog, and having no warning thereof given to him. Upon this evidence his honor ought to have instructed the jury that the plea of "justification" was not sustained, and it was error to lay down the general proposition, that the hog had become a public nuisance, which any man had a right to abate by killing." When the dog of A is on the land of B, chasing fowls, and in the act of destroying one, B may lawfully shoot the dog, in the same manner as if the dog were chasing and killing sheep or other reclaimed and useful animals. *Leonard v. Williams*, 9 Johns. 238. So where a dog had taken fish from the wall of the owner's house where they had been hung up to dry, and a few hours afterward was found trespassing on the same premises, it was held that the owner had a right to protect his property, by killing the dog if that was necessary. *King v. Kline*, 6 Penn. St. 318. If a dog chases or worries animals, other than sheep, it must be shown that the killing of the dog was necessary for the protection of such animals, to constitute a justification for such killing. *Hinckley v. Emerson*, 4 Cow. 251.

Domestic animals cannot be lawfully killed by the owner of lands upon which they may be trespassing at the time, and if he kills them, he will be liable to the owner of the animals for their value. This was held in a case in which geese were trespassing. *Mathews v. Fiestel*, 2 E. D. Smith, 90; so in the case of killing hens that were trespassing, *Clark v. Kilmer*, 107 Mass. 406; *Johnson v. Paterson*, 14 Conn. 1.

A ferocious or dangerous dog which is accustomed to bite mankind, and which is allowed by his owner to run at large, is a common nuisance, and any person may lawfully kill him. *Brown v. Carpenter*, 26 Vt. 688; *Putnam v. Payne*, 13 Johns. 12; *Maxwell v. Palmerton*, 21 Wend. 407; *Woolf v. Chalker*, 81 Conn. 121, 180.

So where a dog is in the habit of haunting a person's dwelling-house, and of disturbing the peace and quiet of his family by barking and howling by day and by night, such person may lawfully kill the dog if he cannot otherwise be prevented from continuing the annoyance. *Brill v. Flagler*, 28 Wend. 354.

In many of the States there are statutes which authorize the killing of dogs which are in the habit of killing, wounding, worrying, or chasing sheep.

So in some of the States the statute requires that the dog shall be registered, licensed, or wear a collar indicating the owner's name, etc., and in default of a compliance with the law the dog may be killed. *Tower v. Tower*, 18 Pick. 262; *Morey v. Brown*, 42 N. H. 878.

The statute does not authorize an entry into a dwelling-house for the purpose of killing a dog which is not duly registered and collared. *Bishop v. Fahay*, 15 Gray, 61; *Kerr v. Seaver*, 11 Allen, 151.

In Kentucky the statute makes it lawful for any person to kill, or cause to be killed, any dog which he may find roaming at large on his premises without the presence of the owner or keeper of such dog. *Bradford v. McKibben*, 4 Bush (Ky.), 545.

There are many cases in which the law holds the owner or possessor of domestic animals responsible for the injuries which they may do to the person or property of others. As a general rule the owner of a domestic animal is not liable for any injury which it may do to the person or to the animals of another person, if he has no notice or knowledge that the animal has done such injury before, or was accustomed to do such mischief. *Vrooman v. Lawyer*, 18 Johns. 339; *Van Leuven v. Lyke*, 1 N. Y. (1 Comst.) 515; *Smith v. Causey*, 22 Ala. 568.

[*587] *poultry, and the like, and those which are usually wild. No difficulty occurs in distinguishing them, and of the former class a man may have as absolute a property as in any inanimate beings; because these con-

Where animals do an injury to the person or animals of another, at a time and place when they are not trespassing upon the lands of the latter, the owner of the animals will be liable if he had previous notice that they were accustomed to commit injuries of the same or a similar character. *Kittridge v. Elliott*, 16 N. H. 77; *Coggswell v. Baldwin*, 15 Vt. 404; *Barnes v. Chapin*, 4 Allen, 444; *Stumps v. Kelly*, 22 Ill. 140; *Earhart v. Youngblood*, 27 Penn. St. 331; *Buckley v. Leonard*, 4 Denio, 500; *Durden v. Barnett*, 7 Ala. 169; *Partlow v. Haggarty*, 35 Ind. 178.

If the owner of a dog appoints a servant to keep it, the servant's knowledge of the dog's ferocity is the knowledge of the master. *Baldwin v. Casella*, L. R., 7 Exch. 835; 41 L. J. Exch. 187; 21 W. R. 16; 26 L. T. (N. S.) 707.

The owner of a wild and savage beast, such as a lion, tiger, bear, wolf, or the like, is presumed to know the nature, disposition and habits of such animals, and if he does not keep them properly and effectually secured he will be liable for any injuries which they may do according to their natures, without any proof that the owner knew them to be ferocious, or that they were negligently kept or secured. *Beaussi v. Harris*, 1 Fost. & Finl. 92; *May v. Burdett*, 9 Q. B. 101, 113; *Scribner v. Kelley*, 38 Barb. 14; *Earl v. Van Alstine*, 8 id. 630, 632; *Laverone v. Mangianti*, 44 Cal. 138.

Although the law does not hold the owner of domestic animals liable for injuries which they may do to the person or animals of another, if he had no previous notice of their propensities to do such injuries, yet this rule does not apply when these animals are trespassing upon the lands of another where they injure animals belonging to the owner of such land, for, in that case, an action may be maintained for the injury done to the animals of such owner of the land. *Van Leusen v. Lyke*, 1 N. Y. (1 Comst.) 515; *Angus v. Radin*, 2 South. (N. J.) 815; *Dolph v. Petrie*, 7 Watts & Serg. 867.

If the owner of a horse negligently permits it to run loose and unattended upon the sidewalks of a populous city, where it kicks and injures a person who is passing along the sidewalk, the owner will be liable for the injury without alleging or proving that the horse was vicious. *Dickson v. McCoy*, 39 N. Y. (12 Tiff.) 400; 7 Trans. App. 111; *Goodman v. Gay*, 15 Penn. St. 188.

So where a sucking colt, while following its dam which is led by her owner in a highway, is kicked and killed by a horse which has been turned loose in the highway without a keeper, and where the owner of the colt was exercising reasonable care, he may recover the value of the colt from the owner of the horse, although it was not vicious. *Barnes v. Chapin*, 4 Allen, 444.

So a cow which is accustomed to hook, to the owner's knowledge, and which hooks and kills another's horse in the highway while on her way to her watering place, the owner will be liable for the value of the horse. *Coggswell v. Baldwin*, 15 Vt. 404.

In some cases the owner of an animal having a contagious disease will be liable if the disease is communicated to a sound horse belonging to another person. And where the defendant brought his glandered horses to the plaintiff's farm, and thereby caused the plaintiff's horses to become infected and to die of the disease, the defendant will be liable for the damages; and it is of no consequence that he was not guilty of false representations to the plaintiff as to the existence of the disease. *Hite v. Blandford*, 45 Ill. 9.

So where the defendant's diseased sheep trespass upon the plaintiff's land, where they communicate the disease to the plaintiff's sheep, of which disease many of his sheep die, the defendant will be liable for the resulting damages without any proof of his knowledge of the disease in his sheep. *Barnum v. Vandusen*, 16 Conn. 300. So a party who is allowed to remain on land under a mere license, if he so uses it as to make it the means of communicating an infectious disease to sheep, will be liable for the damages which result to the sheep of the licensor, if he was ignorant of the danger to which his sheep were thus exposed. *Elton v. Winnie*, 20 Mich. 156; 4 Am. Rep. 377.

But a party will not be liable to an action, although he turns his diseased sheep into a lot of his own, and though the disease is communicated to the sheep of his neighbor, who owns an adjoining lot into which he turns his sheep. *Fisher v. Clark*, 41 Barb. 329.

tinue perpetually in his occupation, and will not stray from his house or person, unless by accident or fraudulent enticement, in either of which cases the owner does not lose his property (*b*). The stealing, or forcible abduction, of such property as this, is criminal; for these are things of intrinsic value, serving for the food of man, or else for the uses of husbandry (*c*).

Of all tame and domestic animals, the brood belongs to the owner of the dam or mother; the English law agreeing with the civil, that "*partus sequitur ventrem*" in the brute creation, though for the most part in the human species it disallows that maxim. And therefore, in the laws of England (*d*), as well as Rome (*e*), "*si equam meam equus tuus praegnantem fecerit, non est tuum sed meum quod natum est.*" And, for this Puffendorff (*f*) gives a sensible reason: not only because the male is frequently unknown; but also because the dam, during the time of her pregnancy, is almost useless to the proprietor, and must be maintained with greater expense and care; wherefore, as her owner is the loser by her pregnancy, he ought to be the gainer by her brood. An exception to this rule is in the case of young cygnets; which belong equally to the owner of the cock and hen, and shall be divided between them (*g*). But here the reasons of the general rule cease, and "*cessante ratione cessat et ipsa lex.*" for the male is well known, by his constant association with the female; and for the same reason the owner of the one doth not suffer more disadvantage during the time of pregnancy and nurture, than the owner of the other.

* The second main class of animals consists of those which are not of a tame and domestic nature. These cannot be possessed in absolute property, and though there are some cases, such as rooks, where their wild habits approach near to domestication, yet, unless they be clearly useful to man, either for the purpose of food or otherwise, and their existence is promoted by his labour, no injury is in law deemed to arise by their destruction (*h*). [* 588]

This leads us to the question, how far they may become the subject of property; the answer to which depends partly upon general principles, and partly upon express declaration of law contained in acts of parliament.

First, then, a man may be invested with a qualified, but not an absolute, property in all creatures that are *ferae naturae*, either *per industriam*, *propter impotentiam*, or *propter privilegium*.

(*b*) 2 Mod. 819.

(*c*) 1 Hal. P. C. 511, 512.

(*d*) Bro. Abr. tit. *Propertie*, 29.

(*e*) Dig. 6. 1. 5.

(*f*) L. of N. l. 4, c. 7.

(*g*) 7 Rep. 17.

(*h*) *Hannam v. Mockett*, 2 B. & Cr. 934.

Yet, notwithstanding one has a right to use his own premises as a hospital for his diseased horses, he has no right to permit such horses, when afflicted with a contagious disease, to go at large in the highway, or to water them at a public tank used for watering the sound horses of other persons. *Mills v. New York & Harlem R. R. Co.*, 2 Rob. 826; affirmed, 2 Hand, 619, n.

Where horses are frightened by a locomotive and become uncontrollable, and run away with the owner, without any fault on his part, he will not be liable for the injury which may result to another in consequence. *Brown v. Collins*, 53 N. H. 442. So where the defendant's horse is frightened by another runaway horse, and also runs away and injures the plaintiff's horse, no action lies if the defendant's horse was properly tied or secured. *Shawhan v. Clarke*, 24 La. Ann. 890.

1. A qualified property may subsist in animals *feras naturae*, *per industriam hominis*: by a man's reclaiming and making them tame by art, industry, and education (i); or by so confining them within his own immediate power, that they cannot escape and use their natural liberty.

1. Qualified property per industriam.

Such are wild deer in a park, pheasants or partridges in a mew, hawks that are fed and commanded by their owner, and fish in a private pond or in trunks. These are no longer the property of a man, than while they continue in his keeping or actual possession; but if at any time they regain their natural liberty, his property instantly ceases; unless they have *animus revertendi*, which is only to be known by their usual custom of returning (k). A maxim which is borrowed from the civil law (l); "*revertendi animus videtur designare habere tunc, cum revertendi * consuetudinem deseruerint.*" The

[* 589] law therefore extends this possession farther than the mere manual occupation; for a tame hawk, that is pursuing his quarry in his owner's presence, though he is at liberty to go where he pleases, is nevertheless property; for he has *animus revertendi*. So pigeons, that are flying at a distance from their home (especially of the carrier kind), and likewise the deer that is chased out of a park or forest, and is instantly pursued by the keeper or forester, all remain in possession, and are still subject to this qualified property in them. But if they stray without their owner's knowledge, and do not return in the usual manner, it is then lawful for any stranger to take them (m). But if a deer, or any wild animal reclaimed, wears a collar or has some other mark upon him, and goes and returns at his pleasure; or, if a wild swan is taken, and marked and turned loose in the river, the owner's property in him still continues, and it is not lawful for any one else to take him (n); but otherwise, if the deer has been long absent without returning, or the swan leaves the neighbourhood. Bees also are *feras naturae*; but, when hived

Bees.

and reclaimed, a man may have a qualified property in them, by the law of nature, as well as by the civil law (o). And to the same purpose, not to say in the same words with the civil law, speaks Bracton (p): occupation, that is, hiving or including them, gives the property in bees; for though a swarm lights upon a tree, the owner of the tree has no more property in them till he has hived them, than he has in the birds which make their nest thereon; and therefore if another hives them, he shall be their proprietor: but a swarm, which fly from and out of a hive, belong to the owner of the hive so long as he can keep them in sight, and have power to pursue them, or, which [* 590] is much the same thing, identify them: and in these * circumstances no one else is entitled to take them. But it has been also said (q), that with us the only ownership in bees is *ratione soli*; and the charter of the forest (r), which allows every freeman to be entitled to the honey found within his own woods, affords great countenance to this doctrine, that property may be had in bees, in consideration of the property of the soil whereon they are found (s).

In all these creatures, reclaimed from the wildness of their nature, the prop-

(i) See in general the observations of Mr. Justice Bayley, 2 B. & C. 937; Com. Dig. *Biens* (F.), and *Action sur Trover* (C.); and 1 Saund. 84.

(k) Bracton, 1. 2, c. 1; 7 Rep. 17. See 4 Car. & P. 131.

(l) Inst. 2. 1. 15.

(m) Finch, L. 177.

(n) Crompt. of Courts, 167; 7 Rep. 16.

(o) Puff. l. 4, c. 6, § 5; Inst. 2. 1. 14.

(p) L. 2, c. 1, § 8.

(q) Bro. Abr. tit. *Propertis*, 87, cites 43 Edw.

8, 24.

(r) 9 Hen. 3, c. 18.

(s) See *Hannam v. Mockett*, 2 B. & Cr. 934. 944; Sir T. Raym. 33.

erty is not absolute, but defeasible; a property that may be destroyed if they resume their ancient wildness, and are found at large. For if the pheasants escape from the mew, or the fishes from the trunk, and are seen wandering at large in their proper element, they become *feras naturas* again; and are free and open to the first occupant that has ability to seize them. But while they thus continue a person's qualified or defeasible property, they are as much under the protection of the law, as if they were absolutely and indefeasibly his. We must bear in mind that special laws have been made concerning certain birds and animals falling under the legal definition of "game:" of these we shall say somewhat more presently.

2. A qualified property may also subsist with relation to animals *feras naturas, ratione impotentiae*, on account of their own inability. As when hawks, herons, or other birds build in a man's trees, or coney or other creatures make their nests or burrows in his land, and have young ones there; he has a qualified property in those young ones till such time as they can fly or run away, and then the property expires (t): but till then, it is in some cases trespass, and in others a criminal offence, for a stranger * to take them away (u). For here, as the owner of the land has it in his power to do what he pleases with them, the law therefore vests [* 591] a property in him of the young ones, in the same manner as it does of the old ones if reclaimed and confined: for these cannot, through weakness, any more than the others through restraint, use their natural liberty and forsake him.

3. A man may, lastly, have a qualified property in animals *feras naturas, propter privilegium*: that is, he may have some special privilege of hunting, taking, and killing them, in exclusion of other persons. Here he has a transient property in these animals, usually called game, so long as they continue within his liberty (x); and may restrain any stranger from taking them therein; but the instant they depart into another liberty, this qualified property ceases. Of this we have already spoken (y), and will presently add somewhat more.

The qualified property which we have hitherto considered, extends only to animals *feras naturas*, when either reclaimed, impotent, or privileged. Many other things may also be the objects of qualified property. It may subsist in the very elements, of fire or light, of air, and of water. A man can have no absolute permanent property in these, as he may in the earth and land; since these are of a vague and fugitive nature, and therefore can admit only of a precarious and qualified ownership, which lasts so long as they are in actual use and occupation, but no longer. The law regulating all rights concerning them has been sufficiently dealt with whilst discussing the nature of easements.

These kinds of qualification in property depend upon the peculiar circumstances of the subject-matter, which is not capable of being under the absolute dominion of any proprietor. But property may also be of a qualified or * special nature, on account of the particular circumstances of the owner, when the thing itself is very capable of absolute ownership. As in case of bailment, or delivery of goods to another person for a particular use: as to a carrier to con-

2. Qualified property, propter impotentiam.

3. Qualified property, propter privilegium.

Secondly, qualified property in other matters and things.

Qualified property arising out of the circumstances of the possession.

(t) Carta de forest. 9 Hen. 3, c. 13.
(u) 7 Rep. 17; Lamb. Eiren. 274.

(x) Cro. Car. 554; Mar. 48; 5 Mod. 376; 12 Mod. 144.

(y) Ante, p. 101, et seq.

vey to London, to an inn-keeper to secure in his inn, or the like. Here there is no absolute property in either the bailor or the bailee, the person delivering, or him to whom it is delivered: for the bailor hath only the right, and not the immediate possession; the bailee hath the possession and only a temporary right. But it is a qualified property in them both: and each of them is entitled to an action, in case the goods be damaged or taken away: the bailee on account of his immediate possession; the bailor, because the possession of the bailee is, mediately, his possession also (z). So, also, in case of goods pledged or pawned upon condition either to repay money or otherwise; both the pledgor and pledgee have a qualified, but neither of them an absolute, property in them: the pledgor's property is conditional, and depends upon the performance of the condition of repayment, &c.; and so too is that of the pledgee, which depends upon its non-performance (a). So the finder of a chattel has the right of possession against everybody except the true owner who lost it (b). (402) But a servant, who has the care of his master's goods or chattels, as a butler of plate, a shepherd of sheep, and the like, has not any property or possession, either absolute or qualified, but only a mere charge or oversight (c).

And having thus distinguished the different degree or quantity of dominion or property to which things personal are subject, and set forth their nature,

we may add a word or two concerning the time of their enjoyment, and the number of their owners; in conformity to the method before observed in treating of the property of things real.

[* 593] * First, as to the time of enjoyment. By the rules of the ancient common law, there could be no future property, to take place in expectancy, created in personal goods and chattels; because, being things transitory, and by many accidents subject to be lost, destroyed, or otherwise impaired, and the exigencies of trade requiring also a frequent circulation thereof, it would occasion perpetual suits and quarrels, and put a stop to the freedom of commerce, if such limitations in remainder were generally tolerated and allowed. But yet in last wills and testaments, such limitations of personal goods and chattels in remainder, after a bequest for life, were permitted (d): though originally that indulgence was only shown, when merely the use of the goods, and not the goods themselves, was given to the first legatee (e); the property being supposed to continue all the time in the executor of the devisor. But now that distinction is disregarded (f): and therefore, if a man, either by deed or will, limits his books or furniture to A.

(z) 1 Roll. Abr. 607.

(a) Cro. Jac. 245.

(b) 1 Str. 504; *post*, p. 597.

(c) 8 Inst. 108.

(d) 1 Eq. Cas. Abr. 360.

(e) Mar. 106.

(f) 2 Freem. 206.

(402) The right of the finder of a chattel to maintain trover for its conversion as against every one but the true owner and those claiming under him is well established in this country. *Poole v. Symonds*, 1 N. H. 289; *Pinkham v. Gear*, 3 id. 484; *Ellery v. Cunningham*, 1 Metc. (Mass.) 112; *Magee v. Scott*, 9 Cush. (Mass.) 148; *McLaughlin v. Waite*, 9 Cow. 670; 5 WELD. 404; *Harker v. Dement*, 9 Gill. (Md.) 7; *Clark v. Maloney*, 8 Harr. (Del.) 68; see *Armory v. Delamirie*, 1 Smith's Lead. Cas. 470 (636), and the cases there collected.

for life, with remainder over to B., this remainder is good (*g*): (403) unless, indeed, the property is such, that *ipso usu consumitur*; for instance, food or fuel; for then a gift of a life interest in it confers an absolute ownership (*h*). But, where an estate tail in things personal is given to the first or any subsequent possessor, it vests in him the total property, and no remainder over shall be permitted on such a limitation (*i*). For this, if allowed, would tend to a perpetuity (*j*): and therefore the law vests in him at once the entire dominion of the goods, being analogous to the fee-simple which a tenant in tail may acquire in a real estate. By the aid of trusts binding in a court of equity, but not recognized at law, settlements of personalty may be made extending * over the period which we have already mentioned when discussing [* 594] the rules against perpetuity (*k*) as governing the limitations of real estates; and this is the usual mode of settlement of personalty upon a marriage.

Next, as to the number of owners. Things personal may belong to their owners, not only in severalty, but also in joint-tenancy, and in common, as well as real estates. (404) They cannot indeed be vested in co-parcenary; because that ownership is peculiar to realty. But

(*g*) 1 P. Wms. 652; *Randall v. Russell*, 8 Meriv. 194.

(*h*) *Randall v. Russell*, 8 Meriv. 194.

(*i*) 1 P. Wms. 290.

(*j*) See *Ld. Dungannon v. Smith*, 12 Cl. & Fin. 546; *Ibbetson v. Ibbetson*, 5 M. & Cr. 26; *post*, p. 611.

(*k*) *Ante*, p. 335.

(403) In this country it is a well-established rule that every species of chattels of a durable nature may be given to one person for life, with a valid remainder over to another person. *Griggs v. Dodge*, 2 Day, 28; *French v. Hatch*, 28 N. H. 331, 352; *Covenhoven v. Shuler*, 2 Paige, 122; *Westcott v. Cady*, 5 Johns. Ch. 334; *Scott v. Price*, 2 Serg. & Rawle, 59; *Deihl v. King*, 6 id. 29; *Royall v. Eppes*, 2 Munf. 479; *Mortimer v. Moffatt*, 4 Hen. & Munf. 503; *Logan v. Ladson*, 4 Desaus. 271; *Geiger v. Brown*, 4 McCord, 427; *Brummet v. Barker*, 2 Hill (S. C.), 543; *Bell v. Warn*, 4 Hun, 406.

(404) Lands may be held in severalty, by joint-tenancy, by co-parcenary, or in common, but while real estate is theoretically the subject of tenure, personal property is owned; and, therefore, it would be more correct to designate persons as joint-owners or owners in common, than as tenants in common. Schouler on Pers. Prop. 186.

Where one person holds or owns personal property in his sole right, without any one joined in that right, he is a sole or several owner of such property. Where two or more persons are joined together with reference to the same personal property, having unities of title, time, interest and possession, they are joint owners of such property. *Id.* 187.

In joint ownership in such a case, unity of title is necessary, that is to say, the title should arise under one and the same instrument, or be created by the same act on the part of the donor or seller; unity of time, that is, each interest should vest at the same moment; unity of interest, that is, these interests in the property should be for the same duration and the same quantity; and unity of possession, that is, each tenant or owner must have an undivided possession of each entire part as of the whole, and not possess, one a distinct and separate portion, and the other another distinct and separate portion. The creation of such an ownership depends upon the acts of the parties, for it does not result from operation of the law. *Id.*

Personal property may be owned by several persons in common, as well as by a joint-ownership, with this difference as to the origin of the title, that a joint-ownership must arise by one or the same title or instrument, while owners in common may derive title at different times, and from different persons or sources of title. An agreement that one person will find timber, and that another will manufacture it into shingles, will make the parties tenants in common of the shingles made. *White v. Brooks*, 43 N. H. 402.

Owners in common of chattels may each sell his shares and the purchaser will take his interest; but one owner in common cannot sell the entire property so as to bind the other owners in common. *White v. Osborn*, 21 Wend. 72; *Nowlen v. Colt*, 6 Hill, 461.

if a horse, or other personal chattel, be given to two or more, absolutely, they are joint-tenants hereof; and, unless the jointure be severed, the same doctrine of survivorship shall take place as in estates of lands and tenements (*l*). And, in like manner, if the jointure be severed, as, by either of them selling his share, the vendee and the remaining part-owner shall be tenants in common, without any *jus accrescendi* or survivorship (*m*). So, also, if 100*l.* be given by will to two or more, equally to be divided between them, this makes them tenants in common (*n*); which, as we have formerly seen (*o*), the same words would have done in regard to real estates. But, for the encouragement of husbandry and trade, it is held that a stock on a farm, though occupied jointly, and also a stock used in a joint undertaking, by way of partnership in trade, shall always be considered as common and not as joint property, and there shall be no survivorship therein (*p*).

[* 595]

* CHAPTER XXVI.

TITLE TO THINGS PERSONAL BY OCCUPANCY.

WE are next to consider the title to things personal, or the various means of acquiring, and of losing, such property as may be had in them: both which considerations of gain and loss shall be blended together in one and the same view, as was done in our observations upon real property; since it is for the most part impossible to contemplate the one, without contemplating the other also. And these methods of acquisition or loss are principally ten: 1. By occupancy. 2. By prerogative. 3. By forfeiture. 4. By custom. 5. By succession. 6. By marriage. 7. By contract, including gift or grant. 8. By bankruptcy. 9. By testament. 10. By administration.

Of these species of title the seventh, that by contract, since it can have no validity, except such as the law, by the aid of its courts, will enforce, will be more properly discussed in that part of these Commentaries in which the grounds of actions at law and suits in equity are unfolded. It, therefore, will be treated of in the third part of these Commentaries. We need only here notice that personal property may be assigned by manual delivery, where the nature of the case admits of it, or by deed or any other suitable instrument of transfer. When, however, personal chattels are assigned by deed, but possession is not delivered to the assignee (which usually occurs on the occasion of a mortgage), the assignment, which is then called a bill of sale, is void not only as against the trustee under a subsequent bankruptcy of the assignor, but even * against the sheriff seizing the property in execution, unless a copy of the deed has been filed in the court of queen's bench; moreover, the registry so made must be renewed every five years during the subsistence of the security (*a*).

(*l*) Litt. § 283; 1 Vern. 482.

(*m*) Litt. § 321.

(*n*) 1 Equ. Cas. Abr. 292.

(*o*) *Ante*, p. 344.

(*p*) 1 Vern. 217; Co. Litt. 182.

(*a*) 17 & 18 Vict. c. 36; 29 & 30 Vict. c. 96. As to the rights of the trustee in bankruptcy, see *post*, pp. 629, 630.

And, first, a property in goods and chattels may be acquired by occupancy: which, we have more than once (*b*) remarked, seems to be the original and only primitive method of acquiring any property at all; but which has since been restrained and abridged, by the positive laws of society, in order to maintain peace and harmony among mankind. For this purpose, by the laws of England, gifts, and contracts, testaments, legacies, and administrations, have been introduced and countenanced, in order to transfer and continue that property and possession in things personal, which has once been acquired by the owner. And, where such things are found without any other owner, they for the most part belong to the king by virtue of his prerogative; except in some few instances, wherein the original and natural right of occupancy is still, to some extent, permitted to subsist. These, however, will require scarcely more than a passing notice.

Thus, in the first place, it has been said, that anybody may seize to his own use such goods as belong to an alien enemy (*c*), upon the ground that during their enmity they can claim no protection from the law, and therefore any man may, when opportunity offers, seize their property with impunity. But this, however generally laid down by some writers, cannot extend beyond such seizures as are duly authorised by the public authority of the state residing in the crown (*d*); and cannot in any case apply to goods belonging to an enemy, and in this country at the time of the declaration of war. Such goods are not liable to be seized (*e*), and goods brought into the country * afterwards may be protected by a safe conduct or [* 597] passport. So a contract made with a foreigner during peace, though it cannot be enforced by him during the period of the war, continues valid, and the right of action upon it revives after the termination of hostilities (*f*).

The title to goods of an enemy founded upon this right of occupancy has usually occurred by capture at sea, or in the plunder of towns taken by assault.

By the practice of the law of nations, in order to vest the property (at least of a ship taken at sea) in the captors, a legal sentence of condemnation by a prize court is necessary (*g*). This is now the law of England, and is regulated by statute (*h*). The practice of permitting privateers to attack the property of an enemy is looked upon with great disfavour in modern times, and has been unknown on the part of the English during recent wars. It is unnecessary to enlarge upon it here.

As to booty taken by soldiers in a campaign, it is now (when any is captured, which is rare, as it is contrary to our present principles of carrying on war to plunder the enemy) taken possession of and sold by agents appointed for the purpose, and the proceeds remitted to the treasurer of Chelsea hospital, and by him distributed among the troops. The title does not accrue to individuals, but rather the state (*i*).

Next, whatever moveables are found upon the surface of the earth, or in the

(*b*) *Ante*, pp. 6, 268, 411.

(*c*) Finch, L. 178.

(*d*) Freeman 40. See *ante*, vol. i. p. 307.

(*e*) Bro. Abr. tit. Property, 38. Forfeiture, 57.

(*f*) *Antoine v. Moreshead*, 6 Taunt. 239.

(*g*) 1 Rob. 139; 3 Rob. 97 and 236.

(*h*) 27 & 28 Vict. c. 25.

(*i*) See 2 Will. 4, c. 53, amended by 27 & 28 Vict. c. 36; 29 & 30 Vict. c. 47. The principles of this distribution were much discussed in a recent celebrated case, that of the Banda and Kurwee booty, taken during the Indian mutiny in 1857.

sea, and are unclaimed by any owner, are supposed to be abandoned by the last proprietor; and, as such, are returned into the common stock and mass of things: and therefore they belong, as in a state of nature, to the first occupant or fortunate finder, unless they fall within the description of waifs, or estrays, * or wreck, or hidden treasure; for [* 598] these are vested by law in the king, and form a part of the ordinary revenue of the crown; or belong to grantees of the crown, lords of manors, and the like.

With regard, likewise, to animals *feræ naturæ*, all mankind had by the original grant of the Creator a right to pursue and take any fowl or insect of the air, any fish or inhabitant of the waters, and any beast or reptile of the field: and this natural right still continues in every individual, unless where it is restrained by the civil laws of the country. And when a man has once so seized them, they become while living his qualified property, or, if dead, are absolutely his own. (405) The restrictions which have been laid upon this right, by the laws of England, relate principally to royal fish, as whale and sturgeon, and such terrestrial, ærial, or aquatic animals as go under the denomination of game; the taking of the former is made the exclusive right of the prince, and such of his subjects to whom he has granted the same royal privilege, and that of the latter is subject to special restrictions.

We may remember (*k*) that the right to hunt and kill game was, in the days of the early Norman kings (if not earlier), claimed as a special prerogative of the sovereign, and of those to whom he had granted the privilege; and this right was not only claimed, but it was, as is well known, enforced with a rigour, the cruelty of which even exceeded the injustice upon which it rested.

The forest laws, however, even in the time of King John (who had himself issued some of the most arbitrary interdicts (*l*)), were much relaxed; and, indeed, the Carta de Foresta (*m*) (extracted from him with almost as much difficulty as Magna Carta itself) went far to put an end to them.

[* 599] The ancient forest laws then gradually lost their force; * but in their place numerous statutes have been from time to time passed, not involving, indeed, such manifest injustice as those laws, yet, to no inconsiderable extent, founded on very similar doctrines, that the pleasures of the chase and of sporting generally were to be reserved for the rich.

By an early statute (*n*) it is ordained that "no artificer, labourer, or other layman which hath not lands or tenements to the value of 40s. by the year, nor any priest, to the value of 10*l*., shall keep any dogs, nets, or engines to destroy deer, hares, or conies, or other gentlemen's game, upon pain of one year's imprisonment."

Other later statutes, such as 1 Jac. 1, c. 27 (*o*), prohibited, with more or less generality, the killing of game, making exceptions in favour of those persons possessed of special qualifications, such as being a lord or lady of a manor, or owners of estates of inheritance worth 40*l*. a year, and the like.

(*k*) *Ante*, p. 101.

(*l*) "*Capturam avium per totam Angliam interdictum*." M. Paris, 808.

(*m*) Confirmed by 9 Hen. 3.

(*n*) 18 Ric. 2, c. 13.

(*o*) Which was altered by 7 Jac. 1, c. 11, and virtually repealed by 23 & 23 Car. 2, c. 25. By the last act the qualification was an estate of inheritance worth 100*l*. a year; or an estate for life worth 150*l*. a year.

The result of these acts was, therefore, that only those who possessed considerable fortunes had the right to kill game. But the right of these is founded upon that general right which, in the absence of any laws on the subject, every person would seem naturally to possess of shooting game, like other wild animals, upon his own land, or the land of any other person whose permission to do so has been given him. No statute gives any express permission to an individual to kill game, except, indeed, those which permit gamekeepers to do so, when duly appointed, though not possessed of a property qualification, and these do not so much confer any right as remove the penalties which previous enactments had imposed (*p*).

* It is therefore an incorrect, though it was a common, expression, to say that the possession of 100*l.* a year, or so forth, gave a qualification, for that possession merely took the person having it out of the operation of the game acts, and left him to his natural rights. [* 600]

Whether, however, we regard the so-called "qualified" persons as the only ones to whom permission to kill game has been given, or whether as the only persons from whom the natural birthright of doing so has not been taken away, the effect is the same, and involves ideas which are ill-suited to the sense of liberty of the present day, and, accordingly, all "qualifications" have been abolished (*q*). Every person may now kill game, though of course his right can have no opportunity of exercise unless with the permission of the owner of the land on which the game is to be killed. The right to kill any particular game, therefore, emanates from the owner of the land on which it is killed,

to whom, by a principle of occupancy, or rather a kind of special Property in game. occupancy, the property in the game, as soon as it becomes the subject of property, that is, as soon as it is killed, accrues (*r*).

We may here note, however, that these ancient ideas and prejudices as to the right of killing game have been put to a practical use for purposes of the public revenue. Under the act which abolished qualifications, it was necessary for every person who was about to kill game to purchase a game certificate (*s*). These certificates have * since been abolished (*t*), and in [* 601] their stead there has been substituted an ordinary excise licence, to be

Licences to kill game. obtained for every year, for which the sum of 3*l.*, or 2*l.*, according to the portion of the year through which the licence extends, must be paid (*u*).

(*p*) As to game-keepers, see 5 Anne, c. 14; 48 Geo. 3, c. 93; 1 & 2 Will. 4, c. 32.

(*q*) By 1 & 2 Will. 4, c. 32, repealing 23 & 28 Car. 2, c. 25, and a vast number of other game acts. Those enactments which remained unrepealed appear to be 3 Jac. 1, c. 13, s. 5; 25 Geo. 3, c. 50; 31 Geo. 3, c. 21; 48 Geo. 3, c. 55; 52 Geo. 3, c. 93; 54 Geo. 3, c. 141, 9 Geo. 4, c. 169. These provisions have since become obsolete, or have been expressly repealed.

(*r*) As to the ownership of the game by the person on whose land it is killed (or his licensees or assigns), see 1 & 2 Will. 4, c. 32, ss. 11, 12, 36. The game killed on the wastes of a manor belongs to the lord, *ib.* s. 10; and see *Rigg v. Lonsdale*, 1 H. & N. 923; *Ewart v. Graham*, 7 H. L. 381; *Bruce v. Halliwell*, 5 H. & N. 609.

(*s*) Certificates were not, however, first introduced by that act. See 52 Geo. 3, c. 93.

(*t*) By 23 & 24 Vict. c. 90.

(*u*) An exception is made as to taking woodcocks or snipes with nets or springes, the destruction of rabbits by the proprietor of the land or his tenant, the coursing of hares, and hunting of deer, and the killing deer in any enclosed lands by the owner or occupier of the land. We may remark that the license is necessary not only to kill game, properly so called (*i. e.*, hares, pheasants and partridges, grouse and moor game), but also woodcocks, snipes, quails or landrails, conies, and deer; 23 & 24 Vict. c. 90, s. 2. The definition of the word game in the Night Poaching Act, 25 & 26 Vict. c. 114, s. 1, is somewhat different.

These licences, however, can no more be said to confer the right of shooting, than the payment of duty upon carriages confers the right to ride in them.

The doctrine of property arising from accession is also grounded on the right of occupancy. By the Roman law, if any given corporeal substance received

By accession. afterwards an accession by natural or artificial means, as by the

growth of vegetables, the pregnancy of animals, the embroidering of cloth, or the conversion of wood or metal into vessels and utensils, the original owner of the thing was entitled by his right of possession to the property of it under such its state of improvement (*x*), (406) whatever might be the change of form; it being only necessary to prove the identity of the materials: but if the thing itself, by such operation, was changed into a different species, as, by making wine, oil, or bread, out of another's grapes, olives, or wheat, it belonged to the new operator; who was only to make a satisfaction to the former proprietor for the materials which he had so converted (*y*). And these [* 602] doctrines are implicitly copied and adopted by our * Bracton (*z*), and

have since been confirmed by many resolutions of the courts (*a*). It has even been held, that if one takes away and clothes another's wife or son, and afterwards they return home, the garments shall cease to be his property who provided them, being annexed to the person of the child or woman (*b*).

But in the case of confusion of goods, where those of two persons are so intermixed, that the several portions can be no longer distinguished, the English law partly agrees with, and partly differs from, the civil. If

Confusion an
intermixture of
goods.

the intermixture be by consent, it seems that, in both laws, the proprietors have an interest in common, in proportion to their respective shares (*c*). (407) But, if one wilfully intermixes his money, corn, or hay, with that of another man, without his approbation or knowledge, or casts gold in like manner into another's melting pot or crucible, the civil law, though it gives the sole property of the whole to him who has not interfered

(*z*) Inst. 2. 1. 25, 26, 31. Dig. 6. 1. 5.

(*y*) Inst. 2. 1. 25, 34.

(*z*) L. 2, c. 2 & 3; 5 Hen. 7, fo. 15; 12 Hen. 8, fo. 15.

(*a*) Bro. Abr. tit. Propertie, 23; Moor. 20; Poph. 88.

(*b*) Moor. 214.

(*c*) Inst. 2. 1. 27, 28; 1 Vern. 217.

(406) The law will not allow one man to gain a title to the property of another, upon the principle of accession, if he took the property of the other willfully as a trespasser; and the owner may take it in whatever form he may find it, and, however much it may have been altered or changed by the wrong-doer, if he can establish the identity of the original materials. This is the rule when corn is taken and converted into whisky (*Silabury v. McCoon*, 8 N. Y. [3 Comst.] 379); or trees are cut down and made into shingles (*Batts v. Lee*, 5 Johns. 349); or into charcoal (*Curtis v. Groat*, 6 id. 169; *Riddle v. Driver*, 12 Ala. 590); or trees cut down and cut into rails and posts (*Snyder v. Vaux*, 2 Rawle, 423); or trees made into boards (*Davis v. Easley*, 13 Ill. 192); or staves. *Heard v. James*, 49 Miss. 236.

Where the taking of the original materials was in good faith, and the labor of the taker has made the property of much greater value than such materials, it has been held that the title will be in the taker, and the original owner will be entitled to the value of the materials. *Wetherbee v. Green*, 22 Mich. 311; 7 Am. Rep. 653; *Hyde v. Cookson*, 21 Barb. 92; *Single v. Schneider*, 80 Wis. 570.

(407) 4 Kent's Com. 364; *Adams v. Meyers*, 1 Sawyer, 306; *Dale v. Olmstead*, 36 Ill. 150.

The rule is the same where such intermixture is by accident, as where a freshet floats off the wood of different owners, and the property of one is mingled with and undistinguishable from that of the other (*Moore v. Erie Railway Co.*, 7 Lans. 89); or by the mistake of the owner. *Pratt v. Rawson*, 20 Vt. 333.

in the mixture, yet allows a satisfaction to the other for what he has so improvidently lost (*d*). But our law, to guard against fraud, gives the entire property, without any account, to him whose original dominion is invaded, and endeavoured to be rendered uncertain, without his own consent (*e*). (408)

* CHAPTER XXVII.

[* 603]

TITLE BY PREROGATIVE AND FORFEITURE.

A SECOND method of acquiring property in personal chattels is by the king's prerogative; whereby a right may accrue either to the crown itself, or to such as claim under the title of the crown; as by the king's grant, or by prescription, which supposes an ancient grant.

Title by prerogative in the king or his grantee.

Formerly, tributes, taxes, and customs were payable to the crown by virtue of the royal prerogative, whatever was their foundation, whether as inherent in the crown, or granted by authority of parliament. At the present day, however, our sovereign derives no direct personal advantage from any tributes, taxes, or customs, or indeed from any other of the ancient sources of wealth given to or acquired by the crown; inasmuch as all such acquisitions fall into the general funds applied annually by parliament to the services of the state. This has been sufficiently dealt with in a former book.

The state now derives, or may derive, the benefit of these doctrines, which are still part of the law, and attach to the prerogative; though they are never given effect to when they work to the manifest hardship of individuals. One of these doctrines is, that the king cannot have a joint property with any person in one entire chattel, or such a one as is not capable of division or separation; but where the titles of the king and a subject concur, the king shall have the whole: in like manner as the king cannot, either by grant or contract, become a joint-tenant of a chattel real with another person, but by such grant * or contract shall become entitled to the whole in severalty. [* 604] Thus, if a horse be given to the king and a private person, the king shall have the sole property: if a bond be made to the king and a subject, the

(*d*) Inst. 2. 1. 28.

513; 2 Vern. 516. See 2 Camp. 576; 15 Ves.

(*e*) Poph. 38; 2 Bulstr. 325; 1 Hal. P. C. 442.

(408) This rule has been frequently followed in this country. *Bryant v. Ware*, 30 Me. 295; *Smith v. Morrill*, 56 id. 566; *Seavey v. Dearborn*, 19 N. H. 351; *Gilman v. Hill*, 36 id. 811; *Weil v. Silverstone*, 6 Bush (Ky.), 698.

Where goods belonging to different individuals are willfully mixed, without mutual consent, no change of ownership will take place if the goods can be easily distinguished and separated, as where one person makes additions to steam machinery which belongs to another. *Alley v. Adams*, 44 Ala. 609.

A person who willfully so confounds the property of another with his own that the line of distinction cannot be traced, will be subjected to all the inconveniences of the confusion, and he will be required to distinguish his own property or lose it. *Weil v. Silverstone*, 6 Bush (Ky.), 698; *Smith v. Morrill*, 56 Me. 566; *Gilman v. Hill*, 36 N. H. 311, 323; *Seavey v. Dearborn*, 19 id. 351; *Loomis v. Green*, 7 Greenl. (Me.) 386; *Treat v. Barber*, 7 Conn. 274.

king shall have the whole penalty ; the debt or duty being one single chattel (*a*) ; and so, if two persons have the property of a horse between them, or have a joint debt owing them on bond, and one of them assigns his part to the king, or is attainted, whereby his moiety is forfeited to the crown ; the king shall have the entire horse, and entire debt (*b*). For, as it is not consistent with the dignity of the crown to be partner with a subject, so neither does the king ever lose his right in any instance ; but where they interfere, his is always preferred to that of another person (*c*) : from which two principles it is a necessary consequence, that the innocent, though unfortunate partner, must lose his share in both the debt and the horse, or in any other chattel in the same circumstances. But this rule has been relaxed in favour of commercial interests, as it has been held that on an extent against one of several partners, only the beneficial interest of that partner can be taken (*d*).

This doctrine has no opportunity to take place in certain other instances of title by prerogative, that remain to be mentioned ; as the chattels thereby vested are originally and solely vested in the crown, without any transfer or derivative assignment, either by deed or law, from any former proprietor. Such is the acquisition of property in wreck, goods found jetsam, flotsam, or lagan, in treasure-trove, in waifs, in estrays, in royal fish, in swans, and the like ; which are not transferred to the sovereign from any former owner, but are originally inherent in him by the rules of law, and are derived to particular subjects, as royal franchises, by his bounty. These are ascribed to him, partly upon the particular reasons already mentioned ; and partly upon the general principle of their being *bona vacantia*, and therefore vested in the king, as well to preserve the peace of the public, as in trust to employ them for the safety and ornament of the commonwealth. The right of the crown to wreck and goods found jetsam, flotsam, or lagan, has been regulated by statute (*e*).

There is also a kind of prerogative copyright subsisting in certain books, which is held to be vested in the crown upon different reasons. Thus, 1. The king, as the executive magistrate, has the right of promulgating to the people all acts of state and government. This gives him the exclusive privilege of printing, at his own press, or that of his grantees, all acts of parliament, proclamations, and orders of council (*f*). 2. As supreme head of the church, he has a right to the publication of all liturgies, and books of divine service. 3. He is also said to have a right, by purchase, to the copies of such law-books, grammar, and other compositions, as were compiled or translated at the expense of the crown. And upon these two last principles combined, the exclusive right of printing the translation of the bible is founded (*g*).

The third method whereby a title to goods and chattels may be acquired and lost, viz., by forfeiture, as a punishment for crime, needs here but a brief

(*a*) Fitzh. Abr. tit. Dette, 38 ; Plowd. 248.
(*b*) Cro. Eliz. 268 ; Plowd. 323 ; Finch.
Law, 178 ; 10 Mod. 245.

(*c*) Co. Litt. 80.

(*d*) 1 Wright, 50 ; Chitt. Prerog. 287.

(*e*) 9 & 10 Vict. c. 99, amending and consolidating the previous law.

(*f*) 1 W. Bl. 105 ; 2 Burr. 661. It has been decided that the Crown has no monopoly or right to grant a monopoly in almanacs. 2 W. Bl. 1004.

(*g*) 8 Bligh, N. S. 391.

Forfeiture. notice. (409) We have already considered forfeitures as a means whereby real property may be partially or totally forfeited. Forfeitures of goods and chattels have been at various times inflicted by special statutes for particular crimes and misdemeanors, some of which were *mala in se*, or offenses against the divine law, either natural or revealed; others, and by far the greatest part, were *mala prohibita*, or such as derive * their guilt merely from their prohibition by the laws of the land; [* 606] such, for instance, as the forfeiture of 40s. per month by the statute 5 Eliz. c. 4, for exercising a trade without having served seven years as an apprentice thereto, and the forfeiture of 10l. by 9 Ann. c. 23, for printing an almanac without a stamp.

These, indeed, have been abolished (*h*), but there are some others now in existence, such, for instance, as the penalty of 10l. forfeited under the copyright act (*i*), to the proprietor of a copyright which has been infringed (*k*). The details of these cannot find a place here. But a more general forfeiture of all the personal property of an offender has long been inflicted in the case of the greater crimes, such as treason (*l*), felony (*m*), or *præmunire* (*n*). In this case the forfeiture is to the crown. The nature of these offences will appear in the fourth book of these Commentaries.

The forfeiture commences from the time of conviction, not the time of committing the fact, as in forfeitures of real property. For chattels are of so **When forfeiture commences.** vague and fluctuating a nature, that to affect them by any relation back, would be attended with more inconvenience than in the case of landed estates: and part, if not the whole of them, must be expended in maintaining the delinquent, between the time of committing the fact and his conviction. Yet a fraudulent conveyance of them, to defeat the interest of the crown, is made void by statute 13 Eliz. c. 5 (*o*). Though a *bond fide* conveyance of property for good consideration, after the offense and before conviction, is * good (*p*). Moreover, as a felon is only restored [* 607] to civil rights upon his pardon, or the expiration of his sentence, all personal property which accrues to a felon in the interval between his conviction and pardon, or expiration of his sentence, is forfeited as well as that belonging to him at the time of the conviction (*q*). But though he may have at that time a contingent interest, if the contingency do not occur till after the restoration of his civil status, there is no forfeiture (*r*).

(*h*) The former by 54 Geo. 3, c. 96, and the latter by 80 Geo. 2, c. 19.

(*i*) 25 & 26 Vict. c. 68.

(*k*) See a discussion of the nature of these penalties in *Bancroft v. Mitchell*, L. R. 2 Q. B. 549, and *Ex parte Graves*, L. R. 3 Ch. 642; and the remedy given for their recovery by the Small Penalties Act, 28 & 29 Vict. c. 127.

(*l*) Vol. iv. p. 97.

(*m*) *Id.* 49.

(*n*) *Id.* 115.

(*o*) *Shaw v. Bran*, 1 Stark. 319. *In re Saunders' Estate*, 4 Giff. 179.

(*p*) 8 Rep. 171; 2 Car. Hawk. P. C. 645; Skin. 357; *Chorone v. Baylis*, 31 Beav. 351.

(*q*) Cro. Jac. 513; 2 B. & Al. 258; *Whittaker v. Wisbey*, 12 C. B. 44.

(*r*) *Stokes v. Holden*, 1 Keen, 145. See *Re Harrington's Trust*, 29 Beav. 24.

(409) "The Congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood, or forfeiture, except during the life of the person attainted." Const. U. S., art. 3, § 3.

[* 608]

* CHAPTER XXVIII.

TITLE BY CUSTOM.

A FOURTH method of acquiring property in things personal, or chattels, is by custom: whereby a right vests in some particular persons, either by the local usage of some particular place, or by the almost general and universal usage of the kingdom. It were endless, should we attempt to enumerate all the several kinds of special customs which have been held to entitle a man to a chattel interest in different parts of the kingdom.

We had occasion (a) to notice one instance, that of heriots, where a lord of a manor, or other chief lord, is, as we said, entitled by custom to the best live beast, or *averium*, of which a tenant dies possessed, or some other chattel, or, as is now more usual, a payment of money in lieu of the chattel. The custom, originally a Danish one, seems to have been, in some measure, founded upon the voluntary act of the tenant, the chattel being looked on as a sort of legacy to the lord (b), though afterwards the bounty was of rather a forced character.

Another instance is that of mortuaries: Mortuaries are a sort of ecclesiastical heriots, being a customary gift claimed by and due to the minister in very many parishes on the death of his parishioners (c). They seem originally to have been, like lay heriots, only a voluntary bequest to the church, being intended, as Lyndewode informs us, from a constitution of Archbishop Langham, as a kind of expiation and amends to the clergy for the personal tithes, and other ecclesiastical duties, which the laity in their lifetime might have neglected or forgotten to pay.

For this purpose, after (d) the lord's heriot or best good was taken out, the second best chattel was reserved to the church as a mortuary: "*si decedens plura habuerit animalia, optimo cui de jure fuerit debitum reservato, ecclesie sue sine dolo, fraude, seu contradictione quolibet, pro recompensatione subtractionis decimarum personalium, necnon et oblationum, secundum melius animal reservetur, post obitum, pro salute animæ suæ* (e). And, therefore, in the laws of King Canute (f), this mortuary is called soul-scot, or *symbolum animæ*.

It was anciently usual in this kingdom to bring the mortuary to church along with the corpse when it came to be buried; and thence (g) it is sometimes called a corse-present: a term which indicates that it once was a voluntary donation. However, in Bracton's time, so early as Henry III., we find it rivetted into an established custom: insomuch that the bequests of heriots and mortuaries were held to be necessary ingredients in every testament of chattels. "*Imprimis autem debet quilibet, qui testamentum fecerit, dominum suum de meliori re quam habuerit recognoscere; et postea ecclesiam de aliâ meliori:*" the lord must have the best good left him as an heriot; and the church the second best as a mortuary. But yet this custom was different in different places: "*in quibusdam locis habet ecclesia melius animal de consuetudine; in quibus-*

(a) *Ante*, p. 197.(b) *Magis fit de gratia quam de jure*. Bract. L. 2, c. 36, s. 9. See also Fleta, L. 3, c. 18; Britton, c. 69.

(c) See Burn, Ecc. L. tit. Mortuaries.

(d) Co. Litt. 185.

(e) Provinc. l. 1, tit. 3.

(f) C. 13.

(g) Selden, Hist. of Tithes, c. 10.

dam secundum, vel tertium melius; et in quibusdam nihil: et ideo consideranda est consuetudo loci" (h). This custom still varies in different places, not only as the mortuary to be paid, but the person to whom it is payable. * In [* 610] Wales a mortuary or corse-present was due upon the death of every

clergyman to the bishop of the diocese; till abolished, upon a Mortuary on death of clergyman. recompense given to the bishop, by the statute 12 Ann. st. 2, c. 6.

And in the archdeaconry of Chester, a custom also prevailed, that the bishop, who was also archdeacon, should have, at the death of every clergyman dying therein, his best horse or mare, bridle, saddle, and spurs, his best gown or cloak, hat, upper garment under his gown, and tippet, and also his best signet or ring (i). But by statute 28 Geo. 2, c. 6, this mortuary was directed to cease, and the act has settled upon the bishop an equivalent in its

room. The king's claim to many goods, on the death of all prelates in England, seems to be of the same nature; though sir Mortuary on death of a prelate. Edward Coke (k) apprehends, that this is a duty due upon death,

and not a mortuary: a distinction which seems to be without a difference. For not only the king's ecclesiastical character, as supreme ordinary, but also the species of the goods claimed, which bear so near a resemblance to those in the archdeaconry of Chester, which was an acknowledged mortuary, puts the matter out of dispute. The king, according to the record vouched by Sir Edward Coke, is entitled to six things: the bishop's best horse or palfrey, with his furniture; his cloak, or gown, and tippet, his cup, and cover; his bason and ewer; his gold ring; and lastly, his *muta canum*, his mew or kennel of hounds.

The variety of customs, with regard to mortuaries, giving frequently a handle to exactions on the one side, and frauds or expensive litigations on the other; it was thought proper, by statute 21 Hen. 8, c. 6, to

reduce them to some kind of certainty. For this purpose, it is enacted, that all mortuaries, or corse-presents to parsons of any parish, shall be taken in the following manner; unless where by custom less or none at all is due: viz., for every * person who does not leave goods to the value [* 611] of ten marks, nothing; for every person who leaves goods to the value of ten marks, and under thirty pounds, 3s. 4d.; if above thirty pounds, and under forty pounds, 6s. 8d.; if above forty pounds, of what value soever they may be, 10s., and no more. And no mortuary shall, throughout the kingdom, be paid for the death of any feme-covert; nor for any child; nor for any one of full age that is not a house-keeper; nor for any wayfaring man; but such wayfaring man's mortuary shall be paid in the parish to which he belongs. And upon this statute stands the law of mortuaries to this day.

The instance of this kind of title, which is perhaps the most interesting because the most familiar to us by name, is that of heir-looms.

Heir-looms are such goods and personal chattels, as, contrary to the nature of chattels, go by special custom to the heir along with the inheritance, and

not to the executor of the last proprietor. The termination, Heir-looms. loom, is of Saxon origin; in which language it signifies a limb or member; so that an heir-loom is nothing else but a limb or member of the inheritance. They are generally such things as cannot be taken away without

(h) Bracton, l. 2, c. 26; Flet. l. 2, c. 57.

(k) 2 Inst. 491.

(i) Cro. Car. 287.

damaging or dismembering the freehold: otherwise the general rule is, that no chattel interest whatsoever shall go to the heir, notwithstanding it be expressly limited to a man and his heirs, but it is his absolute property, and in default of his dealing with it during his life, it goes to his executor or administrator.

If a gift of a chattel be made to A. and the heirs male of his body, or by any other expression which, in the case of land, would create an estate tail, it vests in him the absolute property. It is not uncommon for testators to desire to make personal property, such as leaseholds or family plate or jewels, go in strict settlement, together with the family mansion, or sometimes to have them handed down from generation to generation, as if they were heir-
[* 612] looms, even when there is no family estate. Since, however, heir-
looms, properly so called, exist as such only by custom, such desires can only be partially fulfilled. Various devices have been contrived to keep the settlement alive as long as possible. The ordinary limitations which are applied to land would vest the property absolutely in the first tenant-in-tail; and on his death, even if he died the moment after his birth, the property would go, not to the next remainderman in the settlement, but to his representatives. The usual method, then, which is now adopted in these cases, is to add a declaration that the property shall go over if the tenant-in-tail dies under twenty-one years of age. This declaration operates as an executory bequest, and if it be limited so as not to contravene the rules against perpetuity (l), it will have its effect so as to prevent the representatives of a tenant-in-tail who dies in infancy from becoming entitled.

The chattels in such cases are not heir-looms, property so called, which do not depend on the term of a gift, but upon custom. Instances of true heir-looms are the following: Deer in a real, authorised park, whilst wild (m), fishes in a pond, doves in a dove-house, &c., though in themselves personal chattels, yet are so annexed to, and so necessary to the well-being of the inheritance, that they accompany the land wherever it vests, by either descent or purchase (n). For this reason, also, the ancient jewels of the crown may be considered to be heir-looms (o); for they are necessary to maintain the state, and support the dignity, of the sovereign for the time being. And so an ancient horn, when land is held by tenure of cornage, may be an heir-loom (p).

Charters, title-deeds, court-rolls.
[* 613] Charters, likewise, and deeds, * court-rolls, and other evidences of the land, together with the chests in which they are contained (q), pass together with the land to the heir, in the nature of heir-looms, and do not go to the executor (r). By special custom, also, in some places, carriages, utensils, and other household implements, may be heir-looms (s); but such custom must be strictly proved. On the other hand, by almost general custom, whatever is strongly affixed to the freehold or inheritance, and cannot be severed from thence without violence or damage, "*quod ab ædibus non facile revellitur* (t)," is become a member of the

(l) Which may be easily done by confining the declaration to tenants-in-tail by purchase. See 2 Jarm. Wills, 548. *Shelley v. Shelley*, L. R. 6 Eq. 546 (a case in which the subject-matter was jewels, and there was no land); *Holloway v. Webber*, *ib.* 523.

(m) *Morgan v. Abergavenny*, 8 C. B. 768; *Ford v. Tynte*, 2 J. & H. 150.

(n) Co. Litt. 8.

(o) *ib.* 18.

(p) *Pusey v. Pusey*, 1 Vern. 278.

(q) According to some old authorities, the chest goes to the executor, if it be not sealed up. Plowd. 323; Bro. Abr. Chattleas, 18. But the weight of authority is against this, 1 Will. Exors. 610.

(r) Bro. Abr. tit. Chattleas, 18.

(s) Co. Litt. 18, 185.

(t) Spelm. Gloss. 277.

inheritance, and shall thereupon pass to the heir; as chimney-pieces, pumps, old fixed or dormant tables, benches, and the like (*u*). It has, indeed, been thought that only such things as these and other ponderous chattels can be heir-looms (*x*). Heir-looms, properly so called, are, with the exception of title-deeds, very rare.

Other personal chattels there are, which also descend to the heir in the nature of heir-looms, as a monument or tombstone, in a church (*y*), or the coat-armour of his ancestor there hung up, with the pennons
Monuments, &c. and other ensigns of honour, suited to his degree. In this case, although the freehold of the church is in the parson, and these are annexed to that freehold, yet neither the parson nor any other can take them away or deface them, but is liable to an action from the heir (*z*).

Formerly heir-looms could not be devised away from the heir, unless the land to which by custom they were annexed were also devised, even by a tenant in *fee-simple (*a*), on the ground given by Littleton, that the [* 614] devise must operate in subordination to the custom which vests the property in the heir instantly at the death, and before the devise can take effect.

This cannot, it would seem, be now the law: the general power of disposition possessed by testators must extend to give them absolute control over even heir-looms (*b*).

These instances of heriots, mortuaries, and heir-looms sufficiently illustrate title by custom.

* CHAPTER XXIX.

[* 615]

TITLE BY SUCCESSION AND MARRIAGE.

IN the present chapter we shall take into consideration two other species of title to goods and chattels,—those by succession and marriage.

Title by succession, in strictness of law, is only applicable to corporations aggregate of many, as dean and chapter, mayor and commonalty, master and fellows, and the like; in which one set of men may, by succeeding
Title by succession. another set, acquire a property in all the goods, moveables, and other chattels of the corporation. The true reason of this is, because in judgment of law a corporation never dies; and, therefore, the predecessors, who lived a century ago, and their successors now in being, are one and the same body corporate (*a*). Which identity is a property so inherent in the nature of a body politic, that, even when it is meant to give any thing to be taken in succession by such a body, that succession need not be expressed: but

(*u*) 12 Mod. 520. See *ante*, p. 288, as to fixtures.

(*x*) *Lord Petre v. Heneage*, 1 Ld. Raym. 728.

(*y*) See *Spooner v. Brewster*, 8 Bingh. 136; 10 Moore, 494.

(*z*) 12 Rep. 105; Co. Litt. 18.

(*a*) Co. Litt. 185; *Tipping v. Tipping*, 1 P. W. 780.

(*b*) See 7 Will. 4 & 1 Vict. c. 26, s. 8.

(*a*) 4 Rep. 65.

the law will of itself imply it. So that a gift to such a corporation, either of lands or of chattels, without naming their successors, vests an absolute property in them so long as the corporation subsists (*b*). And thus a lease for years, an obligation, a jewel, a flock of sheep, or other chattel interest, will vest in the successors, by succession, as well as in the identical members, to whom it was originally given.

[* 616] But, with regard to sole corporations, a considerable * distinction must be made. For, if such sole corporation be the representative

Distinction as to
sole corpora-
tions.

of a number of persons; as the master of an hospital, who is a corporation for the benefit of the poor brethren; an abbot, or prior, by the old law before the reformation, who represented the whole convent; or the dean of some ancient cathedral, who stands in the place of, and represents in his corporate capacity the chapter; such sole corporations as these have, in this respect, the same powers as corporations aggregate have, to take personal property or chattels in succession. And, therefore, a bond to such a master, abbot, or dean, and his successors, is good in law; and the successor shall have the advantage of it, for the benefit of the aggregate society, of which he is in law the representative (*c*). Whereas, in the case of sole corporations, which represent no others but themselves, as bishops, parsons, and the like, no chattel interest can regularly go in succession; and, therefore, if a lease for years be made to the bishop of Oxford and his successors, in such case his executors or administrators, and not his successors, shall have it (*d*). For, the word successors, when applied to a person in his political capacity, is equivalent to the word heirs in his natural; and as such a lease for years, if made to John and his heirs, would not vest in his heirs but his executors; so if it be made to John bishop of Oxford and his successors, who are the heirs of his body politic, it shall still vest in his executors and not in such his successors. The reason of this is obvious: for, besides that the law looks upon goods and chattels as of too low and perishable a nature to be limited either to heirs, or such successors as are equivalent to heirs; it would also follow, that, if any such chattel interest (granted to a sole corporation and his successors) were allowed to descend to such successor, the property thereof must be in abeyance from the death of the present owner until the successor be

[* 617] * appointed: and this is contrary to the nature of a chattel interest, which can never be in abeyance or without an owner (*e*); but a man's right therein, when once suspended, is gone forever. This is not the case in corporations aggregate, where the right is never in suspense; nor in the other sole corporations before mentioned, who are rather to be considered as heads of an aggregate body, than subsisting merely in their own right: the chattel interest, therefore, in such a case, is really and substantially vested in the hospital, convent, chapter, or other aggregate body; though the head is the visible person in whose name every act is carried on, and in whom every interest is therefore said (in point of form) to vest. But the general rule, with regard to corporations merely sole, is this, that no chattel can go to or be acquired by them in right of succession (*f*).

(*b*) Bro. Abr. tit. Estates, 90; Cro. Eliz. 464.

(*c*) Dyer, 48; Cro. Eliz. 464.

(*d*) Co. Litt. 46.

(*e*) Brownl. 133.

(*f*) Co. Litt. 46.

Yet, to this rule there are some exceptions. One in the case of the king, in whom a chattel may vest by a grant of it formerly made to a preceding king and his successors (*g*). Again, it has been held that the ornaments of the chapel of a bishop belong to the succeeding bishop (*h*); and hangings and fixtures may pass from one parson to another by succession, continuing in the nature of heirlooms (*i*).

Two cases in which a corporation sole may take a chattel by succession.

Another exception is, where, by a particular custom, some particular corporations sole have acquired a power of taking particular chattel interests in succession. And this custom, being against the general tenor of the common law, must be strictly interpreted, and not extended to any other chattel interest than such immemorial usage will strictly warrant. Thus, the chamberlain of London, who is a corporation sole, may, by the custom of London, take bonds and recognizances to himself and his successors, * for the benefit of the orphan's fund (*k*): but it will not follow from thence, that he has a capacity to take a lease for years to himself and his successors for the same purpose; for the custom extends not to that: nor that he may take a bond to himself and his successors, for any other purpose than the benefit of the orphan's fund; for that also is not warranted by the custom.

The next method of acquiring property in goods and chattels is by marriage; whereby those chattels, which belonged formerly to the wife, are by act of law vested in the husband, with the same degree of property, and with the same powers, as the wife, when sole, had over them.

In view of approaching changes in this head of law, we need be but very brief (*l*). (410) And we may call to mind that, by the aid of trustees, acting

(*g*) 1b. 90.

(*h*) *Corwen's Case*, 12 Rep. 105.

(*i*) 4 Burn. Eccl. L. 804. See 7 B. & Cr. 113; 7 Bligh.

(*k*) 4 Rep. 65; Cro. Eliz. 862.

(*l*) *Ante*, p. 561, note (*p*).

(410) In this country the statutes of the several States so generally declare and define the rights of husband and wife as to property, that a reference to common-law decisions is of much less importance than it would be in the absence of such statutory provisions. In relation to the wife's separate estate a learned and accurate writer says: "But this attempt to point out doctrines held in particular States becomes wearisome and unsatisfactory. We have seen how the English course of adjudication has varied from time to time. It is much the same in our States. It is impossible for the author to know whether any doctrine he may set down in the text will be held by any court hereafter. The practitioner must look carefully at what has been adjudged in his own State, examining the cases in the original reports for himself, look at the true principles, consider the mental conformation and habits of the individual men who, at the time when a controversy arises, compose the supreme bench of his State, then judge of the question before him somewhat as he would of a game of chance; and if his client, after being informed of the nature of the ground, chooses to travel it, he may well go along over it with her to guide, yet hardly to protect, keeping meanwhile in full sight of her husband." 1 Bishop's Law of Married Women, § 809. In a note to this section will be found a summary of the law in many of the States, as to the wife's power to dispose of her separate estate.

Keeping constantly in view the fact that statutory provisions are controlling, and that in most, if not all of the States, such provisions exist, a few of the numerous decisions will be noticed.

At common law a gift to a female before marriage, at the celebration of the marriage or afterward, vests the title to the gift in the husband, whether the present was made by the wife's father or some other relation or friend of hers. *Bragg v. Massie*, 38 Ala. 89, 108;

subject to the control of the Court of Chancery, the whole theory has long been, to a great extent, in operation among the richer classes. The following outline will therefore be sufficient here.

A distinction is taken between chattels real and chattels personal, and of chattels personal, whether in possession, or reversion, or in action. A chattel real vests in the husband, not absolutely, but *sub modo*. As, in case of a lease for years, the husband shall receive all the rents and profits of it, and may, if he pleases, sell, surrender, or dispose of it during the coverture (*m*): if he be outlawed or attainted, it shall be forfeited to the King (*n*); it is liable to execution for his debts (*o*); and, if he survives his wife, it is to all intents and purposes his own (*p*). Yet, if he has made no disposition thereof in his lifetime, and dies before his wife, he cannot dispose of it by will (*q*): for, the husband having made no alteration in the property during his life, it never was transferred from the wife; but after his death she [* 619] shall remain in her ancient *possession, and it shall not go to his executors. If, however, the wife die in the husband's lifetime, the chattel real survives to him. As to chattels personal (or choses) in action; as debts upon bonds, contracts, and the like; these the husband may have if he pleases; that is, if he reduces them into possession by receiving or recovering them at law (*r*). And upon such receipt or recov-

(*m*) Co. Litt. 46. See 5 Mee. & W. 142.

(*n*) Plowd. 268.

(*o*) Co. Litt. 351.

(*p*) *Ib.* 800.

(*q*) Poph. 5; Co. Litt. 351.

(*r*) It has been held that where a man covenants to pay an annuity, and then marries the annuitant, the annuity is only suspended, and revives after the husband's death. *Fitzgerald v. Fitzgerald*, L. R. 2 P. C. 88.

Burns v. Hudson, 37 *Id.* 62; *Machen v. Machen*, 15 *Id.* 873; *Pendleton v. Mills*, 2 Ga. Decis. 166; *Whitaker v. Whitaker*, 1 Dev. (N. C.) 310; *Pettijohn v. Beasley*, 4 *Id.* 512; *The Ordinary v. Geiger*, 1 Brevard, 484; *Early v. Sherwood*, Dudley (Ga.), 7; *Cropsey v. McKinney*, 30 Barb. 47; *Krause v. Beitel*, 3 Rawls, 199.

But where a man had a wife who was living at the time of his second marriage, a gift to the second wife will not vest any title to the present in him. *Sellers v. Davis*, 4 Yerg. (Tenn.) 508.

The earnings of the wife, the products of her personal exertions, skill, or experience, are the absolute property of the husband if no statute declares a different rule. *Switzer v. Valentine*, 4 Duer, 96; 10 How. 109; *McKaolin v. Bresslin*, 8 Gray, 177; *Hinman v. Parkis*, 33 Conn. 188; *Raybold v. Raybold*, 20 Penn. St. 308; *Skillman v. Skillman*, 15 N. J. Eq. 478; *Elliott v. Bently*, 17 Wis. 591; *Todd v. Todd*, 15 Ala. 743; *Bradbury v. Andrews*, 37 Me. 199; *Merrill v. Smith*, *id.* 894; *Hoyt v. White*, 46 N. H. 45; *Baxter v. Prickett*, 7 Ind. 490.

At common law the legal effect of a marriage which renders the parties husband and wife is, among other things, that of vesting in the husband an immediate and complete title to all the personal property of which the wife is at that time in possession, for her possession is, in law, his possession of such property. *Carleton v. Lovejoy*, 54 Me. 445; *Jordan v. Jordan*, 52 *Id.* 320; *Burleigh v. Coffin*, 22 N. H. 118; *Ames v. Chew*, 5 Metc. (Mass.) 320; *Blanchard v. Sawyer*, 2 Barb. 352; *Jaycox v. Caldwell*, 51 N. Y. (6 Sick.) 395, 398; *Hopper v. McWhorter*, 18 Ala. 229; *Pope v. Tucker*, 23 Ga. 484, 487; *Martin v. Poague*, 4 B. Monr. 524; *Brown v. Brown*, 6 Humph. (Tenn.) 127; *Carroll v. Lee*, 3 Gill & Johns. (Md.) 504.

And the same rule prevails where her personal property is in the actual possession of some third person. *Gwynn v. Hamilton*, 29 Ala. 233; *Brown v. Fitz*, 13 N. H. 283; *Westcott v. Gregg*, 13 N. Y. (2 Kern.) 202; *Ryder v. Hulce*, 24 N. Y. (10 Smith) 372; *Miller v. Blackburn*, 14 Ind. 62; *Whitaker v. Whitaker*, 1 Dev. (N. C.) 310; *Armstrong v. Simonton*, 2 Murph. (N. C.) 351; *Sausey v. Gardner*, 1 Hill (S. C.), 191; *Daniel v. Daniel*, 2 Rich. Eq. 115; *Wallace v. Burden*, 17 Texas, 467.

ery, they are absolutely and entirely his own ; and shall go to his executors or administrators, or as he shall bequeath them by will, and shall not revert in the wife. But, if he dies before he has recovered or reduced them into possession, so that, at his death, they still continue choses in action, they shall survive to the wife ; for the husband never exerted the power he had of obtaining an exclusive property in them (s). If the wife die before the husband has reduced choses in action into possession, he does not become entitled by survivorship: nevertheless, he may, by becoming her administrator, gain a title.

Chattels in possession, such as ready-money and the like, vest absolutely in the husband, and he may deal with them, either whilst living, or by his will, as he pleases.

Where the interest of the wife is reversionary, the husband's power is but small: unless it falls into possession during the marriage, his contracts or engagements do not bind it. The extent of the wife's power in such a case has already been pointed out (t).

The husband's power to acquire a property in all the personal substance of the wife is then, we see, considerable: but in one particular instance the wife may acquire a property in some of her husband's goods; which shall remain to her after his death, and not go to the executors. *These are called her paraphernalia; which is a term borrowed from the civil law (u), and

is derived from the Greek language, signifying something over and above her dower. Our law uses it to signify the apparel and ornaments of the wife, and a necessary bed (x), suitable to her rank and degree; and therefore even the jewels usually worn by her, have been held to be paraphernalia (y). (411) These she becomes entitled to at the death of her husband, over and above her jointure or dower, and preferably to all other representatives (z). Neither can the husband devise by his will such ornaments and jewels of his wife; though during his life perhaps he has the power (if unkindly inclined to exert it) to sell them or give them away (a). But if she continues in the use of them till his death, she shall afterwards retain them against his executors and administrators, and all other persons except creditors where there is a deficiency of assets (b). (412) And her necessary apparel is protected even against the claim of creditors (c).

(s) Co. Litt. 351. An exception was made by 32 Hen. 8, c. 37, as to arrears of rent due to the wife before coverture; that statute giving them absolutely to the husband.

(t) *Ante*, p. 473.

(u) Dig. 23. 8. 9. § 3.

(x) Com. Dig. Baron et Femme.

(y) Moor. 213; 11 Vin. Ab. 180; 2 Atk. 77.

(z) Cro. Car. 348; 1 Roll. Abr. 911; 2 Leon. 166.

(a) Noy's Maxims, c. 49. *Grahame v. Ed. Londonderry*, 24 Nov. 1746. Canc.

(b) 1 P. Wms. 730.

(c) Noy's Maxims, c. 49.

(411) The jewelry and furniture of the wife are paraphernal property, and may be sold by her, and the proceeds invested in other property, in the name of a trustee for her separate use. *Gully v. Hull*, 31 Miss. (2 George) 20.

(412) *Illexan v. Wilson*, 43 Me. 186; *Purveyor v. Puryear*, 12 Ala. 13, 15. A gold watch worn by the widow is paraphernalia, and may be subjected by the administrator to the payment of debts; her remedy is in equity for the value if there be assets after the payment of debts. *Howard v. Meniffee*, 5 Pick. (Ark.) 668, 670, 671. The court said: "There is, however, a qualification of the power of the husband over such property of his wife as is denominated her paraphernalia. This was something over and in addition to dower at common law, or the widow's 'reasonable part' of the personal estate of the husband, and consisted of such jewels, articles of luxury, or of personal ornament and decoration as were

[* 621]

* CHAPTER XXX.

TITLE BY BANKRUPTCY.

IN the present chapter we are led to consider a mode of transferring property which has occupied the attention of the courts and the legislature in late years in a remarkable degree. In a former chapter we touched lightly upon this method of acquiring title to lands by bankruptcy; we there deferred any discussion of details. The title to personal property and to real property under the bankrupt laws stand upon very much the same footing. Therefore the short outline which we purpose to give in this chapter will constitute the completion of the subject which was opened in the former chapter. (413)

When we consider persons in reference to their pecuniary contracts which they make with others, we naturally are led to divide them into two main classes — those of traders and non-traders — the distinction between which is pretty obvious: even though, in some instances, individuals may occupy a position so near the boundary-line, that it is not easy to determine on which side it lies. In general, however, the division is broad enough. Persons who “buy and sell” and “use the trade of merchandize” clearly are led to contract numerous obligations of a more varied character than other men; such, indeed, as do not naturally arise with other men. When, therefore, we consider these in connection with their state of indebtedness, we are led to regard them with somewhat different ideas from those with which we look upon other persons. If a gentleman, or one in a liberal profession, at the time of contracting his debts, has a sufficient fund to pay them, the delay of payment is a species of dishonesty, and a temporary injustice to his creditor: and if, at such time, he has no [* 622] sufficient fund, * the dishonesty and injustice are the greater. He cannot, therefore, murmur, if he suffers the punishment which he has voluntarily drawn upon himself. But in mercantile transactions the case is far otherwise. Trade cannot be carried on without mutual credit on both

Classification of persons with reference to their pecuniary obligations.

used by the wife, and suitable to her condition. Though the husband could dispose of them in his life-time, he could not alienate them at his death. The right of the widow to that portion of the estate was absolute and exclusive, except as to creditors. She took it as against the heir or legatee; and in the order of paying the debts of the estate, the personal and then the real estate was applied. For this purpose she might have the assets marshaled in a court of equity, in exoneration of her *paraphernalia*, or to re-imburse the value where it had been subjected.” * * * “From these and many other cases it is evident that the widow’s *paraphernalia* could be subjected by the creditors, and that, if subjected, equity gave her a claim of re-imbursement from the personalty and real estate.”

(413) This subject cannot be here discussed at any length, and a general reference to the statutes is all that will be attempted. The Constitution of the United States provides for the enactment of bankrupt laws. “The congress shall have power, * * * to establish a uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States.” Art. 1, § 8. Bankrupt laws have been passed as follows: April 4, 1800, repealed December 10, 1803; August 12, 1841, repealed March 3, 1843. The acts now in force, with the amendments, were passed as follows: Act of March 2, 1867, chap. 176 (14 U. S. Stat. at Large, 517-541); Act of July 27, 1868, chap. 253 (15 id. 227, 228); Act of June 30, 1870, chap. 177 (16 id. 173, 174); Act of July 14, 1870, chap. 263 (id. 276); Act of June 8, 1872, chaps. 339, 340 (17 id. 334); Act of February 13, 1873, chap. 135 (id. 426, 437); Act of March 8, 1873, chap. 226, § 4 (id. 485, 509); Act of March 3, 1873, chap. 235 (id. 577).

sides: the contracting of debts is, therefore, here not only justifiable, but necessary. And if by accidental calamities, as, by the loss of a ship in a tempest, the failure of brother traders, or by the non-payment of persons out of trade, a merchant, or trader becomes incapable of discharging his own debts, it is his misfortune and not his fault.

Our law has always adopted, and still adopts, the distinction between traders and non-traders, though the distinction has now far less effect than used to be the case. Formerly, indeed, the difference between the treatment of the two classes was of the most marked character; for, although the consequences of being unable to pay his debts were made sufficiently severe, or even, we may say, harsh, to an unfortunate trader, they were absolutely cruel to all others.

The course of opinion and of legislation has, however, gone through many successive phases; there has been a gradual softening of feeling towards debtors, until the result has been, that under the law recently in force there is in practice scarcely any harshness at all, even where the debtor has been guilty of considerable recklessness of conduct.

In early times the prominent idea with our legislature was that of punishing those who recklessly incurred debts without reasonable hopes of paying them. Of late the tendency of the law has been to relieve them from all consequences of so doing. Formerly (and in the case of non-traders until very recent times) a poor debtor languished all his life in a miserable prison; now imprisonment for any ordinary debt no longer exists (*a*).

* We may remember the similar phases, ranging, however, between [* 623] still greater extremes, through which Roman law passed, from the Roman law. savage law of the Twelve Tables, which consigned a defaulting debtor to death or foreign slavery, by which, indeed, if we accept, with Gibbon, the literal interpretation, the creditors had a right to cut the debtor's body into pieces, each taking his proportionable share (*b*), down to the merciful law of cession, under which, if a debtor ceded, or yielded up all his fortune to his creditors, he was secured from being dragged to a gaol, "*omni quoque corporali cruciату semoto*" (*c*). For, as the emperor justly observes (*d*), "*inhumanum erat spoliatum fortunis suis in solidum damnari.*"

With the Romans, indeed, the opposite extreme to harshness was reached, for, by a still later law (*e*), we find it enacted, that, if the debtor, by any unforeseen accident, was reduced to low circumstances, and would swear that he had not sufficient left to pay his debts, he should not be compelled to cede or give up even that which he had in his possession: a law which, under a false notion of humanity, seems to be fertile of perjury, injustice, and absurdity.

The primary object of law in these matters is not to punish a man as a criminal merely because he is unable to pay his debts. Nevertheless, since any reckless or extravagant conduct causes great suffering to others, if a man have been guilty of this, he ought to undergo some punishment. Inasmuch, however, as such punishment, even if it be awarded, cannot restore the losses of those who have suffered, and, moreover,

(*a*) See the Debtors' Act, 1869, 32 & 33 Vict. c. 62. Imprisonment may still be inflicted in a few cases, specially mentioned in the act.

(*b*) Gibbon, Decl. & F. c. 14, adopts the simple interpretation *de debitore in partes secundo*. As to other critics, see Taylor,

Comment. in L. decemviral; Bynkersh. Ob. serv. Jur. l. 1; Heinecc. Antiq., III. 30. 4.

(*c*) Cod. 7. 71.

(*d*) Just. 4. 6. 40; Dig. 43, 8; 4. 6

(*e*) Nov. 135, c. 1.

from the unwillingness which is always evinced by them to undertake the trouble and expense of a prosecution, or even of adducing proofs of misconduct, the offender, in most instances, has been *found to escape, it [* 624] seems that the wise course of legislation has as its chief aim, to put an early end to those disastrous or reckless careers which result in bankruptcy, and thus to secure as small a loss as is possible. The other object of a bankrupt law is to provide machinery, when once the stroke has fallen, and a debtor has become a bankrupt, for the purpose of realizing and distributing his assets amongst his creditors with as little loss and delay as is possible.

We cannot here follow the history of all the numerous measures which have been adopted with these objects, more or less, in view. It is sufficient here to say, that for a long time all bankruptcy acts were confined in their operation to traders only. Persons who were not traders were left to the ordinary course of law, and could only get rid of the burden of their debts by paying them, and no means existed for an enforced distribution of their estates. And the earliest relief that was afforded to them was merely to give them means of freeing themselves from action or other legal proceedings, their future acquired property being, however, made applicable to payment of their debts (*f*).

This distinction between the two classes of debtors was first broken into by the act of 1861 (*g*), by which all persons were made liable to become bankrupt (*h*). And now, under the act which will henceforth regulate this branch of our law, the distinction is only retained in a few particulars, where the circumstance that a man is a trader indicates somewhat different duties and relations on his *part in regard to other members of the community. [* 625] The machinery, as much as the spirit of the law, has changed during the three centuries and a half that bankrupt laws have existed (*i*). The later acts have been framed principally with the view of creating some means of inexpensively winding up a bankrupt estate. Yet in practice their provisions have not been found much more beneficial to creditors, even in this respect, than the older forms of proceeding.

Inasmuch as the present and all preceding laws and rules of bankruptcy will cease to have any operation or effect upon the 1st January, 1870, and the present courts of bankruptcy will then cease to exist, we deem it unnecessary here to dwell upon either the principles of the existing law, or the mode in which those principles are put into practice under the acts now in force (*k*). It is sufficient to say, that experience has shown that under those laws too great facilities have been afforded to debtors to discharge themselves of the just obligations which they have incurred, whilst too great difficulties have been felt by creditors in obtaining a fulfilment of their just wishes for the fair and equal division amongst them of their debtor's property. By the Bank-

(*f*) The first act for the relief of insolvent debtors was 32 Geo. 2, c. 123, relating to debtors under 100*l*. It was extended by 33 Geo. 3, c. 5, to 800*l*. Numerous temporary measures followed, and a permanent system, such as mentioned in the text, adopted by 1 & 2 Vict. c. 110. None of these acts are now in force.

(*g*) 24 & 25 Vict. c. 134, which is now, and will, until the 1st Jan. 1870, continue in force.

(*h*) An exception was made as to debts incurred before the passing of the act, s. 90, which exception is continued by the Bank-

ruptcy Act, 1869, s. 118, so that a non-trader cannot be made a bankrupt by a creditor who became such before 6th August, 1861.

(*i*) The first bankrupt act was 34 Hen. 8, c. 4; the second, 13 Eliz. c. 7; the third, 21 Jac. 1, c. 19. Numerous others followed. The more recent ones are, 13 & 13 Vict. c. 106; 24 & 25 Vict. c. 134; all which are superseded by the act of the present year, 32 & 33 Vict. c. 71.

(*k*) 24 & 25 Vict. c. 134, and such parts of 13 & 13 Vict. c. 106, and the older acts, as were not repealed by the act of 1861. These acts are repealed by 32 & 33 Vict. c. 83.

ruptcy Act, 1861, it was for the first time made possible for a man by direct means (*l*) to make himself a bankrupt. This privilege, which has been made use of to a most unexpected extent, has proved to be unsatisfactory in its operation, and will, from the commencement of the act of 1869, no longer exist.

The principal objects, then, which the legislature has * had in view [** 626*] in framing the recent act have been to secure: first, that a distribution of a debtor's property should be made amongst his creditors with as little expense as is possible; and secondly (by making the consequences of a great deficiency of assets somewhat severe to the bankrupt), that the career of an unfortunate or reckless person may be put a stop to at as early a period as may be practically attainable. Yet the legislature has not been regardless of the necessity for compelling persons, who enter into engagements which may result in their inability to pay their debts, to observe a strict attention to honesty. For by the act (*m*), which abolishes (with a few exceptions) imprisonment for debt, it is enacted, that any person adjudged bankrupt, and any person whose affairs are liquidated by arrangement pursuant to the Bankruptcy Act, 1869, shall, in each of the cases there specified, be held criminally responsible, and punished accordingly. The cases are principally where the bankrupt has committed those fraudulent acts which the pressure of insolvency commonly tempts men to commit.

We will now give a short account of the provisions of the new act (32 and 33 Vict. c. 71).

First, all persons, even including persons who have privilege of parliament (*n*), may be adjudged bankrupt, whether they be traders (*o*), or not.

Next, a person becomes a bankrupt, when adjudged so by the court, upon the petition of a creditor whose debt, which must be a liquidated and unsecured debt (*p*), amounts to 50*l.* or upwards, or of several creditors whose debts in the aggregate amount to that sum at least (*q*). But before such a petition can be presented, the debtor * must have committed [** 627*] one of the acts or defaults which are constituted "acts of bankruptcy."

These are: 1. Making a conveyance or assignment of all his property to a trustee for the benefit of his creditors generally (*r*). 2. Making a fraudulent conveyance, gift, delivery, or transfer of his property, or any part of it (*s*). 3. Doing, with intent to defeat or delay his creditors, any of the following acts; viz., departing from or remaining out of England; or (being a trader) departing from his dwelling-house, or otherwise absenting himself; or beginning to keep house; or suffering himself to be outlawed (*t*). 4. Filing, in a manner prescribed by the rules of the court, a declaration that he is unable to pay his debts. 5. Having execution levied by seizure and sale

(*l*) By the action of a friendly creditor the same result was often obtained previously. This will no doubt often be the case hereafter.

(*m*) The Debtors' Act, 1869, 32 & 33 Vict. c. 42, ss. 11, 12, 13.

(*n*) See ss. 6, 120—124.

(*o*) The act defines who shall be deemed a trader, a list of trades being given in the 1st schedule.

(*p*) If the debt be partially secured, the

surplus, after deducting the value of the security, must amount to 50*l.* As to partially secured creditors, see ss. 6, 16 (*r*. 4), 40.

(*q*) Sect. 6.

(*r*) This was constituted an act of bankruptcy by 6 George. 1, c. 16.

(*s*) This was an act of bankruptcy under 1 Jac. 1, c. 15.

(*t*) These acts were made acts of bankruptcy by 18 Eliz. c. 7; and see 1 Jac. 1, c. 15.

of his goods, for payment of a debt of 50*l.* or upwards (*u*). 6. Having neglected to pay, or secure, or compound, the petitioner's debt, after having had a debtor's summons (a summons provided for by the act (*x*)), served upon him, being a trader, within seven days, and, being a non-trader, within three weeks after service.

An adjudication founded upon any of these acts of bankruptcy will not, however, be granted, unless the petition be presented within six months after the act has been committed (*y*). The act of bankruptcy upon which the petition is founded, or the earliest act of bankruptcy that is proved to have been committed, within twelve months preceding the presentation of the petition, constitutes the commencement of the bankruptcy (*z*). As soon as the bankrupt has been so adjudicated, no creditor may commence or prosecute any [* 628] proceeding against the *bankrupt without leave of the court; and all the ordinary remedies are taken away; the rights only of secured creditors, with respect to their security, being, however, preserved (*a*). Every creditor must prove his debt under the bankruptcy, and is bound by it.

Immediately an order of adjudication has been made, the property of the debtor becomes divisible amongst his creditors; and for the purpose of making the division, a meeting of the creditors is to be called, which is to be presided over by the registrar of the court, and at which they are to appoint some fit person, whether a creditor or not, as a trustee, and also nominate some other fit persons, not exceeding five, who are to be creditors who have proved their debts, as a committee of inspection, for the purpose of guiding, and in some measure controlling, the trustee in the discharge of his duties: or the creditors may leave the appointment of the trustee to the committee. The title of the trustee relates back to the commencement of the bankruptcy. The creditors may at the same or any subsequent meeting give any special directions they may please, as to the manner in which the property is to be administered by the trustee; and such directions are to be binding upon him.

The property which is to be divisible amongst the creditors (*b*) is not to include any property held by the bankrupt on trust for any other person, nor the tools (if any) of his trade, nor the necessary wearing apparel and bedding, of himself, his wife, and children; such tools, apparel, and bedding, not exceeding in value the sum of 20*l.* But it is to include, 1. All such property as may be vested in the bankrupt at the commencement of the bankruptcy, or may be acquired by, or devolve upon him, during its continuance; 2. The capacity to exercise, or take proceedings to exercise, all powers over property which might be exercised by the bankrupt for his own benefit, at the commencement or at any time during the continuance of the bankruptcy. 3. All goods and chattels [* 629] *being at the commencement of the bankruptcy in the possession order, or disposition of the bankrupt, being a trader, by the consent and permission of the true owner; of which goods and chattels the bankrupt

(*u*) Formerly this was only an act of bankruptcy when done at the instance of the debtor, and therefore involving a suspicion of fraud. See 1 Jac. 1, c. 15. The recent act, 24 & 25 Vict. c. 134, s. 73, adopted this as an act of bankruptcy, but only for traders; the present act makes it such for all debtors.

(*x*) Sect. 7.

(*y*) Sect. 6.

(*z*) Sect. 11.

(*a*) Sects. 11, 12, 13.

(*b*) Sect. 15.

is reputed owner, or of which he has taken upon himself the sale or disposition as owner: but it is provided that things in action, other than debts due to him in the course of his trade or business, are not to be deemed goods and chattels within the meaning of this clause (c).

Upon the appointment of the trustee, the property vests, without any conveyance, assignment, or transfer, in him (d); and the certificate of the court of his appointment constitutes his title-deed (e). Until the appointment of a trustee, and during any vacancy which may occur, the registrar of the court is the trustee; and the property also vests, as new trustees (if any) are from time to time appointed, on their respective appointments (f).

It is the duty of the trustee to realise all the property and convert it into money, and from time to time (acting with the sanction of the committee) to divide it ratably among the creditors according to the amount of their unsecured debts. Large powers of administration are given to the trustee for these purposes. As to the debts, they are all to be paid *pari passu*, with the following exceptions:—Parochial or other local rates not more than a year in arrear; all assessed taxes, land tax, and property tax, which have been assessed on the 5th April next before the date of the adjudication; wages of clerks and *servants, not exceeding four months' arrears, and of labourers and workmen, not exceeding two months' arrears. These are to have priority over all other debts, but as between themselves are to rank equally (g). A landlord may, however, distrain at any time, either before or after the commencement of the bankruptcy, for rent due to him from the bankrupt; but if the distress be levied after the commencement of the bankruptcy, it is to be available for only one year's rent, accrued due prior to the adjudication; and he must prove for the overplus under the bankruptcy (h). The debts proveable in the bankruptcy include all debts and liabilities, except those of the nature of unliquidated damages arising otherwise than by contract or promise, and also except debts incurred after an act of bankruptcy with a person who had notice of such act. Interest may be allowed if it would have been allowable by a jury (i).

When the whole of the property has been realised for the benefit of the creditors, or as much of it as in the opinion of the trustee or the committee can be realised without needlessly protracting the bankruptcy, a report is made to the court; and if the court be satisfied that the property has been realised, it makes an order declaring the bankruptcy closed. When this has been done, the bankrupt may apply for his discharge. The order of discharge will only be granted upon condition that the assets have been sufficient to pay a dividend of not less than 10s.

(c) The rule as to "order and disposition" in bankruptcy was first introduced in 21 Jac. 1, c. 19, in order to prevent persons allowing traders to acquire a fictitious credit by appearing to be the owners of goods which in reality belong to themselves. It has been the source of much litigation and many hardships to innocent individuals. The new law is a very considerable modification upon preceding enactments, and may, it is hoped, effectuate its object, without causing the evils which have been hitherto felt. Whether it

will have this result remains to be seen. The section will include property comprised in a bill of sale, even if registered.

(d) Sect. 17. See s. 125, r. 5, as to liquidations by arrangement.

(e) Sect. 18.

(f) Sect. 83, r. 6.

(g) Sect. 83.

(h) Sect. 84.

(i) Sects. 81, 86. As to set-off of mutual debts, see s. 36, and vol. 3, p. 13.

in the pound, unless the creditors have passed a special resolution (*i. e.*, a resolution passed by a majority in number, representing three-fourths in value of the debts, of the creditors present in person or by proxy at a meeting specially convened), to the effect that a discharge should be granted to the bankrupt. An order of discharge releases the bankrupt from all debts proveable under the

[* 631] bankruptcy, except those which he incurred by means of * any fraud or breach of trust, and those of which he obtained forbearance by means of fraud; and, also, except debts due to the crown or relating to the revenue: but of these last he may be discharged if the commissioners of the treasury certify their consent in writing to such discharge (*j*). If the bankrupt fail to obtain an order of discharge, then, after the close of his bankruptcy, the following consequences ensue: a period of three years is given to the bankrupt, during which, if he pays to

Status of uncertificated bankrupt.

his creditors such additional sum as, together with the dividend already paid, makes up 10s. in the pound, he is to obtain an order of discharge; and, meanwhile, no debt proveable under the bankruptcy shall be enforced against his property: but if, at the expiration of the three years, he has not in this manner obtained an order of discharge, any balance remaining unpaid in respect of any debt proved under the bankruptcy (without interest) shall be deemed an existing debt in the nature of a judgment debt, and may be enforced as such.

The court referred to throughout is, in the case of debtors residing in or carrying on business in London (*k*), the London Bankruptcy Court, which is to consist of a chief judge and the usual subordinate officers. In the case of those residing in any other part of England, the court is the county court of the district in which the debtor resides or carries on business (*l*). Orders of the county courts are to be subject to appeal to the chief judge; and orders of the latter are to be subject to appeal to the court of appeal in chancery, and ultimately to the house of lords.

The act also contains provisions for liquidating the affairs of a debtor by arrangement otherwise than in bankruptcy. The details of these cannot be here enlarged upon.

(*j*) Sect. 49.

(*k*) This includes the city of London and

the districts of the metropolitan county courts, s. 60.

(*l*) Sects. 59, 71.

* CHAPTER XXXI.

[* 632]

TITLE BY TESTAMENT AND ADMINISTRATION.

THERE yet remain to be examined, in the present chapter, two other methods of acquiring personal estates, viz., by testament (*a*) and administration. And these we propose to consider in one and the same view; they being in their nature so connected and blended together as makes it impossible to treat of them distinctly, without manifest tautology and repetition.

In the pursuit, then, of this joint subject, we will, first, inquire shortly into the origin and antiquity of testaments and administrations; secondly, show who is capable of making a last will and testament; thirdly, consider the nature of a testament and its incidents; fourthly, show what an executor and administrator are, and how they are to be appointed; and, lastly, select some few of the general heads of the office and duty of executors and administrators.

There is no question that testaments are of very high antiquity, though, as we have seen, wills dealing with real estate in England have not been invariably admitted by our law. The power of directing who shall be the possessors of a person's moveables, after his death, to a limited extent at least, has been nearly universal among civilized nations, and the law of every well-regulated society (*b*) has made provision as to the persons in whom the goods are to vest in the absence of such direction, or so far as such direction may not or does not extend. The former method of acquiring personal property, according to the express directions of the deceased, we call a testament: the latter, which is according to the will of the deceased, not expressed, indeed, but presumed by the law (*c*), we call in England an administration; being the same which the civil lawyers term a succession *ab intestato*, and which answers to the descent or inheritance of real estates.

There seems ample evidence that the Jews in the earliest times exercised this right of testamentary disposition (*d*). Among the Greeks, also, at Athens at least, it was permitted, having been introduced by Solon (*e*), though in other parts of Greece it was discountenanced (*f*).

Amongst the Romans in ancient times a member of the comitia curiata could, by a kind of special law, passed at his personal instance, alter the devolution of his personal property (*g*). Plebeians effected a like object by an indirect method of a pretended sale (*per aes et libram*), a proceeding afterwards countenanced by the Laws of the Twelve Tables (*h*). Subsequently, by

(*a*) The word "will," *ultima voluntas in scriptis*, is now properly applicable to real estate; "testament" being the appropriate word for "personalty" (Co. Litt. 111 a). The two words are however, in substance, the same. Testament has been defined as *testatio mentis* (Inst. 2. 10. 1), though this is hardly a derivation.

(*b*) Puff. L. of N., b. 4, c. 10.

(*c*) *Ib.* b. 4, c. 11.

(*d*) Barbeyr. Puff. 4. 10. 4; Godolph. Orph. Leg. 1. 1, citing Gen. c. 15; and see Gen. c. 48.

(*e*) Plutarch, in Vita Solon.

(*f*) Pott. Antiq. 1. 4, c. 15.

(*g*) Gai. 2, 101—104.

(*h*) *Ubi legassit super pecunia tutelare suae rei, ita jus esto.*

the prætorian law and the imperial constitutions, simple testaments became permissible; to be made, however, with considerable formalities, such as, amongst others, the presence of seven witnesses (*i*). Amongst the Germans, however, they do not seem to have been in use (*k*). And this variety may serve to evince, that the right of making wills, and disposing of property after death, is merely a creature of the civil state (*l*); which has permitted it in [** 634*] some countries and denied it in others: * and, even where it is permitted by law, it is subjected to different formalities and restrictions in almost every nation under heaven (*m*).

With us in England this power of bequeathing is coeval with the first rudiments of the law: for we have no traces or memorials of any time when it did not exist. Mention is made of intestacy, in the old law before the conquest, as being merely accidental; and the distribution of the intestate's estate, after payment of the lord's heriot, is then directed to go according to the established law. "*Sive quis incuriâ, sive morte repentinâ, fuerit intestatus mortuus, dominus tamen nullam rerum suarum partem (præter eam quæ jure debeter herediti nomine) sibi assumpto. Verum possessiones uxori, liberis, et cognatione proximis, pro suo cuique jure, distribuuntur*" (*n*). But we are not to imagine that this power of bequeathing extended originally to all a man's personal estate. On the contrary, Glanvil will inform us (*o*), that by the common law, as it stood in the reign of Henry II., a man's goods were to be divided into three equal parts; of which one went to his heirs or lineal descendants, another to his wife, and the third was at his own disposal: or, if he died without a wife, he might then dispose of one moiety, and the other went to his children; and so *e converso*, if he had no children, the wife was entitled to one moiety, and he might bequeath the other; but, if he died without either wife or issue, the whole was at his own disposal (*p*). The shares of the wife and children were called their reasonable parts; and the writ *de rationabili parte bonorum* was given to recover them (*q*).

This continued to be the law of the land at the time of magna carta, which provides, that the king's debts shall first of all be levied, and then the residue [** 635*] of the goods * shall go to the executor to perform the will of the deceased; and, if nothing be owing to the crown, "*omnia catalla cedant defuncto; salvis uxori ipsius et pueris suis rationabilis partibus suis*" (*r*). In the reign of King Edward III. this right of the wife and children was still held to be the universal or common law (*s*); though frequently pleaded as the local custom of Berks, Devon, and other counties (*t*): and sir

(*i*) Inst. 2. 10. 2.

(*k*) Tacit. de More Germ. 21.

(*l*) Ante, p. 8.

(*m*) Sp. L. b. 27. c. 1; Vinnius in Inst. 1. 2, tit. 10.

(*n*) LL. Canut. c. 68.

(*o*) L. 2. c. 5.

(*p*) Bracton, l. 2, c. 26; Flet. l. 2, c. 57.

(*q*) F. N. B. 122.

(*r*) 9 Hen. 3, c. 18.

(*s*) A widow brought an action of detinue against her husband's executors, *quod cum per consuetudinem totius regni Angliæ hæcenus usitatam et approbatam, uxores debent et*

solent a tempore, &c., habere suam rationabilem partem bonorum maritorum suorum: ita videlicet, quod si nullos habuerint liberos, tunc medietatem: et si habuerint, tunc tertiam partem, &c.; and that her husband died worth 200,000 marks, without issue had between them; and thereupon she claimed the moiety. Some exceptions were taken to the pleadings, and the fact of the husband's dying without issue was denied; but the rule of law, as stated in the writ, seems to have been universally allowed. (M. 30 Edw. 3, 25.) And a similar case occurs in H. 17 Edw. 3, 9.

(*t*) Reg. Brev. 142; Co. Litt. 176.

Henry Finch lays it down expressly (*u*), in the reign of Charles I., to be the general law of the land. But this law is at present altered by imperceptible degrees, and the deceased may now, by will, bequeath the whole of his goods and chattels; though we cannot trace out when first this alteration began. Indeed, Sir Edward Coke (*x*) is of opinion, that this never was the general law, but only obtained in particular places by special custom: and to establish that doctrine, he relies on a passage in Bracton, which, in truth, when compared with the context, makes directly against his opinion. For Bracton (*y*) lays down the doctrine of the reasonable part to be the common law; but mentions that as a particular exception, which Sir Edward Coke has hastily cited for the general rule. And Glanvil, magna carta, Fleta, the year-books, Fitzherbert, and Finch seem to agree with Bracton that this right to the *pars rationabilis* was by the common law (*z*).

* But whatever was the common law throughout the kingdom, [* 636] this at least is certain, that until comparatively modern times, in certain places, particularly in the province of York, the principality of Wales, and the city of London, a restriction upon the testamentary power of disposition was by custom imposed upon testators in favour of their wives and children, which, in fact, continued until abolished by statute (*a*).

These common law or customary restrictions now nowhere exist: absolute power of disposition by testament over all his personal property is possessed by everybody who is not under personal disability (*b*).

In case a person made no disposition of such of his goods as were testable, whether that were only part or, as is now the case, the whole of them, he was, and is, said to die intestate; and in such cases, it is said, that by the old law the king was entitled to seize upon his goods, as the *parens patriæ*, and general trustee of the kingdom (*c*). This prerogative the king continued to exercise for some time by his own ministers of justice; and probably in the county court, where matters of all kinds were determined; and it was granted as a franchise to many lords of manors, and others, who had, till very recently, a prescriptive right to grant administration to their intestate tenants and suitors, in their own courts baron, and other courts, or to have their wills there proved, in case they made any disposition (*d*). Afterwards the crown, in favour of the church, invested the prelates with this branch of the prerogative; which was done, says Perkins (*e*), because it was intended by the law, that spiritual men are of better conscience than laymen, and that they had more knowledge what things * would conduce to the benefit of the soul of the deceased (*f*). [* 637] The goods, therefore, of intestates were given to the ordinary by the crown; and he might seize them, and keep them without wasting, and also might give, aliene, or sell them at his will, and dispose of the money *in pios*

(*u*) Law. 175.

(*x*) 2 Inst. 88.

(*y*) L. 2, c. 26, s. 2.

(*z*) See, however, Somner, Gavelk. 9; Harg. Co. Litt. 176 b., n. 6.

(*a*) See 4 & 5 W. & M. c. 2; 2 & 3 Anne, c. 5, as to the province of York; 7 & 8 Will. 3, c. 38, for Wales; and 11 Geo. 1, c. 18, for London.

(*b*) Any doubts on this were removed by 7 Will. 4 & 1 Vict. c. 26, s. 3.

(*c*) *Henslow's Case*, 9 Rep. 88.

(*d*) *Ib.* 37.

(*e*) Sect. 486.

(*f*) See Bac. Abr. Executors (E), 1; Gilb. Rep. 203; 1 Lev. 158, 186; 1 Reeves's Hist. Eng. Law, 78.

usus: and if he did otherwise, he broke the confidence which the law reposed in him (*g*). So that, properly, the whole interest and power which were granted to the ordinary, were only those of being the king's almoner within his diocese; in trust to distribute the intestate's goods in charity to the poor, or in such superstitious uses as the mistaken zeal of the times had denominated pious (*h*). And, as he had thus the disposition of intestates' effects, the probate of wills of course followed: for it was thought just and natural, that the will of the deceased should be proved to the satisfaction of the prelate, whose right of distributing his chattels for the good of his soul was effectually superseded thereby.

The goods of the intestate being thus vested in the ordinary upon the most solemn and conscientious trust, the reverend prelates were, therefore, not accountable to any, but to God and themselves, for their conduct (*i*). But even in Fleta's time it was complained (*k*), "*quod ordinarii, hujusmodi bona nomine ecclesiæ occupantes, nullam vel saltem indebitam faciunt distributionem.*" And to what a length of iniquity this abuse was carried, most evidently appears from a gloss of Pope Innocent IV. (*l*), written about the year 1250; wherein he lays it down for established canon law, that "*in Britannia tertia pars bonorum decedentium ab intestato in opus ecclesiæ et pauperum dispensanda est.*" Thus the popish clergy took to themselves (*m*) (under the name of the church

[* 638] and poor) * the whole residue of the deceased's estate, after the *partes rationabiles*, or two-thirds, of the wife and children were deducted; without paying even his lawful debts, or other charges thereon. This, however, was in excess of their rights; for we find that in Snelling's case (*n*) it was resolved that the ordinary, if he took possession of the intestate's goods, was chargeable with his debts at common law. The statute Westminster 2 (*o*), which made a declaration to this effect, was only confirmatory of the common law, but probably was effective in enforcing its observation. But, though they were now made liable to the creditors of the intestate for their just and lawful demands: yet the *residuum*, after payment of debts, remained still in their hands, to be applied to whatever purposes the conscience of the ordinary should approve. The flagrant abuses of which power occasioned the legislature again to interpose, in order to prevent the ordinaries from keeping any longer the administration in their own hands, or those of their immediate dependents:

Administration to nearest and most lawful friends of deceased.

and therefore the statute 31 Edw. 3, c. 11, provides, that, in case of intestacy, the ordinary shall depute the nearest and most lawful friends of the deceased to administer his goods; which administrators are put upon the same footing, with regard to suits and to accounting, as executors appointed by will.

This is the origin of administrators, and they so stood till the year 1857, when the Probate Act (*p*) was passed. Administrators were considered as the officers of the ordinary, appointed by him in pursuance of this statute, which

(*g*) Finch. L. 173, 174.

(*h*) Plowd. 277.

(*i*) *Ib.*

(*k*) L. 2, c. 57, s. 10.

(*l*) In Decretal. l. 5, t. 8, c. 43.

(*m*) The proportion given to the priest, and to other pious uses, was different in different countries. In the archdeaconry of Richmond,

in Yorkshire, this proportion was settled by a papal bull, A. D. 1254, (Regist. honoris de Richm. 101), and was observed till abolished by the statute 26 Hen. 8, c. 15.

(*n*) 5 Rep. 826.

(*o*) 18 Edw. 1, c. 19.

(*p*) 20 & 21 Vict. c. 77, amended by 21 & 22 Vict. c. 95.

singles out the next and most lawful friend of the intestate; who is interpreted to be the next of blood that is under no legal disabilities. The statute 21 Hen. 8, c. 5, * enlarged a little more the power of the ecclesiastical judge; and permitted him to grant administration either to the widow, or the next of kin, or to both of them, at his own discretion; and where two or more persons were in the same degree of kindred, gave the ordinary his election to accept whichever he pleased.

Thus stood the general law of probate and administration till the act we have mentioned was passed. That act (*g*) abolished the jurisdiction of the ecclesiastical and all other courts then existing (*r*) to grant probate of wills or letters of administration of the personal estates of intestates. A new court was established, called the court of probate, which now exclusively exercises in the name of Her Majesty every jurisdiction, and performs all duties relating to the personal estates of deceased persons, formerly exercised or performed by the prerogative court of Canterbury, or by the ordinaries, or other courts: with, however, this exception, as to jurisdiction, that no suits for legacies or for distribution of residue are to be entertained. The act abolished all the jurisdiction of the old ecclesiastical and other courts, but did not confer upon the new court any jurisdiction over the administration of the estates; which, indeed, is one of the chief functions of the court of chancery.

With respect to the inquiries, who may make a testament, and how it is to be made, the present law has already been pretty fully stated (*s*), inasmuch as the same rules now govern the capacity to make, and the mode of making, testaments of personal estates, as wills of real estates; though this was not so formerly (*t*). (414) The *incapacity to make a will arising from mental infirmity or other physical causes, or from duress and other disabilities, is much the same as exists in other cases, such as the execution of a deed, of entering into a contract, &c., and must be tried by the same rule; the court of probate being, however, the court in which the validity of the will is tried. Of the procedure in this court, more will appear in the third book of these Commentaries.

An exception exists, however, as to the capacity of a married woman to make a will for the purpose of appointing an executor to continue the personal representation of a testator, of whose will she is the sole or surviving executor (*u*). This she may do without the concurrence or consent of her husband. She may, indeed, make a will of her personal estate, but it must be made with the consent of her husband, and then is rather his will than hers (*v*). (415)

(*g*) 20 & 21 Vict. c. 77, s. 3.

(*r*) Including certain courts established in districts, some exempt from the jurisdiction of the ordinary of the diocese, others even from that of the archbishop, which were called Peculiar and Royal Peculiar, and in which special ordinaries exercised jurisdiction. See 1 Will. Ex. 278.

(*s*) *Ante*, chap. 23.

(*t*) Infants of the age of fourteen years, if males, or twelve years, if females, might

make wills. Godolph. 1, c. 8; Warb. 212. Also the signature of wills of personal estate need not have been witnessed even by a single witness, may, before the Statute of Frauds, need not even have been in writing; and even after that statute, nuncupative wills, *i. e.*, wills orally made, were permissible in certain cases and under certain restrictions.

(*u*) Shep. Touch. 402.

(*v*) *Hearle v. Greenbank*, 1 Ves. S. 298; *Re Rebecca Smith*, 1 Sw. & Tr. 127.

(414) See *ante*, 775, 776, notes 385, 386.

(415) Independently of the statutes authorizing married women to dispose of their own property by will, it is very generally held that a married woman may make a valid will for

If, however, her husband is banished by act of parliament, or, it is said, if he have abjured the realm (x), (if that be possible (y)), her capacity to make a will survives. And a deserted wife, who has obtained a protection order under the act 20 & 21 Vict. c. 85, s. 21, may, it would seem (z), make a testamentary disposition of all property acquired by her after the date of the order. The queen consort, also, may dispose of her chattels without the consent of her lord (a).

[* 641] A codicil, *codicillus*, a little book or writing, is a * supplement to a will, or an addition made by the testator, and annexed to, and to be taken as part of, a testament: being for its explanation, or alteration, or to make some addition to, or else some subtraction from, the former dispositions of the testator. (416)

A few remarks upon the question what local law ought to determine the validity and construction of a will, or the devolution of property on intestacy may here find a place.

A will of fixed or immoveable property is generally governed by the *lex loci rei sitæ* (b). In regard to personal property, however, other considerations clearly apply. As to moveables, the *lex loci domicilii* seems proper to prevail as to the validity and construction of the will and the devolution of the property, though the *forum* will necessarily be that *loci rei sitæ*. (417)

In those countries, such as France, where the law does not permit the exercise of unrestricted testamentary disposition some difficulty arises in applying this principle, and special provisions are accordingly made by French law (c).

(x) *Countess of Portland v. Prodgers*, 2 Vern. 104.

(y) Lord Hatherley (in *Udny v. Udny*, L. R. 1 H. L. Sc. 441) expresses his opinion that a man cannot, at present at least, change his allegiance.

(z) *Ante*, p. 560.

(a) Co. Litt. 133. It is needless to add, that a married woman may exercise a power to

appoint property by will (*ante*, p. 560), and make a will as to her separate estate.

(b) As to whether this applies to leaseholds, which, according to our English legal classification, are placed amongst moveables, see some observations and authorities cited 1 Jarm. Wills, 4 n. The question seems still open for argument.

(c) Cod. Nap. 1. 1. 2.

the disposition of her personal property, if her husband gives his consent. *Cutter v. Butler*, 25 N. H. 343, 357; *George v. Bussing*, 15 B. Monr. 558; *Lee v. Bennett*, 31 Miss. 119; *Newlin v. Freeman*, 1 Ired. Law (N. C.), 514; *Hood v. Archer*, 1 McCord, 225; *Fisher v. Kimball*, 17 Vt. 323.

(416) A codicil is no revocation of a will, except in the precise degree in which it is inconsistent with it, unless there be words of revocation. *Conover v. Hoffman*, 1 Abb. Ct. App. 429; 15 Abb. 100; *Larrabee v. Larrabee*, 28 Vt. 274; *Brant v. Willson*, 8 Cow. 56; *Bradley v. Gibbs*, 2 Jones' Eq. (N. C.) 13; *Read v. Manning*, 30 Miss. (1 George) 308; *Collier v. Collier*, 3 Ohio St. 360.

If a testator, by a codicil to his will, revokes a legacy in express terms, alleging as a reason for such revocation that he had provided a permanent home for such legatee, the codicil will not be held inoperative on the ground of mistake, although the testator had not provided such permanent home. *Hayes v. Hayes*, 21 N. J. Eq. 265.

The revocation of a will revokes all codicils appended to it, and especially all codicils which depend upon it for interpretation or execution. *Youse v. Forman*, 5 Bush (Ky.), 337. And a codicil which depends upon the body of the will for interpretation or execution cannot be established as an independent will, after the will itself has been revoked. *Id.*; *Mutter of Pinckney's Will*, 1 Tuck. Surr. 436; see, also, *Grimwood v. Cozens*, 2 S. & T. 364; 5 Jur. N. S. 497.

(417) See *ante*, 782, note 398.

The law of England being in no difficulty of this sort, adopts without reserve the rule that a will, whether of an Englishman or a foreigner, shall be admitted as valid, if made according to the law of the place where the testator was domiciled at the time of making his will and of his death. What that domicile is, in any particular case, often is a question of very considerable difficulty (*d*); but, when ascertained, it is decisive as to what law ought to be consulted both as to the validity and construction of the will.

Difficulties, however, have arisen, the solution of which by no means presents itself readily; as, *e.g.*, where the testator has changed his domicile after making his will, or * where the will was made according to the law [** 642*] of the country where it was made, the testator having at the time his domicile elsewhere. With regard to wills of personal estate made by British subjects, such questions have to some extent been set at rest by a recent act (*e*), whereby it is declared that every such will made out of the United Kingdom (whatever may be the domicile of the testator at the time of making the same, or at the time of his or her death) shall, as regards personal estate, be held to be well executed for the purpose of being admitted in England and Ireland to probate, and in Scotland to confirmation, if the same be made according to the form required, either by the law of the place where the same was made, or by the law of the place where such person was domiciled when the same was made, or by the laws then in force in that part of Her Majesty's dominions where he had his domicile of origin. And (*f*) every will made within the United Kingdom is to be held to be well executed, as regards personal estate, if executed according to the forms required by the laws in force in that part of the United Kingdom where it was made. Moreover, a change of domicile is not to affect the validity of any will (*g*).

Executors and administrators. We will now consider what is an executor, and what an administrator, and how they are both to be appointed.

An executor is he to whom another man commits by will the execution of that his last will and testament, so far as regards his personal estate. (418)

Executors. And all persons are capable of being executors, that are capable of making wills, and many others besides; as feme-coverts, and infants: nay, even infants unborn, or *in ventre sa mere*, may be made executors (*h*).

(*d*) For one of the most recent disquisitions on the law of domicile, see *Udny v. Udny*, L. R. 1 H. L. Sc. 441, where principles are laid down with singular distinctness.

(*e*) 24 & 25 Vict. c. 114.

(*f*) Sect. 2.

(*g*) Sect. 3. This was a question of great difficulty, whether, if a testator, having made a valid will according to the law of his domicile, afterwards changed his domicile, the will remained good. Story, Conf. Laws, c. xi.

(*h*) West. Symb. p. 1, s. 635.

(418) In Maryland neither letters testamentary nor of administration will be granted to a corporation; nor will a corporation, when named as executor, be allowed, according to the English practice, to designate a person to receive administration with the will annexed. *President, etc., of Georgetown College v. Browne*, 34 Md. 450.

Where a single woman is appointed sole executrix of a will, and she afterward marries, her husband will become joint executor with her. *Barber v. Bush*, 7 Mass. 510. The husband of an executrix may exercise all the powers of an executor by reason of her appointment, and without any qualification on his part; but the right does not survive to him after the death of his wife. *Edmundson v. Roberts*, 1 How. (Miss.) 322.

A married woman who is executrix of a will may execute a mere naked power contained in it without the concurrence or the consent of her husband. *Tyree v. Williams*, 3 Bibb (Ky.), 365, 367, 368; *Hoover v. Samaritan Society*, 4 Whart. (Penn.) 445; *Coryell v. Duntun*, 7 Penn. St. 530; *Ela v. Cord*, 2 N. H. 175.

[* 643] But where an infant is sole executor, since he cannot * perform the duties of the office, it has been provided (i) that administration, with the will annexed, will be granted to the guardian of such infant, or such other person as the court may think proper, until the infant attain the age of twenty-one years. If the infant be not sole executor, this administration *durante minore etate* is unnecessary, for those executors who are of full age may execute the will (k). In like manner, limited administration may be granted *durante absentia*, or *pendente lite*; *Durante absentia*, when the executor is out of the realm (l), or when a suit is commenced in the ecclesiastical court touching the validity of the will (m). This appointment of an executor is essential to the making of a will (n), and, indeed, is the only essential part of the will, since a simple appointment of an executor, without anything more, if duly executed, constitutes a will of which probate will be granted (o); and it may be performed either by express words, or such as strongly imply the same. But if the testator makes an incomplete will, without naming any executors, or if he names incapable persons, or if the executors named refuse to act; in any of these cases, the ordinary must grant administration *cum testamento annexo* (p) to some other person; and then the duty of the administrator, as also when he is constituted only *durante minore etate*, &c., of another, is very little different from that of an executor. And this was law so early as the reign of Henry II. when Glanvil (q) informs us, that "*testamenti executores esse debent ii, quos testator ad hoc elegerit, et quibus curam ipse commiserit; si vero testator nullos ad hoc nominaverit, possunt propinqui et consanguinei ipsius defuncti ad id faciendum se ingerere.*"

[* 644] But if the deceased died wholly intestate, without * making either will or executors, then general letters of administration must be granted by the court to such persons as are entitled thereto under 31 Edw. 3, stat. 1, c. 11, and 21 Hen. 8, c. 5, s. 3; except, indeed, the husband of a deceased wife, whose right to administration of her personal effects is unquestionable, and has been recognised by parliament (r), although the foundation on which it rests has been variously stated (s).

But the husband of a deceased wife who has obtained a protection order, has no right to administration of property acquired by her after the date of the order (t).

The statute of Hen. 8 provides, that administration may be given to the widow of a deceased, or to the next-of-kin, or to both, as by the discretion of the ordinary shall be thought good; and, amongst the next of kin, the ordinary shall be at liberty to choose those of the claimants whom he pleases. The practice now is to give the administration to the widow, and, in default of a widow, to such of the next of kin as, under the statutes which regulate the distribution of the personal estates of intestates, are entitled. Though, if good cause be shown, that course will be departed from (u).

(i) 88 Geo. 3, c. 88, s. 6.

(k) 1 Will. Ex. 222.

(l) 1 Lutw. 842.

(m) 2 P. Wms. 589, 590.

(n) Went c. 1; Plowd. 281.

(o) 1 Will. Ex. 218; *In re Jordan*, L. R. 1 P. & D. 555.

(p) 1 Roll. Abr. 907; Comb. 20.

(q) L. 7, c. 6.

(r) 29 Car. 2, c. 3.

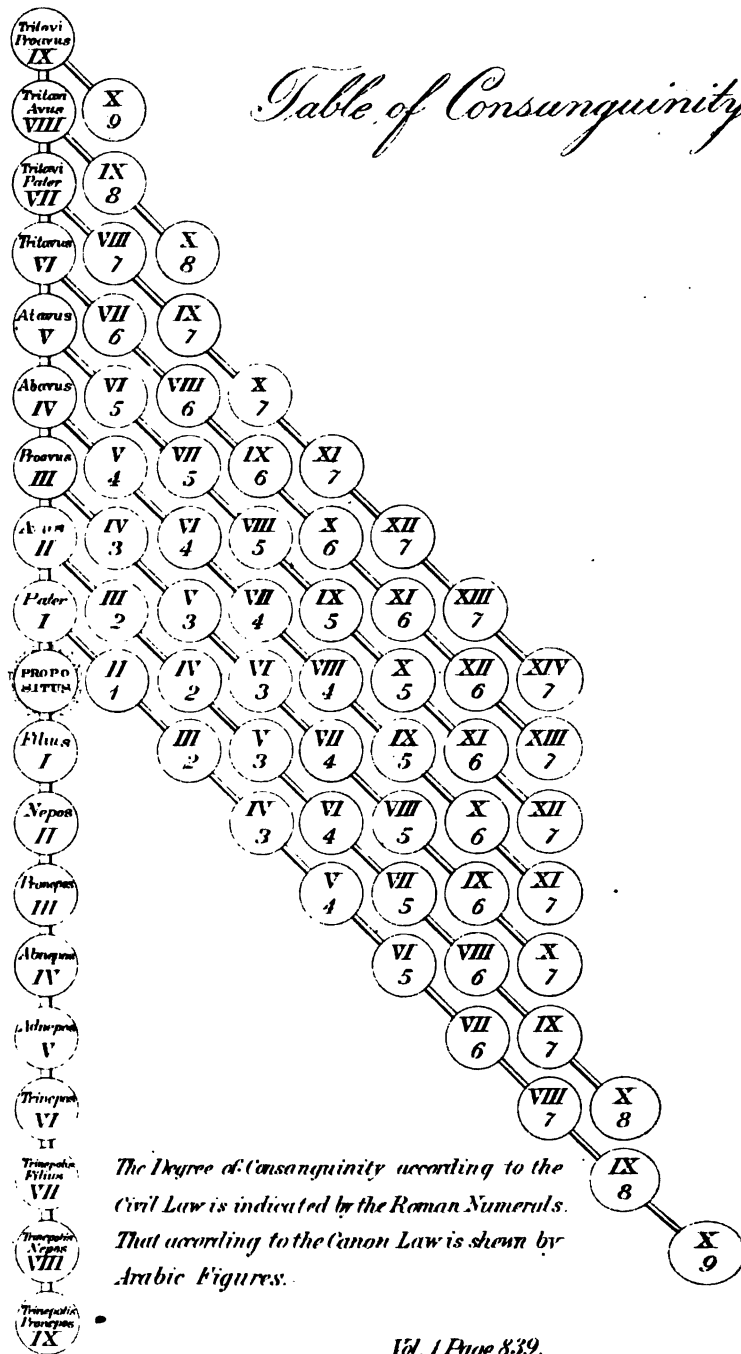
(s) See 1 Will. Ex. 395.

(t) *Ante*, pp. 560, 640.

(u) 1 Will. Ex. 402.

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Table of Consanguinity.



We may here, then, fitly introduce the inquiry, who are the next of kin, and in what order and manner consanguinity is reckoned by our law.

Consanguinity, or kindred, is defined by the writers on these subjects to be "*vinculum personarum ab eodem stipite descendentium*;" the connexion or relation of persons descended from the same stock or common ancestor. This consanguinity is either lineal, or collateral.

Lineal consanguinity is that which subsists between persons, of whom one is descended in a direct line from the other, as between John Stiles (the *propositus* in the table of consanguinity) and his father, grandfather, great-grandfather, and so upwards in the direct ascending line; * or between John Stiles and his son, grandson, great-grandson, and so downwards in the direct descending line. Every generation, in this [* 645] lineal direct consanguinity, constitutes a different degree, reckoning either upwards or downwards: the father of John Stiles is related to him in the first degree, and so likewise is his son; his grandsire and grandson in the second; his great-grandsire and great-grandson in the third. This is the only natural way of reckoning the degrees in the direct line, and therefore universally obtains, as well in the civil (*x*), and canon (*y*), as in the common law (*z*).

The doctrine of lineal consanguinity is sufficiently plain and obvious; but it is at the first view astonishing to consider the number of lineal ancestors which every man has, within no very great number of degrees; and so many different bloods (*a*) is a man said to contain in his veins, as he has lineal ancestors. Of these he hath two in the first ascending degree, his own parents; he hath four in the second, the parents of his father and the parents of his mother; and so on. This lineal consanguinity, we may observe, falls strictly within the definition of *vinculum personarum ab eodem stipite descendentium*; since lineal relations are such as descend one from the other, and both of course from the same common ancestor.

Collateral kindred answers to the same description; collateral relations agreeing with the lineal in this, that they descend from the same stock or ancestor; but differing in this, that they do not descend one from the other. Collateral kinsmen are such then as lineally spring from one and the same ancestor, who is the *stirps*, or root, the *stipes*, trunk, or common stock, from whence these relations are branched out. As if John Stiles has two sons, who have each a numerous issue; both these issues are lineally descended from John Stiles as their common * ancestor; [* 646] and they are collateral kinsmen to each other, because they are all descended from this common ancestor, and all have a portion of his blood in their veins, which denominates them *consanguineos*.

We must be careful to remember, that the very being of collateral consanguinity consists in this descent from one and the same common ancestor. Thus Titius and his brother are related: why? because both are derived from one father: Titius and his first cousin are related: why? because both descend from the same grandfather; and his second cousin's claim to consanguinity is this, that they both are derived from one and the same great-grandfather. In short, as many ancestors as a man has, so many common stocks he has, from which collateral kinsmen may be derived.

(*a*) Dig. 88. 10. 10.
(*y*) Decretal. l. 4, tit. 14.

(*z*) Co. Litt. 23.
(*a*) *Ib.* 12.

The method of computing these degrees by the civil law (which was adopted in determining the next of kin of a deceased person) was to count upwards from either of the persons related to the common stock, and then downwards again, reckoning a degree for each person both in ascending and descending. Thus, to give an illustrious instance from our English annals, king Henry VII., who slew Richard III. in the battle of Bosworth, was related to that prince in the ninth degree. Let the *propositus*, therefore, in the table of consanguinity represent king Richard III., and the class marked (ix, 5) king Henry VII. Now their common stock or ancestor was king Edward III., the *abavus* in the same table. From Richard III. to his father, Richard, Duke of York, we have one degree; then to Richard, Earl of Cambridge, a second; to Edmund, Duke of York, a third; and to Edward III. a fourth degree. Now the descending line from Edward III. gives to John of Gaunt the fifth degree; to John, Earl of Somerset, the sixth; to John, Duke of Somerset, the seventh; to Margaret, Countess of Richmond, the eighth; and thus to Henry VII. the ninth degree.

The canon law reckoned in a different manner: by * that law the degree is determined simply by the number of steps from the common ancestor to the one of them most remote from that ancestor (*b*). According to this mode of reckoning, Henry VII. would be said to be related to Richard III. in the fifth degree.

Having premised these observations as to consanguinity, we may now inquire how the law distributes the personal estates of intestates, subject, of course, to the paramount duty of paying their debts and funeral expenses. Formerly, as we have seen, controversies between the ecclesiastical administrators and the relations arose, and other disputes were frequent. But now these controversies

Statutes 22 & 23
Car. 2, and 29
Car. 2, c. 30.
direct distribu-
tions of residue
of intestate's
personal estate.

are quite at an end: for, by the statute 22 & 23 Car. 2, c. 10, explained by 29 Car. 2, c. 3, it is enacted, that the surplusage of intestates' estates (except of *femes-covert*, which are left as at common law (*c*)), shall, after the expiration of one full year from the death of the intestate, be distributed in the following manner: One third shall go to the widow of the intestate, and the residue, in equal proportions, to his children, or, if dead, to their representatives; that is, their lineal descendants; if there are no children or legal representatives subsisting, then a moiety shall go to the widow, and a moiety to the next of kindred in equal degree and their representatives: if no widow, the whole shall go to the children: if neither widow nor children, the whole shall be distributed among the next of kin in equal degree and their representatives: but no representations are admitted, among collaterals, farther than the children of the intestate's brothers and sisters (*d*). The next of kindred, here referred to, are to be investigated by the rules of consanguinity, as reckoned according to the computation of the civil law. Therefore, on failure of * children, the mother as well as the father succeeds to the effects of their children who die intestate and without wife or issue. As to the mother, however, a later act (1 Jac. 2, c. 17, s. 7) introduced a further modification, for by that act, if the father be dead, and any of the children die intestate without wife

(*b*) Decretal. 4. 14, 309. It is said that our law copied the canon law (Co. Litt. 23); but not so, but copied the civil law. question arises, that stated in the text, it did in the only important case in which the

(*c*) Stat. 29 Car. 2, c. 8, s. 25.
(*d*) Raym. 496; Ld. Raym. 571.

or children, in the lifetime of the mother, she and each of the remaining children, or their representatives, shall divide his effects in equal portions.

With this exception, as to the mother (which in effect reduces her to the position of a sister of the deceased (*e*)), and subject to the right of representation above noticed, all those who are of the nearest of kin and of equal degree, whether of the half blood or of the whole blood, and including maternal as well as paternal relations, share the property equally. Thus, if the nearest of kin of the intestates are great uncles or aunts, first cousins, and great nephews or nieces, these being all related to the intestate in the fourth degree, will all be admitted to an equal distributive share of his estate. We may remark, however, that though a grandfather or grandmother are of equal degree to a brother or sister, yet the latter alone are entitled (*f*). This arises, it would seem, by the rule of representation, for the brothers and sisters represent the father.

It is obvious to observe, how near a resemblance this statute of distributions bears to our ancient English law, *de rationabili parte bonorum*; spoken of at the beginning of this chapter (*g*); and which Sir Edward Coke (*h*) himself, though he doubted the generality of its restraint on the power of devising by will, held to be universally binding (in point of conscience at least) upon the administrator or executor, in the case of either a total or partial intestacy. It also bears some resemblance to the Roman law * of succession *ab intestato* (*i*); which, and because the act was also penned by an emi- [* 649]

Hotchpot. *nent civilian* (*k*), has occasioned a notion that the parliament of England copied it from the Roman prætor: though, indeed, it is little more than a restoration, with some refinements and regulations, of our old constitutional law; which prevailed as an established right and custom from the time of king Canute, downwards, many centuries before Justinian's laws were known or heard of in the western parts of Europe. So, likewise, there is another part of the statute of distributions, where directions are given that no child of the intestate (except his heir-at-law) on whom he settled in his lifetime any estate in lands, or pecuniary portion, equal to the distributive shares of the other children, shall have any part of the surplusage with their brothers and sisters; but, if the estates so given them, by way of advancement, are not quite equivalent to the other shares, the children so advanced shall now have so much as will make them equal. (419) This just and equi-

(*e*) If the father and mother be both alive, of course the mother can take nothing, she having no property, although she is as near of kin as the father; whether this will be the case when the law shall be so far altered as to give the mother separate rights of property, remains to be seen.

(*f*) *Evelyn v. Evelyn*, 3 Atk. 762.

(*g*) *Ante*, p. 634.

(*h*) 2 Inst. 33. See 1 P. Wms. 8.

(*i*) The general rule of such successions was this: 1. The children or lineal descend-

ants in equal portions. 2. On failure of these, the parents or lineal ascendants, and with them the brethren or sisters of the whole blood, or, if the parents were dead, all the brethren and sisters, together with the representatives of a brother or sister deceased. 3. The next collateral relations in equal degree. 4. The husband or wife of the deceased. Dig. 38. 15. 1; Nov. 118, c. 1, 2, 3; 127, c. 1.

(*k*) Sir Walter Walker; Lord Raym. 574.

(419) An advancement is a gift made during his lifetime by a person who afterward dies intestate, to his heir or distributee, of something by anticipation of what the donee would by law receive upon the death of the donor. An advancement is a gift by a parent to his child, by anticipation, in whole or in part, of what it is supposed the child will be entitled to on the death of the parent. *Cawthon v. Coppedge*, 1 Swan. (Tenn.) 487; *Miller's Appeal*,

table provision (which, however, only applies when there is no will, and not where there is a failure of disposition by the will (*l*)) has been also said to be derived from the *collatio bonorum* of the imperial law (*m*): which it certainly resembles in some points, though it differs widely in others.

(*l*) 14 Ves. 324. The representatives of a deceased child, who has been advanced, must bring the amount into distribution. 2. P. Wms. 560. The clause extends only to inter-
tate fathers, (2 P. Wms. 357), and does not extend to benefit the widow. 8 Ves. 51. (*m*) Dig. 37, 6. 1.

31 Penn. St. 337; *Chase v. Ewing*, 51 Barb. 597; *Dillman v. Cox*, 23 Ind. 440, 442; *Grattan v. Grattan*, 18 Ill. 167.

A conveyance of property, made to take effect on the death of the grantor, operates as an advancement. *Hook v. Hook*, 18 B. Monr. (Ky.) 526. But the right to charge such a conveyance of property by a father to his son must exist at the time of the conveyance. *Sherwood v. Smith*, 23 Conn. 516.

A gift to a grandchild will be deemed to be a gift absolute, rather than an advancement. *Thomas v. Capps*, 5 Bush (Ky.), 273; *Shiver v. Brock*, 2 Jones' Eq. (N. C.) 137.

Gifts of things of trifling value, or those given to furnish the donee with the means of pleasure, will not be regarded as advancements. A gift of a horse and gig by a wealthy man to his son-in-law will not be regarded as an advancement. *McCaw v. Blewit*, 2 McCord's Ch. (S. C.) 90, 102, 103; *Isen v. Isen*, 5 Rich. Eq. 15, 19. Gifts of trifling articles, or of small sums, or by way of furnishing an education, will not usually be regarded as advancements. *Mitchell v. Mitchell*, 8 Ala. 414, 420; *Miller's Appeal*, 40 Penn. St. 57.

Advancements by way of absolute gifts once made are not revocable; and the donor cannot subsequently change the nature of the transaction so as to transform it into an indebtedness or a trust. *Dudley v. Bosworth*, 10 Humph. (Tenn.) 9; *Sherwood v. Smith*, 23 Conn. 516, 520; *Lawson's Appeal*, 23 Penn. St. 85.

Advancements may be made by the conveyance of real property or the delivery of personal property, and the amount of the advancement will be determined by the value of the property advanced. In relation to real estate advancements, see *Hatch v. Straight*, 3 Conn. 31; *Woolery v. Woolery*, 29 Ind. 249; *Parks v. Parks*, 19 Md. 323; *Dutch's Appeal*, 57 Penn. St. 461; *Day v. Cooks*, 31 Ill. 336; *Brown v. Burke*, 22 Ga. 574; *Hodgson v. Macy*, 8 Ind. 121; *Temper v. Barton*, 18 Ohio, 418.

As to personal property, see *Isen v. Isen*, 5 Rich. Eq. 15; *McCaw v. Blewit*, 2 McCord's Ch. 90, 102, 103; *Thomas v. Capps*, 5 Bush (Ky.), 273; *Shiver v. Brock*, 2 Jones' Eq. (N. C.) 137; *Autrey v. Autrey*, 37 Ala. 614.

Whether property was delivered or transferred as an absolute gift, or by way of advancement, depends upon the intent of the donor and of the donee at the time of delivering the property. Where a father purchases land with his own money, but takes the deed therefor in the name of his son, this will be regarded as an advancement, rather than a resulting trust in favor of the father. *Page v. Page*, 8 N. H. 187; *Bay v. Cook*, 31 Ill. 336; *Hayden v. Burch*, 9 Gill. (Md.) 79; *Stanley v. Brannon*, 6 Blackf. (Ind.) 193; *Sampson v. Sampson*, 4 Serg. & R. 329, 333; *Fleming v. Donahoe*, 5 Ohio, 255, 256; *Dudley v. Bosworth*, 10 Humph. (Tenn.) 9; *Murphy v. Mathews*, 46 Penn. St. 508.

So of a purchase of stocks. *Butler v. Merchants' Ins. Co.*, 14 Ala. 777.

The declarations of the grantor at the time of making the conveyance, or of the grantee at the same time, or afterward, are evidence from which it is to be determined whether the conveyance is a gift or an advancement. *Christy's Appeal*, 1 Grant's Cas. (Pa.) 369.

The same rule applies to personal property. *Merrill v. Rhodes*, 37 Ala. 449; *Johnson v. Balden*, 20 Conn. 323; *Lawson's Appeal*, 23 Penn. St. 85; *Sanford v. Sanford*, 61 Barb. 293; 5 Lans. 486.

In settling the rights of parties interested in an estate the advancements are to be estimated at their value at the time when they were given, or when the donee entered upon the enjoyment of them, and not at the time of the testator's death, or at that of the settlement. *Grattan v. Grattan*, 18 Ill. 167, 170; *Clark v. Wilson*, 27 Md. 693; *Warfield v. Warfield*, 5 Harr. & Johns. (Md.) 459; *Jackson v. Jackson*, 28 Miss. 674; *Lamb v. Carroll*, 6 Ired. Law (N. C.), 4; *Oyster v. Oyster*, 1 Serg. & R. 422; *Burton v. Dickinson*, 3 Yerg. (Tenn.) 112; *Hook v. Hook*, 18 B. Monr. (Ky.) 526; *Kean v. Welch*, 1 Gratt. 413.

Before quitting this subject, we may notice, that the doctrine and limits of representation laid down in the * statute of distributions (by which [* 650] no representation among collaterals extends after brothers' and sisters' children (n) seem to have been principally borrowed from the civil law: whereby it will sometimes happen, that personal estates are divided *per capita*, and sometimes *per stirpes*; whereas the common law knows no other rule of succession but that *per stirpes* only. They are divided *per capita*, to every man an equal share, when all the claimants claim in their own rights, as in equal degree of kindred, and not *jure repræsentationis*, in the right of another person. As, if the next of kin be the intestate's three brothers, A., B., and C.; here his effects are divided into three equal portions, and distributed *per capita*, one to each: but, if one of these brothers, A., had been dead, leaving three children, and another, B., leaving two; then the distribution must have been *per stirpes*; viz. one third to A.'s three children, another third to B.'s two children; and the remaining third to C., the surviving brother: yet if C. had also been dead, without issue, then A.'s and B.'s five children, being all in equal degree to the intestate, would take in their own rights *per capita*; viz. each of them one fifth part (o).

The Statute of Distributions expressly excepted and reserved the customs of the city of London and the province of York, and all other places having peculiar customs of distribution. But, as by a recent act (p), this exception is repealed, and those customs abolished, save as respects the estates of persons who may have died on or before the 31 December, 1856, it seems unnecessary here to do more than notice the fact of their former existence, under which the distribution of intestates' estates * was made somewhat differently than under the statute (q). [* 651]

We return now to the appointment of executors and administrators. If a bastard, who, being *nullius filius*, has no kindred, die intestate without leaving wife or child, his goods become the property of the crown. In such a case, administration is granted to the solicitor of the treasury. It is very common, however, in such cases, for the lords of the treasury to resign their rights in favour of some relation of the bastard's father or mother.

The interest vested in the executor by the will of the deceased, may be continued and kept alive by the will of the same executor: so that the executor of A.'s sole executor, or of A.'s sole surviving executor, is to all intents and purposes the executor and representative of A. himself (r); but the executor of A.'s administrator, or the administrator of A.'s executor, is not the representative of A. (s). For the power of an executor is founded upon the special confidence and actual appointment of the deceased; and such executor is therefore allowed to transmit that power to another, in whom he has equal confidence; but the administrator of A. is merely the officer of the court, prescribed to him by act of parliament, in whom the deceased has reposed no trust at all: and therefore, on the death of that officer, it results back to the court to appoint another. And, with regard

(n) If therefore A., the brother of the intestate, be dead, leaving only grandchildren, and B. be dead, leaving children, and C. still be living, the grandchildren of A. shall have no share, but one-half will be given to the children of B., and the other half to C. 1 P. Wms. 25.

(o) Prec. Chanc. 54.

(p) 19 & 20 Vict. c. 94.

(q) The customs will be found stated in 2 Will. Ex. 1412.

(r) Stat. 25 Edw. 3, st. 5, c. 5; 1 Leon. 275.

(s) Bro. Abr. tit. Administrator, 7.

to the administrator of A.'s executor, he has clearly no privity or relation to A.; being only commissioned to administer the effects of the intestate executor, and not of the original testator. Therefore in both these cases, and when-

Administration
de bonis non.
Administrator
de bonis non,
etc.

ever the course of representation from executor to executor is interrupted by any one administration, it is necessary for the court to commit administration afresh, of the goods of the deceased not administered by the former executor or administra-

[* 652] tor. * And this administrator, *de bonis non*, is the only legal representative of the deceased in matters of personal property (*t*). But he may, as well as an original administrator, have only a limited or special administration committed to his care, viz. of certain specific effects, such as a term of years, and the like; the rest being committed to others (*u*).

Having thus shown what is, and who may be, an executor or administrator, we will proceed, lastly, to inquire into some few of the principal points of their office and duty. (420) These in general are very much the

Fifthly, of the office and duty of executors and administrators. same in both executors and administrators; excepting, first, that the executor is bound to perform a will, which an administrator

is not, unless where a testament is annexed to his administration, and then he differs still less from an executor: and secondly, that an

(*t*) Styl. 225.

(*u*) 1 Rol. Abr. 908; Godolph. p. 2, c. 30; Salk. 36.

(420) It may be safely assumed that the powers, rights, duties and liabilities are declared and defined by statute in all of the States. It is no part of the plan of this work, or in the notes, to give the details of the statute law. And it will not be possible to do more than to briefly notice a few of the very numerous decisions in the American courts.

If the will is valid in form and substance, the executor will take such an interest in the testator's property as will enable him to carry such will into effect. And, in ordinary cases, or where the will so provides in terms, the executor will be entitled to the possession and control of the personal estate of the testator, with the power of disposing of it according to law and the directions of the will. *Pleasants v. Davidson*, 34 Texas, 459; *Duffey v. Neale*, Taney, 271; *Cook v. Burton*, 5 Bush (Ky.), 64; *Potter v. Van Vranken*, 36 N. Y. (9 Tiff.) 619; *Burton v. Hintrager*, 18 Iowa, 348; *McCollum v. McCollum*, 33 Ala. 711; *Naylor v. Moffatt*, 29 Mo. (8 Jones) 126.

An executor, as legal owner of the credits and choses in action of his testator, may transfer, in the usual way, negotiable paper which is a part of the personal estate. *Booyer v. Hodges*, 45 Miss. 78; *Riddick v. Moore*, 65 N. C. 382; *Hough v. Bailey*, 32 Conn. 288; *Munteith v. Rahn*, 14 Wis. 210; *Grace v. Hannah*, 6 Jones' Law (N. C.) 94; *Hamrich v. Craven*, 39 Ind. 241.

Money due for rent accruing prior to the testator's death goes to his executor as a part of the estate; but rent accruing afterward goes to the heir or devisee if the estate be solvent. *Mills v. Merryman*, 49 Me. 65; *Fay v. Holloran*, 35 Barb. 295; *Wadsworth v. Allcott*, 6 N. Y. (2 Seld.) 64; *King v. Anderson*, 20 Ind. 385; *Foltz v. Prouse*, 17 Ill. 487; *Kohler v. Knapp*, 1 Bradf. Surr. 241.

It is the duty of an executor to carry out the wishes of the testator as directed in his will, if this is not in violation of the rules of law. And, in the absence of express directions, he ought to act in accordance with the requirements of the law. An executor ought to invest the funds of the estate when so directed by the will. *Gilman v. Gilman*, 2 Lans. 1.

He ought not to use the funds of the estate in his own business. *Ivey v. Coleman*, 42 Ala. 409; *Johnson v. Hedrick*, 38 Ind. 129; *Powell v. Cooper*, 43 Miss. 231; *Parker's Estate*, 64 Penn. St. 307.

An unauthorized loan of such funds is a conversion of them. *Johnston v. Maples*, 49 Ill. 101; *Walls v. Grigsby*, 43 Ala. 473; *Baskin v. Baskin*, 4 Lans. 90.

He ought not to sell the assets upon credit without taking proper security. *Raseman v. Pless*, 65 N. C. 374; *Hasbrouck v. Hasbrouck*, 27 N. Y. (13 Smith) 182.

executor may do many acts before he proves the will (*x*), but an administrator may do nothing till letters of administration are issued; for the former derives his power from the will and not from the probate (*y*), the latter owes his

(*x*) Wentw. ch. 8; 1 Will. Ex. pt. 8, § 2. (*y*) Comyns, 151.

An executor has no authority to incur debts which will be obligatory upon the estate he represents, unless, perhaps, in the case of mere incidental expenses in the course of discharging his duties. *Funderburk v. Gorham*, 48 Ga. 296; *Dickson v. Compton*, 24 La. Ann. 83; *McMahon v. Harbut*, 85 Texas, 451; *Farley v. Hord*, 45 Miss. 96; *McMahon v. Allen*, 4 E. D. Smith, 519; *May v. May*, 7 Fla. 207.

Ordinarily the fees of attorneys and counsel employed by an executor in relation to the business of the estate should be paid by the estate, and not by him personally; although it is otherwise where the expenses were incurred for his actual benefit, though ostensibly for the benefit of creditors of the estate. *Wood v. Goff*, 7 Bush (Ky.), 59; *Abingdon v. Tyler*, 6 Coldw. (Tenn.) 502.

An executor who, without any fault on his part, is robbed of money belonging to the estate, is not personally liable to refund the amount. *Fudge v. Durn*, 51 Mo. 284; *State v. Meagher*, 44 id. 856.

One executor is not liable for the acts of his co-executor in relation to the trust estate unless he concurs in such acts. *Fulton v. Davidson*, 8 Helsk. (Tenn.) 614; *Robinson's Estate*, 7 Phila. (Pa.) 61; *Wood v. Brown*, 34 N. Y. (7 Tiff.) 837.

An executor *de son tort* is one who, without lawful authority, undertakes to act as executor of a person deceased by intermeddling with the estate or converting it. *Brown v. Durbin*, 5 J. J. Marsh. 170; *Howell v. Smith*, 2 McCord, 286; *Bacon v. Palmer*, 13 Conn. 213; *Mitchel v. Lunt*, 4 Mass. 654; *Wilson v. Davis*, 37 Ind. 141; *Wilbourn v. Wilbourn*, 48 Miss. 88.

But a person is not rendered an executor *de son tort* by mere acts of kindness in preserving the estate, such as locking up the property, taking care of animals, making an inventory to prevent loss by fraud, burying the deceased in a proper manner, providing for his children, etc. *Bennett v. Ives*, 30 Conn. 329, 332; *Brown v. Sullivan*, 22 Ind. 359; *Emery v. Berry*, 28 N. H. 478, 488; *Magner v. Ryan*, 19 Mo. 196, 200.

An executor *de son tort* is not chargeable with any assets except such as come to his hands; as he has no right, like a lawful executor, to reduce the other assets, he is not liable for not reducing and administering them. *Kinard v. Young*, 2 Rich. Eq. (S. C.) 247.

The acts of an executor *de son tort* are legalized by his taking out letters of administration and are viewed in the same light as though he had been rightful administrator at the time when the goods came to his hands. *Rattoon v. Overacker*, 8 Johns. 126; *Priest v. Watkins*, 2 Hill, 225; *Matter of Faulkner*, 7 id. 181; *Shillaber v. Wyman*, 15 Mass. 822; *Magner v. Ryan*, 19 Mo. 196; *Stagg v. Green*, 47 id. 500; *Alford v. Marsh*, 12 Allen (Mass.), 603.

But, while letters testamentary relate back to the death of the testator and legalize the intermediate acts of the executor, still this will only cover and legalize any acts that he might have lawfully done had he been executor at the time. *Bellinger v. Ford*, 21 Barb. 312.

The erection of suitable grave-stones or monuments is the right and duty of the executor, and this will be an expense which he is authorized to incur and pay out of the funds of the estate. *Ferrin v. Myrick*, 41 N. Y. (2 Hand) 315, 325; 53 Barb. 76; *Donal v. McWhorter*, 44 Miss. 124, 129; *McGlinsey's Appeal*, 14 Serg. & R. 64; *Fairman's Appeal*, 30 Conn. 205.

It is a general, if not a universal rule, in this country, that an executor shall make a proper inventory of the testator's estate. *Matter of Butler*, 38 N. Y. (11 Tiff.) 397; *Griswold v. Chandler*, 5 N. H. 492; *Scott v. The Governor*, 1 Mo. 686.

The rule is not uniform in the several states, as to what property shall be inventoried. In some of them nothing but personal estate is included, while in others real estate must be specified. See 3 Redf. on Wills, 219-225, 3d ed.

The collection of debts due to the estate as a part of the assets is one of the first and most important duties of an executor. Where there is danger of loss he ought to act promptly, and take the proper steps for the collection of the demand. *Roberts v. Summers*, 47 Ga. 435; *Ogleby v. Hoard*, 43 Ala. 144; *Cooley v. Vansyckle*, 1 McCarter (N. J.), 496.

entirely to the appointment of the court. If a stranger takes upon him to act as executor, without any just authority (as by intermeddling with the goods of the deceased (*x*), and many other transactions) (*a*), he is called in law an *Executor de son tort*. executor of his own wrong, *de son tort*, and is liable to all the trouble of an executorship, without any of the profits or advantages; but merely doing acts of necessity or humanity, as locking up the goods, or burying the corpse of the deceased, will not amount to such an intermeddling as will charge a man as executor of his own wrong (*b*). Such a one cannot bring an action himself in right of the deceased (*c*), but actions [* 653] * may be brought against him. And, in all actions by creditors against such an officious intruder, he shall be named an executor, generally (*d*); for the most obvious conclusion which strangers can form from his conduct is, that he has a will of the deceased, wherein he is named executor, but has not yet taken probate thereof (*e*). He is chargeable with the debts of the deceased, so far as assets come to his hands (*f*): and, as against creditors in general, shall be allowed all payments made to any other creditor in the same or a superior degree (*g*), himself only excepted (*h*). And though, as against the rightful executor or administrator, he cannot plead such payment, yet it shall be allowed him in mitigation of damages (*i*); unless, perhaps, upon a deficiency of assets, whereby the rightful executor may be prevented from satisfying his own debt (*k*). But let us now see what are the power and duty of a rightful executor or administrator.

First, he must bury the deceased in a manner suitable to the estate which he leaves behind him. (421) Necessary funeral expenses are allowed, previous to all other debts and charges; but if the executor or administrator be extravagant, it is a species of devastation or waste of the substance of the deceased, and shall only be prejudicial to himself, and not to the creditors or legatees of the deceased (*l*).
 To bury deceased.

Secondly, the executor or the guardian, as administrator *durante minore ætate*, or the administrator *durante absentid*, or *cum testamento annexo*, must prove the will. In order to do this, he must make an estimate of the value of the personal property belonging beneficially to the deceased, without taking [* 654] any account of the debts, * and on the amount so estimated, to the accuracy of which, according to the best of his belief, he must pledge his oath, he must pay the duty imposed by law (*m*). An administrator must make a like estimate (*n*) for a similar purpose.

These duties, and the expensès of the administration, including (if there be one) the expenses of a suit, are the next payments which an executor or administrator may make, and stand in preference to the debts.

Thirdly, the executor or administrator is to make an inventory (*o*) of all the goods and chattels, whether in possession or
 To make inventory.

(s) 5 Rep. 33, 34.

(a) Wentw. ch. 14; Stat. 43 Eliz. c. 8.

(b) Dyer, 166.

(c) Bro. Abr. tit. Administrator, 8.

(d) 5 Rep. 31.

(e) 12 Mod. 471.

(f) Dyer, 166.

(g) 1 Chan. Cas. 33.

(h) 5 Rep. 30; Moor. 527.

(i) 12 Mod. 441, 471.

(k) Wentw. ch. 14.

(l) Salk. 196; Godolph. p. 2, c. 26, s. 2; 1 Salk. 296.

(m) 55 Geo. 3, c. 184; 22 & 23 Vict. c. 36.

(n) The duty paid on letters of administration is about half as much again as that on probate.

(o) Stat 21 Hen. 8, c. 5.

action, of the deceased; which he is bound to deliver in to the public authorities upon oath, if thereunto lawfully required. (422)

Fourthly, he is to collect all the goods and chattels so inventoried (423); and to that end he has very large powers and interests conferred on him by law; being the representative of the deceased (*p*), and having the same property in his goods as the principal had when living, and the same remedies to recover them. And if there be two or more executors, a sale or release by one of them shall be good against all the rest (*q*); but in case of administrators it is otherwise (*r*). Whatever is so recovered, that is of a saleable nature and may be converted into ready money, is called assets in the hands of the executor or administrator; that is sufficient or enough (from the French *assez*) to make him chargeable to a creditor or legatee, so far as such goods and chattels extend. Whatever assets so come to his hands he may convert into ready money, to answer the demands that may be made upon him: which is the next thing to be considered; for,

Fifthly, the executor or administrator must pay the *debts of the deceased. (424) As regards the contract debts of persons who shall die on or after the 1st January, 1870, whether they arise by specialty or simple contract, they are, as we have seen, to be treated as of equal degree (*s*). Therefore, the rules of payment by the executor or administrator will be different hereafter to those which now obtain.

We will, therefore, shortly, first state the order of payment which is at present to be observed, and then note the change introduced for the future.

First, all debts due to the crown by record or specialty (*t*) are to be paid in priority to every other.

Secondly, those debts which are by particular statutes to be preferred to all others; such were formerly the forfeiture for not burying in woollen, now repealed by 54 Geo. 3, c. 108; and such are those owing for letters to the post-office (*u*).

Thirdly, debts of records,—judgments, decrees, statutes, and recognizances, if registered in accordance with 23 & 24 Vict. c. 38, s. 3.

Fourthly, debts by specialty made upon good consideration.

Fifthly, simple contract debts incurred upon good consideration.

(*p*) Co. Litt. 209.

(*q*) Dyer, 23.

(*r*) 1 Atk. 460.

(*s*) 33 & 33 Vict. c. 46. The latter part of the act contains these words: "All the creditors of such persons, as well specialty as simple contract, shall be treated as standing in equal degree and be paid accordingly out of the assets," whether legal or equitable. These words taken alone might seem to place

judgment debts upon the same footing as other debts, but the scope of the act seems hardly to warrant this construction.

(*t*) 1 And. 129. See 33 Hen. 8, c. 39.

(*u*) 9 Anne, c. 10, an obviously obsolete act. Other instances may be found under the following acts: 18 & 19 Vict. c. 63, s. 23 (The Friendly Society's Act); 26 & 27 Vict. c. 57 (Regimental Debts); 57 Geo. 3, c. 29, s. 51 (Local Metropolis Act).

(422) See *ante*, 844, note 420.

(423) See *ante*, 844, note 420.

(424) In this country there is no general and uniform rule as to the order in which debts shall be paid; and there is no mode of determining the rule in any particular State, except by an examination of its statutes and decisions.

It is as general a rule as any to first pay the expenses of the last sickness, and funeral and probate charges; and next of those debts due to the United States and the State in which the deceased resided. See 3 Redf. on Wills (3d ed.), 249, 252, 253.

And, sixthly, bonds or covenants voluntarily given without consideration: and, lastly, other voluntary debts.

The effect of the new act seems to reduce those here * described as [* 656] fourthly and fifthly payable (which constitute the great bulk of debts) to the same degree.

Among debts of equal degree, the executor or administrator is allowed to pay himself first, by retaining in his hands so much as his debt amounts to (x).

But an executor of his own wrong is not allowed to retain: for that would tend to encourage creditors to strive who should first take possession of the goods of the deceased; and would besides be taking advantage of his own wrong, which is contrary to the rule of law (y). Also, if no suit is commenced against him, the executor may pay any one creditor in equal degree his whole debt, though he has nothing left for the rest: for, without a suit commenced, the executor has no legal notice of the debt (z). The new act seems much to enlarge the executor's power in this respect.

6. When the debts are all discharged, the legacies claim the next regard: which are to be paid by the executor so far as his assets will extend; but he may not give himself the preference herein, as in the case of To pay legacies. debts (a). (425)

It often occurred that executors or administrators, after paying all the debts of which he had knowledge, had some difficulty in dividing the surplus among the beneficiaries under the will, or the next of kin, from fear of being called upon to pay other debts of which they had no knowledge. In order to relieve them from this difficulty, a recent act (b) has declared that, if they give such notices as are usually given in administration suits, they may safely divide the estate amongst those entitled to it. But the act reserves the claims of any outstanding creditor to follow the assets.

A legacy is a gift or bequest of property by will; it confers an inchoate right to the legatee, which becomes * perfect upon the executor assenting [* 657] to the bequest, which, of course, until he is satisfied as to the sufficiency of assets, he is not bound to do. In case of a deficiency of assets (c) to pay all the debts, no legatee can receive anything. In case there is, however, merely a deficiency of assets to pay the legacies in full, then they take priority between themselves in the following order: first, specific legacies, that is to say, bequests of specific parts of the property; and among these may be included what are called demonstrative legacies, that is, legacies to be paid out of a particular specified fund (d): secondly, general pecuniary legacies, or gifts of sums of money without special mention of the fund out of which they are to be paid. As between legacies constituting these classes there must be, in case of insufficiency of property, an abatement in proportion to their value. Legacies are considered as payable one year after the testator's death, and if no deficiency of assets exists, interest is allowed from that date.

(x) 10 Mod. 496. See vol. iii. p. 11.

(y) 5 Rep. 30.

(z) Dyer, 32; 2 Leon. 60.

(a) 2 Vern. 434; 2 P. Wms. 25.

(b) 22 & 23 Vict. c. 35, s. 29.

(c) Including for this purpose real estates descended or devised for the purpose of payment of debts.

(d) 2 Will. Ex. 1076.

(425) As to remedies for the recovery of legacies, see 8 Redf. on Wills (8d ed.), 271, 296, 310.

If a legatee die before the testator, then the legacy is lost or lapsed, except he was a child or other issue of the testator, and left issue, in which case, as we have seen (e), the legacy takes effect as if the legatee had died immediately after the testator.

We may here add, that it is the business of the executor or administrator to pay the duty upon legacies and successions to personalty, which varies according to the relationship of the legatee or next-of-kin to the testator or intestate (f).

* Besides, these formal legacies, contained in a man's will and testament, there is also permitted another deathbed disposition of property; which is called a donation *caused mortis*. (426) And that is, when a person in his last sickness, apprehending his dissolution near, delivers or causes to be delivered to another the possession of any

(e) *Ante*, p. 567.

(f) 36 Geo. 3, c. 5. The duties under this act, which govern all estates where the testator or intestate died after the 5th April, 1805, are as follows:—For gifts or shares of residue to lineal ancestors or descendants, 1

per cent.; a brother or sister, or their descendants, 3 per cent.; uncles or aunts, or their descendants, 5 per cent.; great uncles or great aunts, or their descendants, 6 per cent.; all others 10 per cent., except husband or wife, who pay no duty.

(426) If the donor's estate is not sufficient for the payment of his debts, the gift will fail, for the rights of creditors will be preferred, and the property given will be applied to the payment of their demands. *Mitchell v. Pease*, 7 Cush. (Mass.) 350; *Chase v. Redding*, 18 Gray (Mass.), 418, 420; *Gaunt v. Tucker*, 18 Ala. 27.

It is essential that the gift be made in the donor's last illness, or in contemplation and expectation of death; but the apprehension of death may arise from infirmity or old age, or from external and anticipated danger. *Nicholas v. Adams*, 2 Whart. (Penn.) 17, 22; *Michener v. Dale*, 23 Penn. St. 59, 63; *Smith v. Kittridge*, 21 Vt. 238, 245; *Raymond v. Sellick*, 10 Conn. 480, 484; *Knott v. Hogan*, 4 Metc. (Ky.) 99, 101; *Goss v. Simpson*, 4 Coldw. (Ky.) 288, 299.

The gift is revocable during the life of the donor. *Ib.*; *Merchant v. Merchant*, 2 Bradf. Surr. 432, 445.

To render such a gift finally effectual it must not only be made in apprehension of present peril of death, but death must ensue, without any complete remission of the apprehended peril. *Ib.*; *First National Bank of New Haven v. Balcom*, 35 Conn. 351, 358; *Parish v. Stone*, 14 Pick. 198, 203, 204; *Grattan v. Appleton*, 3 Story, 735; *Dale v. Lincoln*, 31 Me. 422; *Kenney v. Public Admr.*, 2 Bradf. Surr. 319.

To constitute a valid gift *donatio mortis causa*, there must be an actual delivery of the chattel to the donee, so as to transfer the possession of it to him, during the life-time of the donor. *Miller v. Jeffress*, 4 Gratt. 472, 479; *Cutting v. Gilman*, 41 N. H. 147; *Sims v. Walker*, 8 Humph. (Tenn.) 503; *Michener v. Dale*, 23 Penn. St. 59; *McDowell v. Murdock*, 1 Nott & McCord, 237; *Huntington v. Gilmore*, 14 Barb. 243; *Case v. Dennison*, 9 R. I. 88.

An after-acquired possession of the donee is nothing; and a previous and continuing possession, though by the authority of the donor, is no better. *Ib.*

The law not only requires that the delivery shall be actual and complete, such as deprives the donor of all further control and dominion, but it requires the donee to take and retain the possession until the donor's death; and, although the delivery may have been at one time complete, yet this will not be sufficient unless the possession be constantly maintained by the donee. *Hatch v. Atkinson*, 56 Me. 324, 327.

A delivery of the chattel to a third person by the donor, for the benefit of the donee, is sufficient where the donor parts with all control over the subject of the gift. *Coutant v. Schuyler*, 1 Paige, 316; *Grymes v. Hone*, 49 N. Y. (4 Sick.) 17, 22; 10 Am. Rep. 318; *Sessions v. Moseley*, 4 Cush. (Mass.) 84; *Michener v. Dale*, 23 Penn. St. 59; *Southerland v. Southerland*, 5 Bush (Ky.), 591.

Bank bills and negotiable securities, executed by parties other than the donor, are proper subjects of a *donatio mortis causa*. *Tillinghast v. Wheaton*, 8 R. I. 536, 541; 5 Am. Rep. 621;

personal goods (under which have been included bonds, and bills drawn by the deceased upon his banker), to keep in case of his decease. This gift, if the donor dies, needs not the assent of his executor: yet it shall not prevail against creditors; and is accompanied with this implied trust, that, if the donor lives, the property thereof shall revert to himself, being only given in contemplation of death, or *mortis causa* (*g*). This method of donation might have subsisted in a state of nature, being always accompanied with delivery of actual possession (*h*); and so far differs from a testamentary disposition: but seems to have been handed to us from the civil lawyers (*i*).

When all expenses, debts, duties, and legacies have been paid by an executor, and when all expenses, debts, and duties, have been paid by an administrator, the clear surplus is to be divided among the residuary legatees, or, as the case may be, the persons entitled under the statute of distribution. When this has been done, the duties of the executor or administrator are at an end. Formerly when a testator failed, either partially or wholly, to dispose of the residue of his personalty, the executor was entitled to retain for his own benefit the property so undisposed of (*k*). This privilege has been taken away by an act of 1830 (*l*); and now any such undisposed of residue must be applied in accordance with the statutes of distribution. If, however, there is no person entitled under the statute, the privilege remains.

(*g*) Prec. Chanc. 269; 1 P. Wms. 406, 441;
3 P. Wms. 357.

(*h*) Law of Forfeitt. 16.

(*i*) Inst. 2, 7, 1; Dig. 1, 89, t. 6.

(*k*) Will. Exs. pt. iii. bk. iii. c. v. s. 2.

(*l*) 11 Geo. 4 & 1 Will. 4, c. 40, taking effect
upon the estates of all testators who have
died since 1st September, 1830.

Westerlo v. De Witt, 36 N. Y. (9 Tiff.) 340; *Brown v. Brown*, 18 Conn. 410; *Parish v. Stone*, 14 Pick. 198; *Waring v. Edmonds*, 11 Md. 424; *Turpin v. Thompson*, 2 Metc. (Ky.) 420; *Lee v. Boak*, 11 Gratt. (Va.) 182; *Caldwell v. Renfrew*, 38 Vt. 318; *Boneman v. Sidlinger*, 21 Me. 185.

But the donor's own promissory note for the payment of money to the donee is not the subject of a valid gift *donatio mortis causa*. *Copp v. Sawyer*, 6 N. H. 386; *Holley v. Adams*, 16 Vt. 206; *Parish v. Stone*, 14 Pick. 198; *Michener v. Dale*, 23 Penn. St. 59; *Chase v. Redding*, 18 Gray, 418; *Raymond v. Sellick*, 10 Conn. 490.

So of a gift of the donor's unaccepted draft or his check payable to the donee. *Harris v. Clark*, 8 N. Y. (3 Comst.) 98; *Second National Bank of Detroit v. Williams*, 13 Mich. 282.

APPENDIX.

No. I.

No. I.

VETUS CARTA FEOFFAMENTI.

SCIANT presentes et futuri, quod ego Willielmus filius Willielmi de Segenho, dedi, concessi, et hac presenti carta mea confirmavi, Johanni quondam filio Johannis de Saleford, pro quadam summa pecunie quam mihi dedit pre manibus, unam acram terre mee arabilis, jacentem in campo de Saleford, juxta terram quondam Richardi de la Mere: **Habendum et Tenendum** totam predictam acram terre, cum omnibus ejus pertinentiis, prefato Johanni, et heredibus suis, et suis assignatis, de capitalibus dominis feodi: **Reddendo** et faciendo annuatim eisdem dominis capitalibus servitia inde debita et consueta; **Est** ego predictus Willielmus, et heredes mei, et mei assignati, totam predictam acram terre, cum omnibus suis pertinentiis, predicto Johanni de Saleford, et heredibus, et suis assignatis, contra omnes gentes warrantizabimus in perpetuum. **In** cujus rei testimonium huic presenti carte sigillum meum apposui; **Testibus** Nigello de Saleford, Johanne de Seybroke, Radulpho clerico de Saleford, Johanne molendario de eadem villa, et aliis. **Data** apud Saleford die Veneris proximo ante festum sancte Margarete virginis, anno regni regis EDWARDI filii regis EDWARDI sexto.

Premises.

Habendum, et Tenendum.

Reddendum.

Warranty.

Conclusion.

[L. S.]

Memorandum, quod die et anno infrascriptis plena et pacifica seisinam acre infrascriptam, cum pertinentiis, data et deliberata fuit per infranominatum Willielmum de Segenho infranominato Johanni de Saleford, in propriis personis suis, secundum tenorem et effectum carte infrascripte, in presentia Nigelli de Saleford, Johannis de Seybroke, et aliorum.

Livery of seisin endorsed

tures commons hedges ditches fences ways waters watercourses liberties privileges easements advantages and appurtenances whatsoever to the said messuage farm cottages closes and parcels of land and hereditaments or any of them appertaining or with the same or any of them now or heretofore demised occupied or enjoyed or reputed or known as part or parcel of them or any of them or appurtenant thereto And all the estate right title interest claim and demand of the said John Brown and Mary his wife and each of them in to and upon the same premises To have and to hold the said messuage farm cottages closes and parcels of land and hereditaments and all and singular other the premises hereinbefore expressed to be hereby granted unto the said Thomas Smith his heirs and assigns To the use of the said Thomas Smith his heirs and assigns for ever And it is hereby declared that the said Thomas Smith was not married on or before the first day of January one thousand eight hundred and thirty-four to a wife now living and that no widow of the said Thomas Smith shall be entitled to dower out of the said premises (b) And the said John Brown doth hereby for himself his heirs executors and administrators covenant with the said Thomas Smith his heirs and assigns that notwithstanding anything by him the said John Brown or by Mary his wife or by the said Matthew Brown done or knowingly suffered (c) they the said John Brown and Mary his wife, now have full power to grant and dispose of all and singular the said premises hereinbefore expressed to be hereby granted to the use of the said Thomas Smith his heirs and assigns And that the same premises shall at all times remain and be to the use of the said Thomas Smith his heirs and assigns and be quietly entered into and upon and held and enjoyed and the rents and profits thereof received by the said Thomas Smith his heirs and assigns accordingly without any lawful interruption or disturbance by the said John Brown and Mary his wife or either of them or any person lawfully or equitably claiming through or in trust for them or either of them or through or in trust for the said Matthew Brown And that free and discharged from or otherwise by him the said John Brown his heirs execu-

Habendum.

Covenants for title.

(b) This declaration in bar of dower of the grantee's widow is not infrequently omitted, and properly so, inasmuch as no clog upon alienation by deed or devise arises from the existence of a wife, who may become entitled to dower, and her claim is at least equal to that of an heir at law. If the grantee have been married before the 1st January, 1834, the conveyance takes a different form, and is to uses to bar dower: a third party, Henry Wright, is introduced, and the grant is to Henry Wright and his heirs, "To have and to hold the said messuage, farm, cottages, closes, and parcels of land and hereditaments, and all and singular the premises hereinbefore expressed to be hereby granted Unto the said Henry Wright and his heirs To such uses, for such estates, and in such manner as the said Thomas Smith shall by deed appoint. And in default of and until any such appointment, and so far as no such appointment shall extend To the use of the said Thomas Smith and his assigns during his life, without impeachment of waste. And after the determination of that estate by any means in his lifetime To the use of the said Henry Wright and his heirs during the life of the said Thomas Smith In trust for the said Thomas Smith and his assigns. And after the determination of the estate so limited to the said Henry Wright as aforesaid To the use of the said Thomas Smith, his heirs and assigns, for ever. And it is hereby declared that no widow of the said Thomas Smith shall be entitled to dower out of the said premises." As to this last declaration a similar remark applies, see ante, p. 259.

(c) The covenants for title extend to the acts of John Brown and his wife, and also to those of his father; but they extend no further, as Matthew Brown is supposed to have purchased the property.

tors or administrators sufficiently indemnified against all estates incumbrances claims and demands created occasioned or made by the said Mathew Brown John Brown and Mary his wife or any of them or any person lawfully or equitably claiming through or in trust for them or any of them And further that he the said John Brown and his heirs and Mary his said wife and every person having or lawfully or equitably claiming any estate right title or interest in or to the said premises or any of them through or in trust for the said Mathew Brown John Brown and Mary his wife or any of them will at all times at the cost of the said Thomas Smith his heirs or assigns execute and do every such lawful assurance and thing for the further or more perfectly assuring all or any of the said premises to the use of the said Thomas Smith his heirs and assigns as by him or them shall be reasonably required In witness whereof the said parties to these presents have hereunto set their hands and seals the day and year first above written.

The schedule above referred to.

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